The Rights to Access to Justice and Fair Trial before the International Chamber of Commerce

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Abstract

The rights to access justice and to have a fair trial are enshrined and safeguarded in various international human Rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) the African Charter on Human and Peoples' Rights, the Inter-American Convention on Human Rights and the European Convention on Human Rights. Founded at Paris-France in 1923, the International Chamber of Commerce is one of the oldest commercial organizations harbouring an international arbitration jurisdiction known as the International Court of Arbitration (ICA). The ICA stands apart from other institutions in its ability to handle even the most complicated disputes involving large sums of money, while appraising the competence of its arbitrators, flexibility, and efficiency in its hearings and of timeliness in the delivery of its arbitral sentence. Luis Alfonso writes in this regard that the International Chamber of Commerce possesses the necessary facilities and capable personnel to run arbitration in a fairly efficient way. It is in consideration of these elements that we would pose the question does the arbitration system within the International Chamber of Commerce effectively safeguard the rights to access to justice and a fair trial in its court? A content analysis of the 2021 ICC Rules will enable one to determine whether the guarantee of the right to access justice and the right to a fair trial within the ICC's arbitral system is effective.

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Introduction

Justice in the 21st century is no longer an aspect subjected to a political body as it used to be in ancient monarchies[i]. At first, human societies established bodies of rules which they applied in settling disputes. Over time, the schematization and generalization of these rules led to the creation of a uniform legal system[ii], whereby its evolution was conveyed on the communization of jurisdictional rules. This judicial system was anchored on principles, sometimes universal that conferred rights to individuals, who by virtue of them could receive effective hearing before their respective legal systems. These are the right to access justice, which is akin to another, the right to a fair trial.

As equity remains an "*arlessiene*"[iii] to most legal systems, the concept of justice today is seemingly a boon, though not a myth within institutionalized national and international legal orders as coined in the wordings of Renard Jules "if you thirst for justice, you will always be thirsty"[iv], which in essence precludes the quest for justice to one whose satisfaction is not impossible to quench, but one that of a continuous quest that needs patience for it to be satisfied, giving a unanimous definition to the notion would only spur incontinence and manipulation by institutions to suite their practices. In ordinary terms, justice refers to a concept of fairness and moral fairness that guides the application of the law to a fact in an issue. It entails a set of principles instituted to guise the due process as well as the safeguard the rights of every person (natural and physical) during a hearing in court. It is however not overrated to insist on the commutation that justice shares with humanity, since the establishment of justice is only possible by human transmission[v]. Having that the function of the court is to enforce the obligations arising from legislative sources, the existence of an alternative dispute resolution mode (ADR)[vi] rightly reveals that the mechanism of rendering justice is not a closed system. Arbitration[vii], as a genuine form of international justice[viii], remains a more advanced form of alternative dispute resolution because of its effectiveness in resolving disputes arising from international commercial relations[ix]. Arbitration is a discrete mode of alternative dispute resolution to litigations, whose primacy is established based on an agreement between the

parties[x], consisting of the appointment of one or more private individuals, who have as task to settle arising disputes[xi]. The guarantee of the rights of the individuals during its proceedings is essential if arbitration is to serve as a commendable means of resolving disputes arising from trade, investment, and international commerce, as well as from the operation of an activity generating exorbitant sums of money among individuals or states.

The rights to access justice and to have a fair trial, are considered today as prisms framing nearly all institutionalized judicial systems and are required to soothe even within the scope of arbitration, they form the cornerstone of every judicial procedure and are for this reason erected as general principles of law, an imperative that is recognized and imposed on civilized nations. While one has a classical connotation relating to the ability to introduce individual plea before judicial instances, the other has traits to articulate the operationalization and scheme through which the judicial entity will adjudicate the matter, yet both principles are essential factors in appreciating the effectiveness, indeed the necessity, of the rule of law within the society.

What are the rights to access to justice and fair trial?

