

INTERNATIONAL ARBITRATION IN 2021

BEYOND THE PANDEMIC

MODERATED BY TODD J. BURKE



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AGENDA

Topic	
International Commercial Arbitration – During and Beyond Covid-19	
Dispute Resolution and Corporate Counsel	
Update to Institutional Rules	
<i>Expedited Procedures</i>	
<i>Joinder and Consolidation</i>	
<i>Virtual Hearings</i>	
<i>Third Party Funding</i>	
New Judicial Commentary on Private Dispute Resolution: Canada and UK	

INTERNATIONAL COMMERCIAL ARBITRATION

- **A simple definition:**

*A method of **private, binding, enforceable** dispute resolution which may be **chosen** by parties as an alternative to litigation before **national courts***

- **Apply to both domestic and international disputes.**

- Preferred dispute resolution option when investing in a foreign country or with a foreign government.

- **Administration can be *Ad Hoc* or *Institutional***

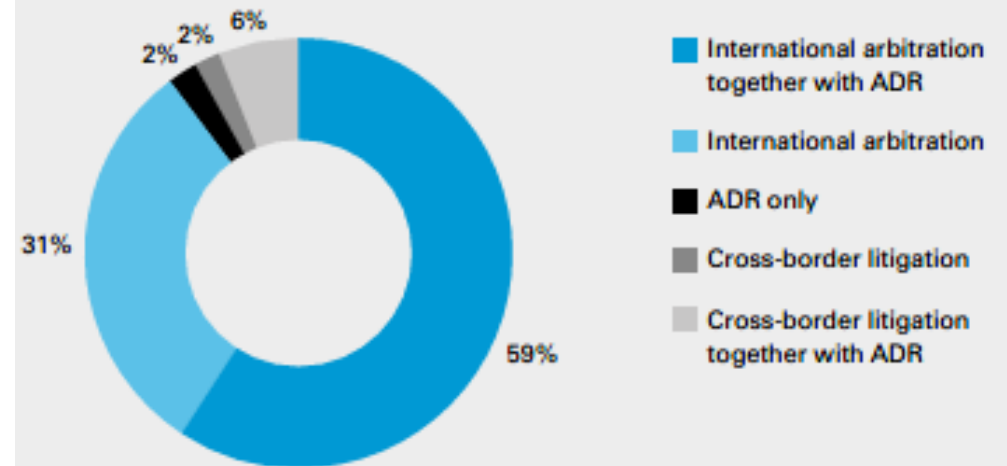
- Arbitration Institutions : **ICC, LCIA, AAA (ICDR), SIAC, ADR Institute of Canada, ADR Chambers Canada, regional centres.**

ARBITRATION BEYOND THE PANDEMIC

- Caseloads reached all-time highs
 - The **ICC** beat their previous record in 2016 by reporting 946 new arbitration cases in 2020 — up from 869 cases in 2019
 - The **LCIA** received 444 case referrals, including 407 arbitrations pursuant to the LCIA Rules, marking an all-time high and an 18% increase on 2019 alone.
 - The **HKIAC** received 318 cases in 2020, its highest number of new arbitration filings in more than a decade.

- Arbitration is the preferred method of resolving cross-border disputes

Chart 1: Post-COVID-19, what would be your preferred method of resolving cross-border disputes?



