

International Arbitration Alert

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ICC issues Practice Note on Three Hot-Topics in International Arbitration: an Arbitrator's Duty of Disclosure; Transparency in "Commercial" Arbitration; and Tribunal Secretaries

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Key Points

- The International Court of Arbitration (the "Court") of the ICC has published a Note to Parties and Arbitral Tribunals on the conduct of the arbitration under the ICC Rules of Arbitration (the "Note" or the "2019 Note") which entered into force on 1 January 2019.
- The ICC implements a new mandatory transparency regime, during and after the proceedings, by providing for publication of case data and awards. Publication of awards will be a concern for some clients and such clients may wish to prohibit publication of awards as part of the arbitration agreement.
- The Note assists arbitrators with disclosure of potential conflicts, the constitution of tribunals and transparency.
- Other updates deal with the issues of (i) additional Secretariat assistance in the constitution of arbitral tribunals; (ii) data protection; (iii) increased transparency and scrutiny for investor-state arbitrations; and (iv) duties of administrative secretaries.

Background of the Note

Given continued criticism that the arbitration process is "opaque" the International Chamber of Commerce (ICC) Court has made enhancing its transparency (and perhaps its predictability) a point of priority in the past three years. In February 2016, the Court issued a Note improving the overall transparency of the arbitration process and providing guidance on conflict disclosure under the 2012 ICC Rules (the "2016 Note"). In particular, the 2016 Note focused on:

- Improving transparency by publishing information on the Court's website (e.g., the arbitrator's name, nationality, and whether the arbitrator is the chairperson, a co-arbitrator or a sole arbitrator).

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- Introducing an efficiency policy pursuant to which the ICC may increase or decrease the arbitrators' fees based on how expeditiously the arbitrators draft the award.
- Providing guidance on conflict disclosure (circumstances prospective arbitrators should consider when assessing their impartiality and independence).
- Enabling parties to request communication of reasons for the Court's Decisions.
- Explaining the Court's calculation of fees.

The 2019 Note takes this general objective further and provides clarity on the arbitration process under the updated ICC Rules of 1 March 2017. In the words of Mr Alexis Mourre (President of the Court) **“these amendments reflect the Court's continuous efforts [...] to provide more transparency in its practices, increase the efficiency of our arbitrations and offer an ever wide range of services to our users.”** Building on the 2016 Note foundation, the 2019 Note aims to:

- Clarify the circumstances and relationships to be taken into account in the arbitrator disclosure process to assess conflicts of interest.
- Provide additional Secretariat assistance in constituting arbitral tribunals.
- Enhance transparency by the publication of awards and other case data.
- Specify the duties of administrative secretaries.
- Introduce further guidance on investor-State arbitrations.
- Comply with the European Union General Data Protection Regulation (GDPR).

The updated ICC Court policies will apply to all ICC arbitrations regardless of the version of the ICC Rules pursuant to which they are conducted.

Most Significant Updates of the Note

Transparency (paras. 34-46 of the Note)

- All ICC awards made as from 1 January 2019 may be published, no less than two years after their notification, based on an opt-out procedure (i.e., if parties want to prevent the publication, they must object) (see paras. 40-46 of the Note). The parties may alter the time-period for publication or may, at any time, object to publication of an award, or request that the award be redacted or anonymized. Should the underlying contract or arbitration be subject to a confidentiality agreement, the publication of the award will be subject to the parties' specific consent. The Secretariat may also seek specific consent, or exempt an award from publication, in certain sectors of industry or in sensitive cases.
- The arbitration community has expressed concern about this rule which leads to the automatic publication of the award if no objection is raised before said publication, namely within two years of the date of notification of the award.
- For arbitrations registered from 1 July 2019, information published on the ICC Court's website will now include (i) the sector of industry involved and (ii) the counsel representing the parties in the arbitration (para. 36 of the Note). This will come in addition to publishing information relating to the composition of ICC tribunals and status of the arbitration which was one of the major policies of the 2016 Note. This information will remain on the ICC website after the closure of the

proceedings unless consent is withdrawn in accordance with data protection regulations.

Guidance on Conflict Disclosure by Arbitrators and Prospective Arbitrators (para. 24 of the Note)

The Court has issued further guidance on the circumstances and relationships prospective arbitrators should pay particular attention to when assessing their impartiality and independence.

