



The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic

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Can the ICC's invitation to accept electronic service of awards be an effective tool when arbitrations are seated in Italy?

On April 9, 2020, the ICC issued the Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (the ICC Guidance Note). In the wake of the January 2019 note to the parties on the conduct of arbitration (the January Note), the ICC Guidance Note encourages counsel, parties and arbitrators to manage arbitrations in a fair, expeditious and cost-effective manner, in spite of the pandemic.

To this end, the ICC Guidance Note offers a number of tools (such as the organization of virtual hearings and conferences, the use of prompt digital communication between the arbitrators, the ICC Secretariat and the parties) to mitigate the effect of delays to the arbitral process, including those caused by COVID-19.

Unlike other institutions; for example, the Milan Chamber of Arbitration the ICC has clearly stated that COVID-19 should not delay the tribunals' deliberations on their preparation of the draft awards, as these activities can be done remotely. Therefore, the time limits for the submission of draft awards remain in effect.

E-signatures and the electronic service of awards

One of the procedural tools set forth in the ICC Guidance Note is the possibility for the parties to agree that the process of signature and service of the award is done electronically.

In particular, §15 of the ICC Guidance Note reads as follows:

"Subject to any requirements of mandatory law that may be applicable, the parties may agree that: (i) any award be signed by the members of the tribunal in counterparts, and/or (ii) all such counterparts be assembled in a single electronic file and notified to the parties by the Secretariat by email or any other means that provides a record of the sending thereof, pursuant to Article 35 (§164 of the Note). Parties are encouraged to agree, whenever possible, to the electronic notification of the award. The Secretariat shall in principle not proceed with an electronic notification of the award unless explicitly agreed by the parties."

The electronic formation and notification of the award may give rise to a couple of concerns, at least in the Italian legal framework. Therefore, assuming the ICC arbitration is seated in Italy, the following issues should be taken into account before accepting the invitation of the ICC to the e-signature and service of the award.

First, the e-signature of the award might cast some doubt on the validity of the award, if the signature is a mere scan of a handwritten signature – as it seems to be the case in the suggestion made by the ICC – and not a certified digital signature in compliance with the terms and conditions regulating digital signatures in Italy. If so, this situation might create grounds for challenges of the award.

Second, the electronic collation of the award might have an impact on the set aside or enforcement procedures to be started in Italy, as an original of the award (i.e. a handwritten signed document) or a certified copy shall be dispatched to each party, in accordance with Italian procedural law.

Scans of handwritten signatures and the validity of the award under article 823 of the Italian civil procedural code

As to the first topic, pursuant to articles 823 and 829 of the Italian code of civil procedure (ICCP), the award shall be signed by the arbitrators under the penalty of nullity. The provision clearly refers to handwritten signatures on the original of the arbitral award. After the entry into force of the Italian digital administration code in 2005 and the recognition of full equivalence between the handwritten signatures and the certified digital signatures (see Court of Cassation no. 22871 of 10 November 2015), it could be concluded that a certified digital signature – placed in compliance with the relevant regulations in force – might also be placed on the award.

In fact, digital signatures certified by authorized operators guarantee – through the cryptography – the signature's authenticity, unless the author disowns it; therefore, it is guaranteed that through a certified e-signature the arbitrator takes the ownership of the content of the award.

The same conclusions and degree of certainty as to the attribution of the signature to its author cannot be drawn from the mere scan of a handwritten signature.

It follows that, while it is safe to conclude for the validity of electronic signatures placed in conformity with the applicable regulations, some doubts may arise on the validity of any other signature, like, for example, the handwritten signature simply scanned into a pdf document.

If so, then the electronic signature is considered invalid under Italian law, the award itself might be subject to challenges for nullity.

Whether article 823 ICCP is a mandatory provision of law or not does not substantially change the uncertainties and hurdles parties may encounter in accepting the ICC's suggestion.

Where is the original award?

As to the second point, the suggestion made by the ICC in the Guidance Note is that the award would be collated and dispatched electronically (“(ii) all such counterparts be assembled in a single electronic file and notified to the parties by the Secretariat by email or any other means that provides a record of the sending thereof, pursuant to Article 35 (§ 164 of the Note)”). This means that no original award (bearing the authentic handwritten signatures of the arbitrators) would either be sent to the parties or deposited at the ICC Secretariat, as mandated by article 35, § 4 of the ICC Rules. This means that, in practical terms, there would be no original version of the award but

This means that, in practical terms, there would be no original version of the award but only electronic copies. This might create obstacles to parties wishing to challenge or enforce that award in Italy.

In fact, pursuant to article 824 ICCP, the original award or the relevant certified true copy shall be dispatched to each party. Pursuant to article 825 ICCP and 826 ICCP, a party wishing to challenge the award for nullity or to enforce it shall submit to the relevant court office the original of the award or either its certified copy. If the award is only formed electronically through the mere collation of single electronic files bearing handwritten signatures and no original hard copy is actually deposited at the ICC Secretariat, the requirements set forth by the ICCP would never be achievable.

In fact, the original award would never come to existence. As a result, nobody – neither the ICC Secretariat, the arbitrators, nor a public notary – would be able to validly issue a certified copy.

This would certainly create some hurdles which might be difficult to overcome when attempting to start set aside or

enforcement proceedings. This is especially true in a country like Italy, where the relevant state courts competent for the administration of such proceedings do not shine for efficiency and often hide behind over-formalistic approaches.

Conclusions

There is no doubt that the ICC's efforts to make sure that efficiency in arbitral proceedings is maintained even in this difficult time is to be praised. However, parties should carefully assess the impact of the suggested routes. Eventually, the delays in the dispatching of the original award, especially during the global lockdown, may not be unbearable. Perhaps a slight delay shall be preferred to a faster solution that might give rise to objections concerning the validity of the award or that might create troublesome obstacles to set aside or enforcement proceedings.

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