



ARTICLE

MORE TRANSPARENT AND MORE EFFICIENT ARBITRATION PROCEEDINGS: THE ICC TAKES MEASURES

| 20/04/16 | Marie Danis



On January 5, 2016, the ICC announced new policies to “foster transparency and ensure greater efficiency” in the arbitration proceedings it administers:

- (i) the publication of the composition of its tribunals;
- (ii) financial consequences for excessive delays in rendering awards for arbitrators.

More transparent proceedings: the composition of arbitral tribunals shall be made public

Although it is true of course that numerous parties choose arbitration because it is usually confidential, there are many downsides to confidentiality for arbitration as a system. Indeed, with confidentiality may come opacity which may in turn leave room for doubts as to its adequate functioning. It is for instance very difficult to check arbitrator credentials as their references remain unpublished. It is also close to impossible to verify how many times an arbitrator has been appointed, although it could be considered as information that an arbitrator should disclose.

This criticism is usually not taken seriously by arbitration practitioners who trust the institution, comforted by a good knowledge of the people taking part in the process. The ICC's new policy is therefore a clear sign that users have been heard and that it is making attempts at more transparency.

For this purpose of fostering transparency, the note indicates that the Court will publish “*on its website the names of the arbitrators sitting in ICC cases, their nationality, as well as whether the appointment was made by the Court or by the parties and which arbitrator is the tribunal chairperson*”.

“*In order not to compromise expectations of confidentiality that may be important to the parties*”, the ICC has chosen that certain information such as the case reference number and the names of the parties and their counsel will not be published. Furthermore, in order to preserve confidentiality, parties are granted the possibility to opt out of this disclosure through a mutual agreement. However parties can also choose to publish more information about their case than what the ICC recommends if they so wish.

This new policy applies to all cases registered as from January 1, 2016. However, since such information “*will be published once the tribunal is constituted*”, a search of the ICC's website does not show any such information yet.

In essence, according to the ICC's new measure, the following information for arbitrations started from January 1, 2016 will be made public:

- the number of appointments received by Arbitrator X in ICC arbitration proceedings;
- whom Arbitrator X was sitting with and his role in the tribunal (co-arbitrator or chair);
- whether Arbitrator X was appointed by the ICC or by the parties;
- in how many pending ICC arbitration cases Arbitrator X is involved.

It is too early to estimate how many parties will accept to render the composition of their tribunals public. We believe however that since the case reference number, the parties' identities and those of their counsel are omitted the number of parties who will oppose such publication should be limited.

However, such statistics will be by nature incomplete since Arbitrator X, to use the same example, may be involved in other arbitrations which may be ad hoc or administered by other institutions. Accordingly, the information published on the ICC's website will probably prove not to be as significant in practice as it could have been considered at first sight. Therefore, such information must be analyzed with caution by arbitration practitioners.

The ICC officially states that such information shall show the quality of its tribunals and will contribute to promoting “*regional, generational and gender diversity in the appointment of arbitrators*”.

It will indeed be very interesting to have detailed statistics on the appointments of arbitrators in ICC administered arbitrations. However it is doubtful that should the statistics show that certain groups are underrepresented as arbitrators, the parties shall adapt their appointment decisions.

More efficient proceedings: cost consequences for unjustified delays in submitting awards

Arbitration is often criticized because of the growing length of the proceedings. Indeed, the 2015 Queen Mary University survey found that “*Cost and lack of speed were both ranked by respondents as amongst the worst characteristics of international arbitration.*”¹ While the parties agree that a certain amount of time is necessary to submit written and oral



arguments, they however do not accept that the process may be delayed because of the lack of availability of arbitrators or any lack of diligence on their part.

Although in theory the ICC rules provide a maximum delay for submitting the award, in practice the deadline is usually extended several times. Indeed, Article 30 provides that the time limit for the final award is six months starting from the execution of the terms of reference². Our own experience of the average duration of an ICC arbitration is however longer.

Since all proceedings are different, the ICC itself indicates in its note that "*arbitral tribunals are expected to submit draft awards within three months after the last substantive hearing concerning matters to be decided in an award or, if later, the filing of the last written submissions (excluding cost submissions)*". The Court has therefore decided to impose financial consequences on arbitrators who do not render their award in a timely manner. Indeed, the arbitrators' remuneration will be reduced when the draft award is rendered late.

If the three-month deadline mentioned above is expired (reduced to two months for cases heard by sole arbitrators), the Court shall impose the following consequences on arbitrators' fees:

- "*for draft awards submitted for scrutiny up to seven months after the last substantive hearing or written submissions, whichever is later, the fees that the Court would otherwise have considered fixing are reduced by 5 to 10%.*
- "*for draft awards submitted up to 10 months after the last substantive hearing or written submissions, the fees that the Court would otherwise have considered fixing are reduced by 10 to 20%.*
- "*for draft awards submitted for scrutiny more than 10 months after the last substantive hearing or written submissions, the fees that the Court would otherwise have considered fixing are reduced by 20% or more.*"

Of course, should the Court be provided with the appropriate justification of "*factors beyond the arbitrators' control*" or of "*exceptional circumstances*", such financial consequences shall not be imposed.

Should the proceedings be broken down into several phases giving rise to partial awards, all awards shall be taken into account to apply such consequences.

Since the purpose of this measure is to promote rapid resolution of disputes, indicated to be one of the Court's top priorities, a bonus has also been envisaged. Indeed the Court may increase arbitrators' fees where they have conducted the arbitration 'expeditiously'. However, there is no clear indication as to how expeditious the rendering of the award need to be for the bonus to be awarded.

Whilst such measures send a strong message to users, their impact may be questioned. A further step to be taken by the ICC on the path to improving efficiency, could be to publicize the decisions whereby it imposes financial consequences.

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¹ 2015 Queen Mary University survey entitled "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" available at <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>

² Article 30 of the ICC Rules: "1 The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2). 2 The Court may extend the