

# Revision of the WIPO Arbitration Rules: Adapting to an Increasingly Remote Setting In Technology Disputes

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On July 1, 2021 the World Intellectual Property Organisation (WIPO) revised its Arbitration Rules (2021 WIPO Rules). The amendments include a possibility for the parties to conduct remote hearings, an obligation to disclose third-party-funder agreements and a decrease in costs in arbitration proceedings. As elaborated below, the 2021 WIPO Rules have been adapted to reflect modern trends of dispute resolution in an increasingly remote environment. This post provides an overview of the WIPO, discusses these revisions to its Rules, and suggests areas where perhaps the WIPO could have gone further in its revisions to its Rules.

## Background

WIPO is a global forum for intellectual property and one of the United Nations (UN) specialised agencies. Its Arbitration and Mediation Centre (WIPO ADR) provides time- and cost-efficient alternative dispute resolution, which benefits from specialised arbitrators, privacy, confidentiality, and a simple enforcement procedure. These advantages stand clear in contrast to common courts, where parties may end up with a judge without the necessary expertise, hearings are often public, and enforcement proceedings last for years.

As a result, the demand for ADR in technology disputes has been steadily increasing in recent years. According to the WIPO Caseload Summary, the number of cases it has administered grew from 41 in 2011 to 182 in 2020. In its 2020 report, WIPO ADR highlighted the importance of arbitration as a forum to resolve technology disputes.

The 2021 WIPO Rules introduced a series of amendments as a response to the COVID-19 pandemic. They replace the 2020 Rules, which expired on 30 June 2021 but apply to disputes registered until that date. The main change concerns remote hearings and coincides with revisions of other arbitration rules such as the ICC rules for 2021, LCIA rules for 2021 and the Swiss Arbitration Centre rules for 2021. Further changes concern third-party funding agreements, electronic filings and fees.

## Remote hearings as a response to the post-COVID-19 era

Remote communication tools have gained in popularity as a result of restrictions on the functioning of arbitration tribunals around the world due to the COVID-19 pandemic.

Remote WIPO arbitration hearings are now not only expressly permitted in the 2021 WIPO Rules, but also parties are encouraged by the WIPO to use this tool (as WIPO indicated in its [official communication](#)). Article 55 of the 2021 WIPO Rules provides that the adjudicating panel may, after consulting the parties to the proceedings, conduct hearings by videoconference, using online tools, or in-person.

Remote hearings are of great importance because WIPO manages IT disputes in which the parties are accustomed to online communication. Moreover, given the characteristics of disputes resolved under the 2021 WIPO Rules, including disputes involving infringement in licensing, the parties are typically concerned with bringing the case to a quick resolution and stopping further infringement as soon as possible.

Most of the arbitration institutions have already introduced similar solutions. The possibility of conducting proceedings by videoconference was introduced by the Swiss Arbitration Centre in June 2021 (Article 27), the International Chamber of Commerce in January 2021 (Article 26(1)), and in October 2020 – by the London Court of International Arbitration (Article 19(2)).

The solution presented by WIPO is not only a response to the COVID-19 pandemic but also a response to the needs of a centre handling disputes mostly involving technology companies.

### **Electronic filing to make parties' lives easier**

The 2021 WIPO Rules permit the electronic filing of cases, as well as ordinary communication, as the default option for communication. The amendment proposed to Article 4(a), although it is a more cosmetic change, organizes and clarifies the issue of online communications. WIPO thus emphasized online communication, making it the default mode of contact, perhaps with no room for other interpretation. On its website, WIPO offers that the request for arbitration be submitted online using the [WIPO IP Portal form](#).

A similar solution was introduced by ICSID at the last revision of the Arbitration Rules of the [International Centre for Settlement of Investment Disputes](#) (ICSID) in June 2021 (in case of request for arbitration regulated by Article 36 of the ICSID Convention). At the time, Meg Kinnear, ICSID's Secretary-General, [said](#) that: "Given the state of information technology—and the ease with which participants in ICSID cases have adapted to online file sharing in recent years—it made sense to make electronic filing the norm".

This solution could potentially improve the administration of cases by WIPO, as in practice WIPO uses email to communicate with the parties and arbitrators, thus making all case-related documents in one place on a secured online file-sharing platform (see [blog coverage here](#)).

