

# Entry into force of updated version of the Note to Parties and Arbitral Tribunals on the Conduct of Arbitration pursuant to the ICC Rules of Arbitration

16 January 2019 - by [Carolina Pitta e Cunha](#)

The International Chamber of Commerce (ICC) has recently revised its [Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration](#) (“Note”).

The Note provides the users of ICC arbitration (including parties, arbitral tribunals and administrative secretaries) with useful, practical guidance on the conduct of arbitrations under the [ICC Rules of Arbitration](#) (last amended in 2017).

Importantly, the new version of the Note applies to “all ICC arbitrations regardless of the version of the Rules pursuant to which they are conducted”[\[1\]](#), which means that parties and arbitral tribunals involved in arbitrations started under the 2012 ICC Rules must also be sure to comply with the new Note.

The new Note, effective since 1 January 2019, introduces several changes to its latest version, the most relevant of which are briefly outlined in this article.

**1. Disclosures by arbitrators and prospective arbitrators with respect to “relevant entities” (section III.A, paragraph 24):** the Note clarifies that arbitrators and prospective arbitrators should consider their relation with “non-parties having an interest in the outcome of the arbitration”[\[2\]](#), when assessing whether a disclosure should be made with respect to their independence or impartiality. Pursuant to the Note, the Secretariat may assist arbitrators and prospective arbitrators by providing them with a list of “relevant entities”. This does not, however, dispense them with their duty to disclose with respect to other “relevant entities” not identified by the ICC.

**2. Assistance by the Secretariat with the nomination and appointment of sole arbitrators or presiding arbitrators (section III.B, paragraphs 32-33):** pursuant to the new Note, the Secretariat may assist the parties with the nomination and appointment of a sole arbitrator or presiding arbitrator by providing them with a list of possible candidates and/or non-confidential information on prospective arbitrators.

**3. Publication of additional information regarding ICC arbitral tribunals on the ICC website, for arbitrations registered as from 1 July 2019 (section III.C, paragraph 36):** adding up to the information already available online, including (i) the names of arbitrators, (ii) their nationality, (iii) their role within a tribunal and (iv) their appointment

method and (v) whether the arbitration is pending or closed<sup>[3]</sup>, the Court will also publish on the ICC website, for arbitrations registered as from 1 July 2019: (vi) the sector of industry involved and (vii) counsel representing the parties.

**4. Publication of awards no less than two years after their notification, based on an opt-out procedure**

**(section III.D, paragraphs 40-46):** in line with the ICC's commitment to publish and disseminate information about international arbitration as a tool facilitate worldwide trade, the ICC Note contains a new section on the publication of awards. According to this section, awards made as from 1 January 2019, may be published in their entirety no less than two years following the parties' notification, subject to the parties' potential opt-out, potential confidentiality agreements and the applicable data protection regulations.

**5. Protection of personal data pursuant to data protection regulations, including [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data](#) (section VI.D, paragraphs**

**80-91):** the new Note also devotes an entire new section to the protection of personal data, explicitly placing upon the parties a duty to ensure that their representatives, witnesses, experts and any other persons appearing on their behalf, are aware and accept their personal data may be collected, transferred, archived and published. Pursuant to paragraph 87, arbitral tribunals shall to that effect, at an appropriate time in the arbitration (v.g., in the Terms of Reference), remind the parties and other participants that their data may be used.

**6. Express provisions concerning investment arbitrations based on treaties (section XI, paragraphs**

**139-142):** considering the growing number of investor-State arbitrations administered by the ICC<sup>[4]</sup> and transparency concerns, the new Note further introduces a new section on "Treaty-based Arbitrations". Pursuant to section XI, prospective arbitrators are encouraged to include in their CVs a complete list of the treaty-based cases in which they have been involved, either as counsel, arbitrators or experts. The Note also states that parties may select, in whole or in part, the [UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration \(2014\)](#) to apply in ICC arbitration. Also, considering the particularities of investor-State arbitrations, the process of scrutiny of draft awards can only be carried out by Vice-Presidents of the Court and Court members having experience in investment treaty arbitration. The Note further provides that treaty-based awards may be published six months after their notification, rather than the two-year period applicable to all other awards.

**7. Power of arbitrators to allow oral or written submissions by *amici curiae* and non-disputing parties**

**(section XII, paragraph 143):** the updated Note also clarifies that, under Article 25(3) of the Rules, arbitrators may,

upon consultation with the parties, accept submissions by *amici curiae*.

**8. Changes to the specific tasks that may be entrusted to administrative secretaries (section XIX.B, paragraphs 183-188):** the new version of the Note further introduces some changes to its long section on the role of administrative secretaries. Under the revised note, administrative secretaries may now specifically liaise with the parties in respect of the organization of hearings and meetings, draft correspondence to the parties and send it on behalf of the arbitral tribunal and prepare for the arbitral tribunal's review drafts of procedural orders as well as factual portions of an award, such as the summary of the proceedings, the chronology of facts, and the summary of the parties' positions<sup>[5]</sup>. As provided under the previous version of the Note and specifically set out in the ICC's online communication on the new Note<sup>[6]</sup>, it remains "strictly impermissible" for any arbitral tribunal to delegate decision-making functions to an administrative secretary or, in any way, rely upon him or her to perform on its behalf any of the essential duties of an arbitrator<sup>[7]</sup>.

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<sup>[1]</sup> Note, para. 2.

<sup>[2]</sup> Note, para. 24.

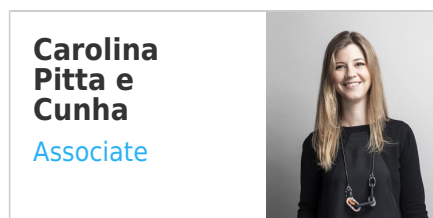
<sup>[3]</sup> <https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/> (accessed 11 January 2019).

<sup>[4]</sup> *ICC issues updated Note providing guidance to parties*, dated 19 December 2018 and available at <https://iccwbo.org/media-wall/news-speeches/icc-issues-updated-note-providing-guidance-parties/> (accessed 11 January 2019).

<sup>[5]</sup> Note, para. 185.

<sup>[6]</sup> *ICC issues updated Note providing guidance to parties*, dated 19 December 2018 and available at <https://iccwbo.org/media-wall/news-speeches/icc-issues-updated-note-providing-guidance-parties/> (accessed 11 January 2019).

[7] Note, para. 184.



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