Francioni Francesco defines the right to access justice as the right of the individual to obtain the protection of the law and to have recourse to a court or other equivalent mechanism of judicial or quasi-judicial protection[xii]. Ngotho Njung James states that it depicts a situation whereby people who seek justice, are kept abreast about the process, turn to find effective, accessible, and affordable remedies before a competent court, which is understandable by all, and doth delivers its justice promptly[xiii]. On the other hand, the right to a fair trial means that any trial must take place in a competent court of law that is independent and impartial in the application of essential rules, indispensable to the outcome of its decisions. The rules include the adversarial principle, the principle of equality of arms, the principle of reasonable time limits, and the requirement to motivate judicial decisions, the right of appeal, publicity of the hearing, and effective enforceability of judgements.

In general terms, the right to access justice and the right to a fair trial summarize all *sine qua non* dispositions put in place by a jurisdictional power in order to ensure minimum accessibility

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to the protection of life, safety, and property for the individuals[xiv], and also to ensure that the judicial process is compliant, and does not favour one party against the other, but obviously to ensure the enforcement of its results. These rights are enshrined and safeguarded in various international human Rights instruments such as the Universal Declaration of Human Rights[xv], wherein it provides in its article 8 and 10 respectively that;

> ***"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."***[xvi]
>
> and ***"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him***."[xvii]

In addition, article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR) provides for access to justice by stating that the state will ensure that any person whose rights are violated shall have an effective remedy, any person claiming such a remedy shall have his right enforced by the competent judicial or any other competent authority. The state shall equally develop the possibilities of judicial remedy and ensure that the competent authorities enforce such remedies when granted.[xviii]

Access to justice and fair trial is equally recognised in various regional instruments as well, for example Article 7(1) of the African Charter on Human and Peoples' Rights[xix], article 8 of the Inter-American Convention on Human Rights[xx] and the European Convention on Human Rights.[xxi]

All these instruments are to the effect that everyone has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal established by law for the determination of his rights and obligations. As such, access to justice and fair have to be protected in each state. Failure to protect these rights is tantamount to a denial of justice because access to justice is a necessary condition for justice in that it is more than improving access to courts. It is the ability to seek and obtain a remedy through formal or informal institutions of justice for complaints in compliance with human rights rules. There is no access to justice where people fear the judicial system, see it as foreign, and where the justice system is financially inaccessible due to the extremely high cost of procedure. Access

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to justice involves *"normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight."*[xxii]

The effectiveness of the respect of the rights to access to justice and fair trial within the ICC.

Founded at Paris-France in 1923, the International Chamber of Commerce is one of the oldest commercial organizations harbouring an international arbitration jurisdiction within, known as the International Court of Arbitration (ICA). With more than 57 national committees in over 100 countries worldwide, and internationally recognized arbitrators skilled in resolving a plethora of commercial disputes, the ICA stands apart from other institutions in its ability to handle even the most complicated disputes involving large sums of money, while appraising the competence of its arbitrators, flexibility, and efficiency in its hearings and of timeliness in the delivery of its arbitral sentence. ***Luis Alfonso*** writes in this regard that the International Chamber of Commerce possesses the necessary facilities and capable personnel to run arbitration in a fairly efficient way[xxiii]. It is in consideration of these elements that we would pose the question does the arbitration system within the International Chamber of Commerce effectively safeguard the rights to access to justice and a fair trial in its court?

A content analysis of the 2021 ICC Rules will permit one to appreciate the effectiveness of the guarantee of the right to access justice and the right to a fair trial within the ICC's arbitral system. Not only will we be able to perceive the degree of respect for the rule of law and human rights as embodied in international conventions, but we will be informed on the role and place that their underlying respect may have in the choice of the services of the Centre. To attain this, the exegetical method which revolves around the exploitation of legal texts relating to this topic: most especially those applicable to arbitration disputes before the ICC, international conventions and treaties governing the right to access justice and a fair trial, and documents will be expedient to us. The mobilization of this method results in the pre-eminence of an inclining imbalance in favour of the requirements linked to these rights, viewable through a ubiquitous consideration of the rights in every phase which does not exclude the fact that their effectiveness is still in a wanting state.