THE DECISION TO ARBITRATE

- **Important considerations when choosing to arbitrate:**

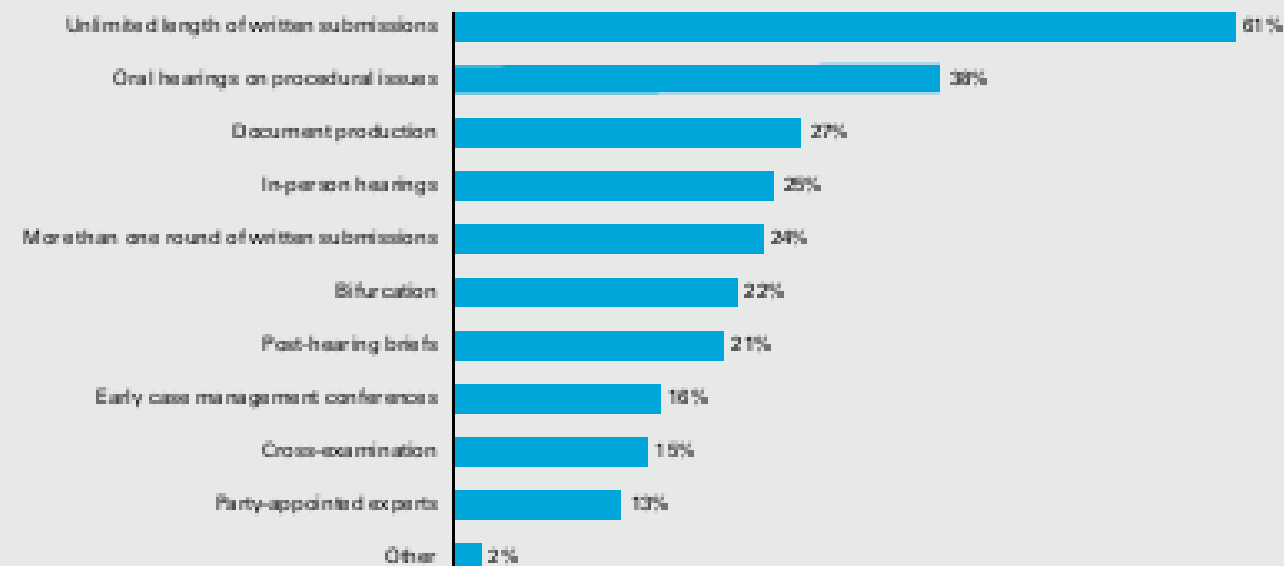
- Do I have a Choice?
- Public or Private?
- Nature of Dispute
- Location of Dispute/Parties
- Selection of Arbitrator/Judge
- Fairness and Rule of Law
- Speed and Cost of Process
- Expertise/Competence of the Tribunal
- Availability of Appeal and Enforcement



CHEAPER AND FASTER ARBITRATIONS

- Time and cost are the biggest concerns for arbitration users.
- To improve speed and cost, arbitration users would be most willing to do without:
 - 'unlimited length of written submissions',
 - 'oral hearings on procedural issues' and
 - 'document production'

Chart 9: If you were a party or counsel, which of the following procedural options would you be willing to do without if this would make your arbitration cheaper or faster?



Respondents were able to select up to three options.

UPDATE TO INSTITUTIONAL RULES

- The 2020 LCIA Rules, updating the 2014 Rules, became effective on October 1, 2020 (“**LCIA Rules**”)
- The 2021 ICC Rules, updating the 2017 Rules, became effective on January 1, 2021 (“**2021 ICC Rules**”).
- The 2021 ICDR Rules became effective March 1, 2021 (“**2021 ICDR Rules**”).



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HIGHLIGHTS OF NEW INSTITUTIONAL RULES

1. Expedited Procedures

- Allow parties or tribunal to adopt procedures that will make the proceedings more cost-effective and timely.

2. Joinder and Consolidation

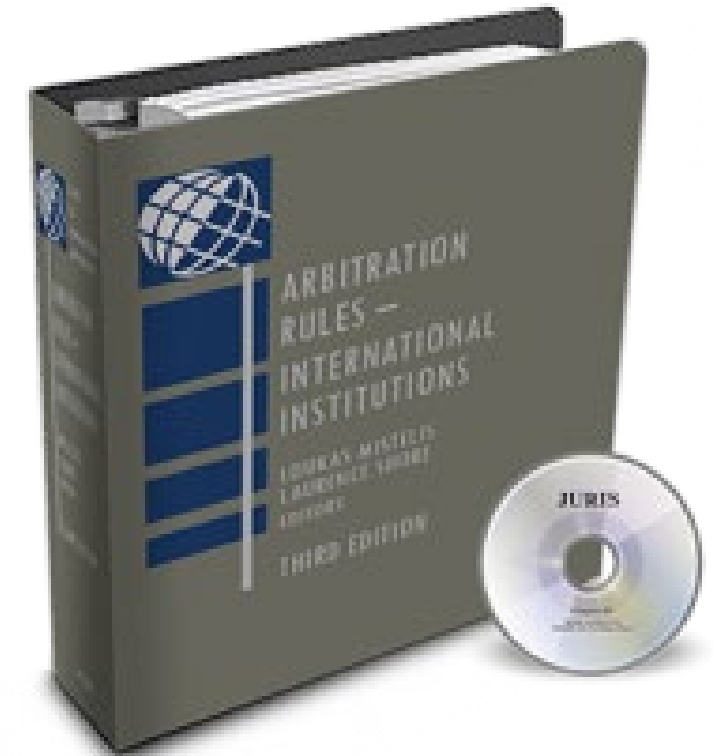
- Updates streamline the joinder and consolidation procedures, particularly important in construction disputes (i.e. multiple owner, contractor, supplier, relationship).