On the other hand, there are potential dangers with online hearings, including the issue of confidentiality and potential leakage of information. In particular, the issue of confidentiality in using online platforms should be subject to constant digital transformation. A significant number of proceedings conducted before WIPO are technology disputes and, as data show, more than 30% of parties to the technology disputes found confidentiality as an important element ([Report on International Trends](#), WIPO, 2018). Crucially, IT market is very competitive, therefore any leakage of information may result in substantial losses to the company revenue or its reputation.

Moreover, there is a serious risk of cyberattacks. If file-sharing platforms are not properly secured, it may harm the confidentiality of a dispute, which may be a critical issue in disputes concerning intellectual property and related claims. There are many guidelines for parties and arbitrators on how to conduct the virtual hearings properly, using specific tools that arbitration institutions have already put in place (for example, the [ICC Guidance Note](#), the [HKIAC Guidelines](#) and the [Seoul Protocol](#) – see the blog coverage [here](#)). Although the area of virtual hearings is developing dynamically, a close collaboration between the arbitral tribunal and technology firms may be of the greatest importance.

### **The obligation to disclose the third-party funder**

Similar to the [ICC rules for 2021](#), the WIPO Rules 2021 recognise the growing popularity of financing arbitral disputes through third-party funders. Under the 2020 WIPO Rules, the issue of third-party funders was not addressed. However, under the new rules, the obligation to disclose third-party funders' arrangement with a party is required at the time when a request for arbitration is filed. If a funding agreement is concluded at a later stage of the proceedings, the identity of the third-party funder shall be disclosed promptly to the parties, the WIPO, and the tribunal. The third-party funder disclosure must also be made by the respondent, in its answer to the request for arbitration (Article 9(vii) and 11(b) of the 2021 WIPO Rules).

The proposed changes reflect a trend in international arbitration to address conflicts of interest between parties to the proceedings. The trend is visible not only in the recent amendment to the arbitration rules in Europe (see blog coverage [here](#)), but is also an emerging topic in East – Asia region (see blog coverage [here](#)). Moreover, not only commercial arbitration is full of TPF standards. Recent work undertaken by the UNCITRAL Working Group III covers the issue of third party funding in investor-state disputes (see blog coverage [here](#)).

### **Fees reduction by 25%**

Together with the amendments made to the 2021 WIPO Rules, WIPO has updated its Schedule of Fees and Costs and introduced a 25 % reduction to the WIPO Centre's administrative fees that apply if one or both parties to a dispute is a small or medium-sized

enterprise (SME). This solution may attract entrepreneurs to submit their cases to WIPO ADR.

Although WIPO's fees have increased, they remain lower compared to the fees offered by other arbitration centres. For example, when the amount in dispute is \$2 million, the administrative fees at WIPO are \$3,000.00, while the administrative fees required by the Swiss Arbitration Centre for a dispute of the same value are \$9,815.00.

### **Amendments of the 2021 WIPO Rules could have gone further – proposals for future consideration**

Surprisingly, the 2021 WIPO Rules do not include certain amendments that could make arbitration proceedings conducted at the WIPO Centre potentially more attractive.

Firstly, the time limit set for the appointment of an arbitral tribunal under the 2021 WIPO Rules is 50 days when appointed by the parties (Article 16) and 45 days when the appointment is made by the WIPO Centre (Article 15b). In contrast, under the revised LCIA rules for 2021, the deadline for convening a tribunal is 28 days (down from 35).

Secondly, the time limit to render the final award in the case of the 2021 WIPO Rules is 12 months (Article 65a), while under the ICC rules for 2021 the time limit for the final award is 6 months (Article 31). Moreover, the recent amendments made by the LCIA to the LCIA rules for 2021 cover this issue and specify the deadline of "as soon as possible", but no later than 3 months.

The length of arbitral proceedings has often been touted as a principal advantage of arbitration compared to state court proceedings. Given WIPO's competition with other arbitral centres (and state courts), it would behove the WIPO to consider solutions to reduce the length of arbitral proceedings, as has been achieved by other centres with much success. Coupled with reduced fees and the other added features of the 2021 WIPO Rules, reducing the length of arbitral proceedings could be advantageous for many entrepreneurs who may be deciding to bring a case to the WIPO Centre instead of a court.

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