

**AN ANALYSIS OF THE EFFICACY AND CHALLENGES OF THE INTERNATIONAL CHAMBER OF
COMMERCE IN COMMERCIAL DISPUTE RESOLUTION**

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ABSTRACT

International commercial disputes have rapidly increased as a result of the massive rise in global commerce. Effective trade dispute resolution systems are required because, if ignored, transnational trade deadlocks can lead to serious global economic and political issues. As a result, there is growing need for quick and effective dispute settlement. As opposed to litigation in national courts, extrajudicial measures are the most effective way to meet this need. This paper makes two arguments: (1) that alternative dispute resolution (ADR) procedures that are compatible with the cultural backgrounds of the disputants are the best ways to settle international commercial disputes; and (2) that regardless of the ADR procedure ultimately chosen—negotiation, conciliation, arbitration, or a hybrid process—a third-party mediator who is well-versed in the cultures of the disputants can best assist the disputants in reaching an amicable agreement quickly. The International Chambers of Commerce's enforceable dispute resolution processes have long been seen as making it an effective organization. In this Paper the International Chamber of Commerce (ICC), the efficiency and otherwise of its rules are analyzed; as well as how the institution reaches its goals, and provide a theoretical perspective regarding non-governmental organizations that deal with international arbitration.

KEY WORDS: *Dispute resolution, International arbitration, Arbitration courts, ICC*

1.0 INTRODUCTION

As international business transactions have emerged as key drivers of economic development around the world, disputes in this field have proliferated. As a result, the operation of public and private sector procedures for resolving international economic disputes, particularly arbitration, has taken on added significance.¹ One upshot of the increase in international commercial transactions and the resulting disputes has been the development of fast, modern, and efficient dispute resolution systems that are independent of any national jurisdiction.² Such mechanisms are now the inseparable complement of the institutions governing international economic and financial relationships.³ It goes without saying that if left unresolved, international commercial disagreements can develop into trade wars with serious political and economic ramifications. International bodies for the resolution of commercial disputes are at the center of this trend.

These institutions, which consist of several international tribunals, committees, groups, and special bodies, all serve the same purpose of resolving disputes in international trade.⁴

The International Chambers of Commerce is one of the major regulators of International Commercial transactions. The International Chamber of Commerce is well-known for its role in resolving international commercial disputes. It was founded in 1923, and its initial institution was established as the International Court of Arbitration in Paris, France's capital city, with limited powers granted to the tribunal.⁵ After the establishment of ICC there was unpredictable growth to resolve the international commercial disputes by using the method of arbitration. The Rules of ICC holds a great importance that it supervises the other international arbitration institutions and any country can use these rules under any law by using its procedure.⁶

Alternative Dispute Resolution (ADR) becomes the fastest, quickest and most reliable way of resolving dispute arising from international commercial transactions. ADR is a procedure that assists people in resolving civil disputes

¹ Gonzalo Biggs, "Resolving International Trade and Investment Disputes" (2003) *Cepal Review* 80 at 98

²*Ibid*

³*Ibid*

⁴ Cesare P. R. Romano, "A Taxonomy of International Rule of Law Institutions" (2011) *Journal of International Dispute Settlement* 2 at 241.

⁵ Erik Schafer, H. Verbist, C. Imhoos, "ICC Arbitration in Practice", (Kluwar law, 2005), p 13

⁶*Ibid* 88, at para 15

outside going to court. Arbitration, conciliation, and mediation are the three well-known processes of alternative conflict settlement. It serves as an alternative to the established court system. The goal of alternative dispute resolution is to resolve conflicts outside of the court system. In this process, a neutral third party is always chosen to hear both parties out and assist them in reaching a mutually agreeable conclusion.

When individuals or organizations enter into contracts with their international partners that and that contract is becomes subject of disagreement, their disagreements can then be subject to arbitration in accordance with the ICC's arbitration procedures. The ICC Rules are very important since they regulate other international arbitration bodies, and any nation may apply these rules in accordance with any law by following the procedures they prescribe.

International commercial arbitration is a process of resolving conflicts that may emerge from international economic transactions. Its distinguishing feature is that it is a consensual, private, and confidential dispute settlement mechanism that results in a final and binding award specifying the disputant's rights and obligations.⁷

Two distinct sets of rules have been established by the International Chamber of Commerce (ICC) for arbitration and mediation processes, respectively. The most recent version of the ICC Rules of Mediation came into effect in 2014, whereas the most recent edition of the ICC Rules of Arbitration took effect on January 1, 2021. The International Centre for ADR oversees mediation processes, whereas the International Court of Arbitration is responsible for arbitral proceedings. Despite its name, the International Court of Arbitration does not function like a national court.

