

Revised ICC Note to Parties and Tribunals: Will Publication of Awards Become the New Normal?

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ICC's updated guidance to parties

On 20 December 2018 the International Court of Arbitration of the International Chamber of Commerce (**ICC**) published an updated Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (Note). The Note, which came into effect from 1 January 2019, introduces a number of significant updates to the ICC's practical guidance on its Rules of Arbitration.[fn] These updates include new guidance on data protection, clarifications on disclosures by arbitrators and additional guidance for treaty-based arbitrations.[/fn]

Amongst these updates, the ICC's new opt-out approach to the publication of awards will be of particular interest to users of international arbitration, many of whom have chosen this method of dispute resolution for its privacy and perceived confidentiality. Some users may also be surprised to learn of this change, which came in through an updated practice note rather than via a formal amendment to the ICC Rules.

This article will examine the ICC's new approach, and the practical considerations it raises for users of ICC arbitration. Ultimately, while we consider the ICC's new approach to publication will have benefits for users of arbitration and tribunals, it remains to be seen whether parties will support the ICC's attempts to make information about its awards more widely-accessible.

Revised approach to publication of awards

The ICC's new approach to the publication of awards is set out in paragraphs 40 to 46 of the Note. The ICC considers that the publication and dissemination of information about arbitration is an "*instrumental factor*" in facilitating the development of world trade. (paragraph 40 of the Note) It is in this context that the ICC has adopted the following approach:

- ICC awards made from 1 January 2019 may be published.
- The Secretariat will inform parties at the time of notification of awards, that the award may be published in its entirety no less than two years after notification. Parties are able to agree to publication in a shorter or longer time period.

- Any party may, at any time before publication, object to publication or require that the published version of an award be anonymised or pseudonymised.
- If a party objects to publication or requires that the award be anonymised or pseudonymised, the award will either not be published, or will be published in a restricted format.
- If there is a confidentiality agreement in place covering the arbitration or specific aspects of the arbitration or award, publication of the award will be subject to the parties' specific consent (opt-in to publication rather than opt-out).
- Aspects of awards that refer to personal data may be anonymised or pseudonymised by the Secretariat to comply with applicable data protection regulations.
- The Secretariat retains the discretion to exempt awards from publication.

This approach to publication will apply to all future ICC awards, including those issued under arbitrations commenced before 1 January 2019. Importantly, although publication is the default position, the new approach does provide parties with an opt-out mechanism. Where any party objects to publication, the award will simply not be published (or will be anonymised or pseudonymised if that is what a party requires). While the other party might want to challenge non-publication for strategic or other reasons, the Note (perhaps unsurprisingly) does not provide any process by which a party may object to non/limited publication once requested.

Given the relative ease with which parties are able to achieve non-publication via the opt-out process, and present attitudes towards publication of awards, it is possible that the new approach to publication will not significantly increase the number of awards that are published, in the immediate future.

The Note does not set out a process or protocol for anonymisation or pseudonymisation of awards. This lack of guidance on restricted publication of awards may simply reflect the notion that each case may have different requirements. However, the extracts from over 600 awards contained in the ICC Dispute Resolution Library, may provide some insight for parties into how the Secretariat may approach restricted publication.

What does this mean for users of arbitration?

For most users of international arbitration the prevailing sentiment is likely to be against publication of awards in full. Although the new approach does provide protections for those who do not want their awards to be published, the presumption in favour of publication may be of concern to some of the ICC's users. It is, of course, possible to foresee a situation arising where a party inadvertently fails to opt out – leading to publication of an award where the party would not otherwise have actively consented to publication.

At a practical level, for parties who are engaged in ongoing ICC arbitrations, it will therefore be important to consider:

- whether their arbitration agreement includes any restrictions on the publication of any award, or confidentiality provisions that may restrict the ICC from making public the existence of the arbitration or publishing the award;
- whether the terms of reference or procedural orders issued by the Tribunal include any restrictions on the publication of any award, or confidentiality provisions that may restrict the parties and the ICC from making public the existence of the arbitration or publishing the award; and
- whether to write to the Tribunal and the ICC Secretariat opting out of potential publication of

any final award in advance, so as to avoid possible publication via a failure to raise an objection at a later stage.

For parties currently negotiating ICC arbitration clauses in contracts, it may be wise to consider including a confidentiality provision that will operate to restrict or prevent publication of any award up front, if confidentiality is desired. Likewise, parties may also want to revisit standard form ICC arbitration clauses and consider the inclusion of this type of confidentiality provision or otherwise address the publication of awards in their arbitration agreements.

It is fair to say that there are potential benefits of disseminating information about arbitrations more generally. Most users will know that the ICC already publishes extracts from some awards through its ICC Dispute Resolution Library, mentioned above. These extracts are classified according to the procedural points they address.

However, having access to a greater number of previous awards – which might include rulings on the application of the ICC Rules, other procedural points or even substantive legal issues – would undoubtedly be of value to practitioners and tribunals, and could provide parties with more certainty about particular questions of law and procedure. In turn, wider publication of awards, with appropriate anonymisation where required, might go some way to address the concerns some have raised as to the potential of private arbitration to affect detrimentally the development of the rule of law and international commerce.^[fn] See, for example, the [2016 BAILII Lecture](#) by then Lord Chief Justice of England and Wales, Lord Thomas.^[/fn] It is certainly true that one of the commonly-cited advantages of international arbitration generally is the privacy and confidentiality that the process affords,^[fn] In the [Queen Mary University of London 2018 International Arbitration Survey](#), 36% of respondents indicated these to be amongst the most valuable characteristics of international arbitration.^[fn] and it could be argued that the ICC's new approach is not necessarily incompatible with those two attributes (although awards in some sectors may clearly not lend themselves to publication even with anonymisation or pseudonomisation).

Ultimately, while the ICC's continued focus on transparency is to be lauded, whether or not this will lead to an increased number of awards being published will depend on the approach taken by users of arbitration. Given how highly privacy and confidentiality is valued for users of arbitration at present, it may require a significant change in attitude for publication to become widely accepted. Many users may well make opting out of publication their default approach. It is also possible that given the opt-out framework some parties may unwittingly fail to object to publication and some awards may be published where parties never expected them to see the light of day. At this stage there appears to be no way back, as there is no provision in the Note for published awards to be withdrawn from the ICC database.