

ICC Arbitration – Penalties for Slow Arbitrators

Written by Elizabeth Slattery

In its bulletin of 5 January 2016, the ICC announced penalties to encourage arbitrators to deliver up their awards more quickly than at present. The tardiness of some arbitrators has long been cause for major discontent amongst both lawyers and clients. Corbett & Co's worst experience was a sole arbitrator who took more than 18 months to issue an award on a preliminary issue!

Now, a sole arbitrator will have two months from the last hearing on the matter (or the last written submission, but excluding hearings or submissions on cost matters), to deliver to the ICC an award in draft. An arbitral tribunal will have three months to produce its award.

In addition, the ICC has stated in the bulletin that it will publish on its website the names of all arbitrators who are sitting in cases registered from 1 January 2016, including some further details such as the nationality of the arbitrators and the identity of the Chair of the tribunal. The purpose of this is so that the parties are able to identify the workload of an arbitrator they may be seeking to appoint (at least so far as other ICC work is concerned).

What are the sanctions for non-compliance?

As one would expect, the sanctions relate to fees, which may be reduced on a sliding scale if the arbitrator fails to adhere to the new rule, unless he or she can show that there are exceptional circumstances or other factors beyond their control. An award produced more than ten months after the appropriate deadline will incur a reduction of 20 % or more of the fees set by the ICC.

This development on the delivery of awards has since been incorporated in a useful and practical Note to Parties dated 22 February 2016 <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/practice-notes,-forms,-checklists/> The ICC now appear to be sending this Note as a matter of course to the

parties and their representatives at the outset of an arbitration. It is akin to a High Court Practice Direction and contains much sensible guidance on how the arbitration will be managed, from both the Arbitrators' and the ICC's perspective. The recent directives on timing of awards appear at Section III B which also includes a summary of the duties of the Arbitral Tribunal and, within the Tribunal, the duties of the individual arbitrator to satisfy himself as to availability, impartiality and independence. The question of availability in particular should now require some careful thought in light of the fee sanctions described above.

The new directive is entirely consistent with the policy of the ICC to endeavour to make the process of arbitration a transparent one in which the parties have confidence (Section III B 27) and the statement at Section IV B 38 that rapid and cost effective resolution is one of the main priorities of the Court. Specifically, the arbitrators are required to *'devote the time and effort necessary to conduct the arbitration with the requirements of the Rules'*. The guidance goes on to refer the arbitrators directly to the strict time limits in the Rules. The whole section is aimed at emphasising the requirements of the Rules for the control of time and costs and the contents of the January bulletin on efficiency in submission of awards are reproduced at Section D.

On its face this development must in general terms be good news for parties and practitioners. It is to be hoped that the initiative on awards will enable parties at the outset to identify the likely workload of their chosen arbitrator and re-consider if necessary. It will also inevitably apply pressure to those whose own time management and administration is really in need of an upgrade. We would hope that over time the grace period without penalties will be reduced from the current 10 months.

Consider, however, the arbitrator's perspective on this. There must in reality be very few arbitrators who would not wish to discharge their duties expediently and properly, where possible. Of course, in practice, however, there may be multiple and entirely understandable reasons why an award cannot be submitted in the time required; this may be so particularly in the case of a panel of arbitrators liaising from different countries and with practices of their own to maintain.

Some popular arbitrators need to learn to turn down new appointments when they are over-loaded and, as a result, providing poor and tardy service to the parties. How much can an arbitrator remember of the evidence given at the hearing after six or more months? It is to be hoped that the new regime will help to ensure ICC awards are given promptly.



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