2.0. The ICC's approach to dispute resolution.

When commercial disputes arise, the ICC's commercial-leading dispute resolution services may be depended on to resolve them as quickly and cost-effectively as feasible. It provides a diverse range of administrative procedures as an alternative to litigation for resolving local and international conflicts. Furthermore, its globally accessible and impartial services are available to anyone: from individuals and private sector firms to states and state bodies.⁸

Businesses, nations, and international organizations such as the G20, the World Bank, and the World Trade Organization look on the ICC as a credible voice in international trade and investment.

The ICC's contribution to the global economy of today is more than in just trade. Through its managed conflict resolution services, it also aids in resolving issues in global company. These services include arbitration, a private process that the parties can significantly influence and that results in a legally-binding and enforceable conclusion. Arbitration is based solely on rules that only it is empowered and authorized to administer. ICC arbitration is overseen by its premier International Court of Arbitration. It has also established various ancillary services over the years, which are now housed within the International Centre for ADR. It includes mediation and other kinds of amicable dispute resolution; locating specialists to provide opinions on technical, legal, and financial issues; and assisting in the establishment and operation of dispute boards.⁹

According to the 2020 Survey conducted by Queen Mary University, London in collaboration with law firm White & Case, ICC is the most preferred institution among arbitration providers, including market leaders featured in the rankings who have led the field for well over a decade. The survey rankings reflect the ICC's position as a truly global and independent institution with nearly 100 years of experience in resolving business disputes and a modern

⁷Tsotang Tsietsi* B.A. (Law); LL. B (NUL); LL.M (Cambridge). Lecturer, Faculty of Law, National University of Lesotho. Professor Gerald McGinley comments and suggestions on previous drafts. 1. U.N. Conference on Trade and Dev., New York and Geneva, 2005, Dispute Settlement: International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N.Doc.UNCTAD/ EDM/Misc.232/Add.38, available at http://unctad.org/en/Docs/edmmisc_232add38_en.pdf [hereinafter U.N. Conference on Trade and Dev. 5.1]. quoted in * The International lawyer - International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes, (vol 47. No. 2), pg. 249 available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1582&context=til> Accessed 10th September 2023.

⁸<https://iccwbo.org/dispute-resolution/dispute-resolution-services/> Accessed 11thSeptember, 2023.

⁹ ICC Dispute Resolution: *A World of Experience, a Wealth of Expertise*, Paris: International Chamber of Commerce (ICC), 2012, 1.

mission to utilize dispute resolution to benefit society.¹⁰

In April 2021, the ICC Court produced a COVID-19 set of guidelines (the COVID-19 Guideline Note) that analyzes specific methods that may help reduce the pandemic's negative impacts on ICC arbitrations, particularly as they pertain to the organizing and execution of virtual hearings.

2.0 INTERNATIONAL COURT OF ARBITRATION.

The International Court of Arbitration is an autonomous body that is attached to the International Chamber of Commerce.¹¹ The Court neither hears nor resolves issues on its own.¹² Instead, it has the responsibility of managing and supervising arbitrations held in accordance with the ICC Arbitration Rules. It is responsible for overseeing the general implementation of the ICC Arbitration Rules. Additionally, it performs quality control checks on the arbitral procedure and the award-making. It does this by attempting to strike a balance between professional oversight and party autonomy. In order to encourage the parties to voluntarily comply with the arbitral tribunal's rulings and, if necessary, to ensure that the award is enforceable at law before national courts, the Court seeks to ensure that both the arbitration's administration and its conclusion are neutral, impartial, and reliable with the help of the Secretariat.¹³

The Court performs a variety of distinct duties, such as:

