

# Overview of Recent Changes to ICC Arbitration Proceedings

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If you have any questions regarding the matters discussed in this memorandum, please contact **Anke C. Sessler**, 49.69.74220.165, [anke.sessler@skadden.com](mailto:anke.sessler@skadden.com) or call your regular Skadden contact.

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An der Welle  
360322 Frankfurt am Main  
Germany  
49.69.74220.0

Four Times Square  
New York, NY 10036  
212.735.3000

[skadden.com](http://skadden.com)

The International Court of Arbitration (the Court), the arbitral institution of the International Chamber of Commerce (ICC), recently announced a series of changes to ICC arbitration proceedings. The new policies are summarized below.

## Improving Transparency

For all arbitration proceedings registered as of January 1, 2016, the Court now publishes the following information on its website:

- the arbitrator's name;
- their nationality;
- the date the Terms of Reference were established;
- whether the arbitrator is the chairperson, a co-arbitrator or a sole arbitrator;
- whether the appointment was made by the Court or by the parties;
- whether the arbitration is pending or closed; and
- any changes to the composition of the arbitral tribunal (without mentioning the reason for the change).

The publication occurs after the Terms of Reference have been established, and the information remains on the website even after a case is closed. The names of the parties and their counsel, as well as the case reference number, are not made public. The published information contains a case ID number, but this number is generated for publication purposes only and does not reflect the case reference number. The parties may opt out of the disclosure by mutual agreement. They also may request the ICC to publish additional information about a particular case.

A chart containing the information listed above was published for the first time in late June 2016. The ICC has announced that the chart, available [here](#), will be updated monthly.

## Key Takeaways

Parties can make use of the published information when choosing arbitrators. The information should not replace a thorough check of multiple sources to determine an arbitrator's suitability for a specific case. However, information such as the amount of pending ICC cases an arbitrator is involved in, or his or her experience as chairman or sole arbitrator, may be taken into account when parties search for arbitrators who have the necessary time and skills to efficiently conduct a looming arbitration proceeding.

## Efficiency Policy

The ICC also has introduced an efficiency policy pursuant to which the ICC may increase or decrease the arbitrators' fees based on how expeditiously the arbitrators draft the award.

According to Art. 30(1) of the ICC Rules of Arbitration (ICC Rules), arbitral tribunals are expected to issue awards within six months of the establishment of the Terms of Reference (or within a specific time limit fixed by the Court). When fixing the arbitrators' fees at the end of the arbitration, pursuant to Art. 2(2) of Appendix III of the ICC Rules, the Court will take into consideration "the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award."

Under the new policy, three-member arbitral tribunals are expected to submit draft awards within three months of the last substantive hearing or filing of the last written

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submission (excluding cost submissions), whichever is later. The time frame is two months for cases heard by sole arbitrators.

If a draft award is submitted beyond that time frame, the Court, unless satisfied that the delay is attributable to exceptional circumstances or justified by factors beyond the arbitrators' control, may lower the arbitrators' fees. The Court may increase the fees above the average if an arbitral tribunal has conducted the arbitration in an expeditious manner.

In addition, the Court recently announced that if unjustifiable delays occur in the process of scrutinizing awards, the Court's administrative fees will be reduced by up to 20 percent. The scrutiny process (Art. 33 of the ICC Rules), which is carried out by the Court with the assistance of the ICC Secretariat, is a unique feature of ICC arbitration aimed at improving the quality of arbitral awards.

## Key Takeaways

These policies are aimed at speeding up ICC arbitration proceedings and were established in response to criticism that parties have to wait too long for the arbitral award to be issued.

## Guidance on Conflict Disclosure

As part of its Note to Parties and Arbitral Tribunals, the Court also has issued some guidance on the circumstances prospective arbitrators should pay particular attention to when assessing their impartiality and independence.

The guidance includes situations where:

- the prospective arbitrator or his/her law firm represents or has represented one of the parties (or one of their affiliates) to the dispute;
- the prospective arbitrator has in the past been appointed as arbitrator by one of the parties (or one of their affiliates), or by counsel to one of the parties or the counsel's law firm;
- the prospective arbitrator or arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of their affiliates;
- the prospective arbitrator or arbitrator acts or has acted as arbitrator in a related case.

The complete list of circumstances can be found in para. 20 of the [Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration](#), dated July 13, 2016.

## Key Takeaways

The circumstances the ICC has listed correspond to a large extent to the situations contained in the Red and Yellow lists of the widely used [IBA Guidelines on Conflicts of Interest in International Arbitration](#) (IBA Guidelines). The ICC's Note to Parties

and Arbitral Tribunals merely states that an arbitrator should "in particular [...] pay attention to" the enlisted circumstances, *i.e.*, the Note, other than the IBA Guidelines, does not further address potential legal consequences. This means that parties to an ICC arbitration proceeding can still seek guidance from the IBA Guidelines if conflict of interest issues come up.

## Communication of Reasons for Court Decisions

For reasons of transparency, the Court has slightly shifted its approach on communicating the reasons for its decisions.

Under Art. 11(4) of the ICC Rules, the reasons for Court decisions on the appointment, confirmation, challenge or replacement of an arbitrator are not communicated. Notwithstanding this provision, upon request by all parties, the Court may communicate the reasons for a decision on both the challenge and replacement of an arbitrator.

In addition, upon request by all parties, the Court may communicate the reasons for its decisions pursuant to Art. 6(4) of the ICC Rules (*prima facie* decision on the existence of an arbitration agreement) and Art. 10 of the ICC Rules (consolidation of arbitrations).

## Key Takeaways

The new stance on communicating the reasons for its decisions is in line with ICC's shift toward more transparency. However, parties interested in obtaining such reasons must make the request for the communication of reasons before the Court makes its decision. The Court also has full discretion to reject such request.

## Calculation of Fees

Finally, in paras. 54 et seqq. of the Note to Parties and Arbitral Tribunals, the Court has explained its internal practices regarding the calculation of fees in new ICC cases.

In general, ICC arbitration fees are calculated as a percentage of the amount in dispute (*ad valorem* system). The ICC may adjust those fees based on several factors. The amount of time the arbitrators spend working on a given case is one factor. In all new ICC cases, arbitrators are now being asked to provide periodic reports on the amount of time they have spent working on a case in order to help the Court calculate the fees.

## Key Takeaways

To keep arbitrators' fees low, it is important that parties (and their counsel) prepare cases in such a way that the arbitral tribunal can quickly reach a decision. As a rule of thumb, the easier the parties make it for the arbitrators to reach a decision, the less time the arbitrators will have to spend working on the case and the lower the costs will be.