3. Third Party Funding

- Increased transparency to avoid conflict of interest.

4. Paperless Filings and Remote Hearings

- Adapting to remote hearing technology



EXPEDITED PROCEDURES

- Under the ICC Rules, parties can use Expedited Procedures if:
 1. the amount of the dispute does not exceed USD 2 million (or USD 3 million if the arbitration agreement is concluded on or after January 1, 2021) or
 2. the parties agree to apply the Expedited Procedure
- The 2021 ICDR Rules have doubled the threshold amount for expedited procedures to USD 500,000.

Institution	Rules
ICC	Article 30(2)
LCIA	Article 9A
ICDR	Article E-5

JOINDER AND CONSOLIDATION

- Joinder

- The 2021 ICC and ICDR Rules empower a tribunal, once constituted, to approve Request for Joinder, as appropriate, if the additional party consents to such joinder.'

Institution	Rules
ICC	Article 7(5)
LCIA	Article 22.1
ICDR	Articles 8

- Consolidation

- The new rules allow for separate arbitrations being heard under the same arbitration agreement, or, any compatible arbitration agreements between the same parties, or, arising out of the same transaction, to be conducted concurrently.

Institution	Rules
ICC	Article 10
LCIA	Article 22.7
ICDR	Articles 9

THIRD PARTY FUNDING (TPF)

- “Third party funding is a feature of modern litigation.” - English Court of Appeal in *Excalibur v Texas Keystone*
- New Disclosure Obligations for Transparency
- Scope of Disclosure
 - The new ICC rule require all parties to **disclose the existence and identity** of any non-party which has entered into an arrangement for the funding of claims or defences.
 - The new ICDR Rules permit the tribunal to require the parties to disclose the existence and identity of TPF.
- When is TPF Appropriate?

Institution	Rules
ICC	Article 11(7)
LCIA	N/A
ICDR	Article 14(7)

THE NEW VIRTUAL REALITY?

- **Reported Benefits**

- 'potential for greater availability of dates for hearings'
- 'greater efficiency through use of technology'
- 'greater procedural and logistical flexibility'

- **Reported Concerns**

- 'difficulty of accommodating multiple or disparate time zones'
- 'harder for counsel teams and clients to confer during hearing sessions'
- 'more difficult to control witnesses and assess their credibility.'
- 'screen fatigue'



As far as virtual hearings are concerned, respondents tended to come down on one side or another: either very positive towards them, or very sceptical of them



‘GREEN ARBITRATIONS’

- The new rules allow for greater flexibility for the parties to decide upon the format of process.
- Under the 2021 ICC Rules, remote hearings are now recognised, and there is no longer contain a presumption of pleadings and other written communications being sent by hard copy.
- Evidence of witnesses *should* be presented in the form of witness statements

Institution	Rules
ICC	Article 26(1)
LCIA	Article 19.2
ICDR	Article 22 and 26

UPDATES IN JUDICIAL COMMENTARY 2020-2021

- **Arbitral Bias**
 - *Halliburton Company v Chubb Bermuda Insurance Ltd*, 2020
- **Governing Law of Arbitration Agreement**
 - *Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant)* [2020] UKSC 38
 - *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48
- **Unconscionable Arbitration Agreements**
 - Supreme Court of Canada, *Uber Technologies Inc. v. Heller*, 2020



QUESTIONS?



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