- a) Nominating an arbitrator in cases when a party fails to nominate an arbitrator or when the parties cannot agree on a single arbitrator or the panel's chair. In order to help the Court with this job, the Secretariat will solicit suggestions from National Committees. If the parties do not stipulate or agree on the number of arbitrators, the Court shall decide this matter as well.¹⁴
- b) Fixing the place or seat of arbitration when the parties have not agreed on it.¹⁵ This is a vital function because, amongst other things, the place of arbitration determines the national or external law supervising the conduct of the arbitration and the enforceability of the award under international conventions including the New York Convention. (The award is rendered at the place of the arbitration).
- c) Approving the terms of reference if signed by the arbitrators when one of the parties has failed to do so.¹⁶ This is important because it allows an arbitration to proceed despite the sabotaging tactics that may be adopted by a recalcitrant party. An arbitration will proceed notwithstanding the refusal or failure of a party to take part in it.¹⁷ However, this does not relieve the participating party from the burden of arguing and proving its case nor the arbitral panel from its duty to 'establish the case by all appropriate means.
- d) Scrutinizing the draft arbitral award as to both form and substance. The purpose of this control is to ensure the quality of the final product so as to render it enforceable at law¹⁸ and as invulnerable to attack as possible in any subsequent judicial proceedings.¹⁹ The arbitral tribunal is obliged to modify its award in accordance with the Court's comments as to form; however is free to determine for itself whether to follow the Court's suggestions as to substance. In regard to matters of substance, arbitrators generally pay respectful attention to the Court's comments.²⁰ In evaluating the importance of the Court in providing scrutiny of draft awards it is difficult not to applaud anything that is done to help ensure the enforceability of an award. National Courts have also been comforted by this function of the Court.

Despite the functions noted above, which most commentators and practitioners regard as conducive to the smooth progress of arbitration, the Court has attracted some criticism.

¹⁰<https://iccwbo.org/media-wall/news-speeches/icc-worlds-most-preferred-arbitral-institute-global-survey-finds/>
Accessed 12th September, 2023.

¹¹ Article 1(1) 2021 ICC Arbitration Rules

¹² *Ibid*

¹³ Article 35 2021 ICC Arbitration Rules.

¹⁴ Article 12(2) 2021 ICC Arbitration Rules.

¹⁵ Article 18(1) 2021 ICC Arbitration Rules.

¹⁶ Article 23(3) 2021 ICC Arbitration Rules.

¹⁷ Article 26(2) 2021 ICC Arbitration Rules.

¹⁸ Article 34 2021 ICC Arbitration Rules.

¹⁹ *Ibid*

²⁰ *Ibid*

Firstly, it has been argued that whilst the Court exercises an essentially negative or controlling function it does not provide substantive or constructive support.

Secondly, it has been stated that the Court contains numerous archaic elements. Its bulk is cumbersome. Members are not compensated, which restricts the attraction of the job given the heavy workload. Third, dissatisfaction has been expressed with the Court's "anonymous character and total isolation from tribunals, parties, and their legal advisors."²¹

These difficulties have prompted calls for a "fundamental restructuring of the ICC Court itself, a reorganization of its work, and a thorough revision of the standards of recruitment and remuneration."

Hence, On December 1st, 2020, the International Chamber of Commerce (ICC) announced a new version of its Arbitration Rules (2021 Rules), which will apply to all cases lodged as of January 1st, 2021. In comparison to the amendments made to the Arbitration Rules in 2017 (2017 Rules), the 2021 Rules make no significant fundamental changes to the arbitration procedure. Rather, the additions and changes are practical in character.

The following are the most significant changes.

- i. Boosting the efficiency and flexibility of the arbitration process;
- ii. Improving the administration of complicated arbitrations; and
- iii. Increasing the procedures' transparency.

i. *Boosting the efficiency and flexibility of the arbitration process.*

- The development of arbitration proceedings is fostered through the use of digital mechanisms.
- The use of digital technology has been critical for the continuation of numerous arbitration hearings since the beginning of the COVID-19 epidemic. Following proof that arbitration processes may be conducted digitally, the 2021 Rules include adjustments and clarifications that confirm and support this practice in future hearings.
- First, the amended language in Article 3(1) eliminates the requirement to file physical/hard copies of communications and documents. This introduces a new universal standard that all communications must now be exchanged solely through electronic methods. This modification also affects Article 4(4), which now stipulates that the arbitration request will be transmitted digitally unless the claimant chooses to produce physical copies.
- Second, the revised language of Article 26(1) specifically permits the arbitral tribunal to choose, following consultation with the parties, to conduct a virtual hearing (by videoconference, telephone, or any other means), if the facts and circumstances of the case so warrant. The 2021 Rules' language will enable the tribunal to reach this conclusion even if one or both parties object to a virtual hearing.

The language of *Article 22(2)* has been changed to explicitly require the arbitral tribunal to take any procedural steps necessary to guarantee the smooth operation of the proceedings (so long as they do not conflict with any agreements between the parties). The arbitral tribunal had the option to do so in the past, but not the duty. This amendment embraces and upholds a widely acknowledged arbitral procedure efficiency principle. The term "may" have been changed to "shall" in the regulations' text to reflect this revision.