- In addition to circumstances or situations mentioned in the “IBA Guidelines on Conflicts of Interest in International Arbitration” of 23 October 2014 (the “IBA Guidelines”), the ICC recommends taking into consideration if the arbitrator or prospective arbitrator or his/her law firm:
 - *“advises, or has represented or advised, one of the parties or one of its affiliates.*
 - *acts or has acted against one of the parties or one of its affiliates.*
 - *firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.*
 - *acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise.*
 - *is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.*
 - *has a professional or close personal relationship with counsel to one of the parties or the counsel’s law firm.*
 - *acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.*
 - *acts or has acted as arbitrator in a related case.*
 - *has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel’s law firm.” (para. 23 of the Note)*
- The ICC list of circumstances may be less clear than those in the IBA Guidelines. For example, the Note does not contain any time-limit and does not use a traffic light system or any other method to guide arbitrators in their disclosure.
- The 2019 Note also states that disclosures should be made not only with respect to the parties and their affiliates but also to non-parties having an interest in the outcome of the arbitration.
- The ICC Secretariat may assist prospective arbitrators in preparing their disclosures by identifying, at the outset of the arbitration, a list of “relevant entities.” However, the Court stresses that, ultimately, it is for the prospective arbitrator to assess whether disclosures should be made in respect of non-parties.

Assistance by the Secretariat with the Constitution of Arbitral Tribunals (paras. 32-33 of the Note)

- Under the ICC Rules, parties may agree to nominate a sole arbitrator or a presiding arbitrator for confirmation by the ICC Court. The Note now clarifies that the

Secretariat may assist the parties by proposing names of possible candidates or providing non-confidential information on prospective arbitrators.

- If jointly requested by the parties, the Secretariat is also able to contact candidates in order to check experience, availability and possible conflicts of interest. Parties are also free to agree that appointments will be made with the Secretariat's involvement, by way of a list procedure (i.e. list of candidates whose names can be struck out and ranked in order of preference).

Increased Transparency and Scrutiny for Investor-State Arbitrations (paras. 139-143 of the Note)

- The ICC Court administers a growing number of investor-State arbitrations and has introduced four practice points in this context:
- Prospective arbitrators are encouraged, for the sake of transparency, to disclose in their CV a complete list of treaty-based cases in which they participated as arbitrator, expert or counsel.
- Parties may agree in an ICC arbitration to apply in all or part the UNCITRAL Rules on Transparency, and the Secretariat may in such a case act as repository.
- Awards may be published six months after their notification as opposed to the usual two years applicable for other awards.
- Pursuant to Article 25(3) of the ICC Rules, the arbitral tribunal has the power to hear *amici curiae* submissions after consulting the parties.

Furthermore, as to scrutiny of draft awards by the Court treaty-based awards will be scrutinized in a plenary session including ICC Court members having specific experience in the field.

Duties of Administrative Secretaries (paras. 183-188 of the Note)

- The 2019 Note lists tasks that administrative secretaries may, under the control of the arbitral tribunal, perform, such as drafting correspondence and sending it on behalf of the tribunal, and preparing for the tribunal's review drafts of procedural orders as well as of factual portions of the award, such as the summary of the proceedings, the chronology of facts and the summary of the parties' positions. The complete list of organizational and administrative tasks can be found in para. 185 of the Note.
- **However**, it remains strictly impermissible for any tribunal to delegate its decision-making functions nor any other essential duties of an arbitrator to a secretary. In addition, the secretary's tasks shall in no circumstance release the arbitrators from their duty to personally review the file.

Data Protection (paras. 80-91 of the Note)

The Court will now ensure compliance with the GDPR which came into force on 25 May 2018. In this respect:

- The Note points out that by accepting to participate in an ICC arbitration, parties, their representatives, arbitrators, the administrative secretary, witnesses, experts and any other individuals that may be involved in any capacity in the arbitration acknowledge that their personal data may be collected, transferred, archived and published.

- Both parties and arbitrators are also required to ensure that only personal data that are necessary and accurate for the purposes of the arbitration proceedings are processed and that secured means of collecting, communicating, and archiving data are used throughout the entire arbitration process and during the applicable retention period of such data. The Note specifies that any individual whose data is collected and processed may exercise their right under the GDPR and request the Secretariat and arbitral tribunal to correct or delete their data.

For ease of reference, the Notes are available at:

- **2016 Note:** http://res.cloudinary.com/lbresearch/image/upload/v1456236629/note_to_parties_and_arbitral_tribunals_on_the_conduct_of_arbitration_22_231116_1410.pdf
- **2019 Note:** <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>
- **Press release of the Court dated 19 December 2018:** <https://iccwbo.org/media-wall/news-speeches/icc-issues-updated-note-providing-guidance-parties/>

Akin Gump Strauss Hauer & Feld LLP will provide further updates as appropriate. Please contact us if you would like to discuss its implications in further detail.