Among the measures that a tribunal can take to ensure the smooth running of the proceedings, arbitral tribunals can now actively encourage the parties to resolve their dispute amicably (in whole or in part), through negotiation or any other amicable dispute resolution mechanism.⁴ Previously, the rules merely permitted the tribunal to notify the parties of alternative options.

Article 1(2)(b) of the 2021 Rules raises the threshold for access to the expedited rules from US\$2 million to US\$3 million as further evidence of trust in the expedited procedure. This increased sum will be used to arbitrations begun on or after January 1, 2021.

²¹ Wetter JG. 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 1 *American Review of International Arbitration* 91 p.97

Article 36(3) of the 2021 Rules is amended to allow the arbitral tribunal to issue an additional award within 30 days of the final award. Once the final award was issued, the parties could only request clarification of clerical errors or interpretation of ambiguous ideas under the 2017 Rules. This change allows the parties to request a supplemental award for claims that were not resolved in the final decision.

ii. *Improving the administration of complicated arbitrations.*

The 2021 Rules feature a series of improvements and clarifications that allow for a more effective administration of specific problems that regularly occur in the execution of arbitration proceedings where several parties and/or contracts are involved.

According to the 2017 Rules, it was only possible to add new parties to the proceedings before the arbitral panel was chosen. It is now allowed to add more parties to the proceedings under the revised language of *Articles 7(1) and 7(5)*, even after the arbitral tribunal has been put into effect. In certain situations, the new party is required to agree to the tribunal's composition. The tribunal will also be required to fulfill a number of duties, such as taking into account any conflicts of interest or the effect the addition of the new party will have on the proceedings.

Furthermore, *Articles 10(b) and (c)* were amended to highlight the possibility of combining arbitration proceedings governed by distinct arbitration agreements ("arbitration agreement or agreements"). The 2017 Rules were ambiguous on this point, implying that only arbitrations conducted under the same arbitration agreement might be merged.

iii. *Increasing the procedures' transparency.*

The existence of third-party financing must now be disclosed by the parties. The 2021 Rules take a position in favor of the greatest possible level of transparency in response to the discussion around the disclosure of financing by third parties. The requirement of the parties to disclose the presence and name of any third party with whom they have an agreement to finance the arbitration and derived from which there is an economic interest in the outcome of the case is stated in a new paragraph (7) to Article 11. The purpose of paragraph (7) is to help the arbitrators in fulfilling their duty to act impartially and independently when evaluating potential conflicts of interest.

The 2021 Rules amend Article 17 to require parties to notify each other of any change in their legal team or representation. The arbitral tribunal, for its part, may take whatever necessary action to avoid or eliminate a potential conflict of interest, including the expulsion of a new representative from the process.

Article 5 of Appendix II has been amended to provide the right of any party to request the rationale for certain rulings from the court in advance. This change explicitly addresses the existence of prima facie jurisdiction and the extent of an arbitration agreement; arbitration consolidation; and the appointment, challenge, and replacement of arbitrators. It is also recognized that the court may deny the request in rare circumstances.

3.0 THE EFFICIENCY OF THE ICC'S ACTIVITY IN TERMS OF DISPUTE RESOLUTION.

The ICC Dispute Resolution Statistics reports are issued annually and provide an overview of the cases handled by the ICC International Court of Arbitration and the ICC International Centre for ADR. The issues brought to the ICC Court spanned a wide range of industries. The majority of disputes are in the fields of engineering and construction, followed by energy issues and finally those involving governments or state-owned businesses.

In 2021 a total 853 new cases were filed at the ICC International Court of Arbitration, a fall from 2020's 946 cases.²² More specifically, the registered 853 new cases in 2021 and 27 requests for an emergency arbitrator, which is slightly lower than 2020 but nothing that could indicate a change in the growing trend of disputes administered by the ICC. New cases registered under ICC Arbitration Rules in 2021 involved 2,206 parties from 143 countries. The top five were: USA, Brazil, Spain, The United Arab Emirates, Mexico. Those countries were followed by France, Germany, China and Hong Kong, India, and Italy. The ICC International Centre for ADR registered 80 new requests, a few more than in 2020 (77) - the largest number of cases registered in a year. The split of cases between

²²<https://iclg.com/cdr/arbitration-and-adr/17580-icc-arbitration-remains-popular-despite-slight-2021-downturn>
Accessed September, 15th, 2023.

the requests was: mediation: 44, expertise: 25, dispute boards: 4, cases related to trade finance instruments: 7.²³

The ICC Court registered 946 new cases in total in 2020, the most since 2016 when a complicated collection of minor issues caused a noticeable uptick in the figures. Out of the 946 cases that were registered, 929 were arbitrated using the reputable ICC Rules of Arbitration, and 17 used the ICC Rules for Appointing Authorities. The numbers for 2020 also revealed the greatest number of parties involved in proceedings, as well as appointments or confirmations of arbitrators. Other records cover the geographical diversity of arbitrators as well as the locations of arbitration.²⁴ Furthermore, the International Centre for ADR (the 'Centre') received 77 new cases in 2020 under the Mediation Rules, Expert Rules, Dispute Board Rules, and DOCDEX Rules.²⁵

Furthermore, a thorough review of the ICC's yearly reports reveals certain findings concerning the subjects on which the ICC places significant emphasis and priority:

- a) preserving the reputation established as the most favored arbitral institution in the most recent comprehensive market assessment, pointing to the reputation,
- b) the number of new cases registered,
- c) draft awards approved,
- d) countries of origin of arbitrators,
- e) places of arbitration,
- f) further progress of the number of women arbitrators sitting in ICC tribunals,
- g) nature of the disputes,
- h) choice of law,
- i) amounts in dispute,
- j) expedited procedure,
- k) languages of awards,
- l) reinforcing regional and international reach with the creation of the Secretariat's fourth international case management office, considering the broadest possible reach,
- m) building new collaborative bridges and strengthening existing ones with pertinent institutions and organizations that entrust the International Court of Justice (ICC) with the resolution of disputes (UNCITRAL, UNIDROIT, FIDIC, WTO, World Bank), as well as planning dispute resolution events around the world, such as regional conferences, trainings, Young Arbitrators Forum activities, and educational activities.

4.0 CHALLENGES FACING THE INTERNATIONAL CHAMBERS OF COMMERCE

As seen and understood from the aforementioned the importance of the International Chamber of Commerce (ICC) has grown in the modern world as a result of the rise in trade disputes between states, businesses, and financial institutions, as well as the competition among countries to enact protectionist policies that go against internationally agreed-upon norms.

Despite years of rules changing the ICC poses a number of challenges to arbitrators, notorious among them are:

i. Choice of Decision-makers:

The ability of the parties to choose the decision-makers is one of the features of international arbitration, which has drawn criticism despite typically being highlighted alongside the majority of its benefits. Critics have mostly questioned the legality of an award issued by arbitrators appointed privately. The legality of party-appointed arbitrators may be bolstered further if ICC first appoints the President/Chairman of the tribunal and then designate the other two arbitrators with their input.

ii. Length of time of the Tribunal:

International arbitrations are becoming increasingly protracted for a variety of reasons, including:

- a) In general, the conflicts that come to arbitration are complicated.
- b) While the parties and the tribunal are liberal in defining the procedure, they want to follow in accordance

²³<https://insight.opus2.com/icc-releases-preliminary-figures-for-2021> Accessed September, 15th, 2023.

²⁴ ICC Dispute Resolution 2020 Statistics, Paris: International Chamber of Commerce (ICC), 2021, 4

²⁵*Ibid*

with party autonomy, they frequently agree on somewhat lengthy procedures.

iii. Cost of Arbitration process:

Although arbitration has always been valued as an advantage over litigation, that perception is currently being challenged. The cost of international arbitration has increased along with its complexity.

5.0 CONCLUSION

Despite the many challenges, the ICC recognizes that ADR procedures offer extra advantages that cannot be obtained through the court system. These approaches are anticipated to minimize the overall financial expenses of resolving conflicts while preserving party autonomy, involving the parties in the construction of the platform for dispute settlement, and maintaining secrecy. According to the research conducted over the last six years, the year 2016 was the most fruitful in terms of cases addressed for assessment and resolution by the ICC assistance apparatus, with 966 instances, while 2017 was the worst represented in terms of the number of cases, with 810. These cases were all resolved to show the speedy nature of the ADR system adopted by the ICC and to further buttress how efficient, effective, time saving and cost effective these processes are. In recent years, the ICC International Center for ADR, in addition to the ICC International Court of Arbitration, has entered the game with certain steps (offering a range of services that can be employed individually, sequentially, or even concurrently with other dispute resolution procedures). Furthermore, the number of parties involved and the countries from which the parties come in the disputes filed to the ICC for resolution have expanded. Additionally, an increasing number of jurisdictions are attempting to broaden their geographic scope.

Finally, there has been continual development in the representation of women in the processes run by the ICC.