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A general consideration of the rights to access justice and fair trial at the ICC

During the Middle Ages, the judicial function was not separated from the executive function, which was that of the sovereign. The English system of dispute resolution, as in various ancient monarchies, was conducted by the sovereign, whose discretionary role was to settle disputes between his subjects. This was not only tiring for the sovereign but also slow and sometimes inaccessible, given the various functions incumbent on the sovereign. The justice of the sovereign was equally questionable when he was confronted with a dispute opposing a bourgeois or member of the royal family and a peasant, an issue deplored by many. It was, therefore, necessary to separate the two functions if maximum recourse was to be ensured, thus the institutionalization of the jurisdictional function as we have today. The characters that frame up contemporary judicial function should be guaranteed in all modes of resolving disputes, for this reason, the ICC has for many years been working to ensure optimum accessibility for anyone wishing to use its services. This stance is justified by the constant development in each phase of its normative, procedural, and institutional facilities to ensure its conformity with contemporary developments.

- The materialization of the rights to access justice before the ICC

The second decade of the 21st century was a remarkable time for the structure of the ICC, in the sense that it permitted it to renovate its arbitration framework to adapt to the demands of the contemporary world. This renovation is demonstrated through its adoption of new rules governing arbitration in the court, which came into force on 1 January 2012 and amended in 2021[xxiv] replacing that of 1998. This change is commensurate with the practice established by the Court regarding individuals' rights to access justice and to have a fair trial, while others aim to increase the flexibility, efficiency, and transparency of arbitration before the ICC[xxv]. It will be an opportunity for us to look at the inventions of the ICC in the sphere of the aforementioned rights.

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- The use of technology to facilitate access to justice

The technological evolution today is on the hinge of various institutions, even though its implementation is seemingly complex with regard to judicial systems. Arbitration must be adaptable to this development and an analysis of the rules demonstrates that ICC arbitration is not foreign to technological. In line with the demands contained in the UN Conventions on the use of electronic means for the transmission of communications[xxvi], ICC arbitration's fondness for technology is perceptible from the preliminary phase of bringing a dispute. This is apparently the most difficult and important phase[xxvii] since it often involves processing multiple documents. Article and 4(4b) of the Rules of Arbitration provides for the mandatory submission of requests by electronic means to one of the offices mentioned in the rules, failing which, the case will be inadmissible. The request[xxviii], must be sent to the ICC through an e-mail, though this is not a common practice in some arbitral institutions around the world, whose arbitration rules do not envisage this possibility and require the physical filing of requests, physical presence during the case management conference[xxix] and the exchange of correspondence[xxx].

These considerations demonstrate the ICC's openness in simplifying access to justice through the means of referring and exchanging of proceeds between individuals and the court since anyone can submit a request for arbitration wherever they are, and whenever they want. This equally helps in minimizing expenditure, since there is no need to travel to France to submit a request for arbitration. The claimant has sufficient time to prepare their paper copies and send them to the courts' secretariat at their request, which will in turn notify the respondent.

Also, major natural occurrences such as the covid19 pandemic[xxxi], climate change, floods, and even volcanic eruptions often obstruct hearings in arbitral jurisdictions. The ICC has stepped up its efforts in this respect by dematerializing and delocalizing its hearings through the admission of telephone conferences or videoconferences for procedural[xxxii], hearing of witnesses and pleadings without personal presence which promotes consistency in participation of individuals in hearings through other means such as Zoom and teams.

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- Time for Arbitration procedure before the ICC

Ensuring a prompt hearing serves as a barometer for determining the degree of recourse to an instance since everyone will always recourse to the fastest route in obtaining justice. As provided by the rules of the court, the time provided for the conduct of an arbitration is set for six (06) months[xxxiii]. It is thus that the court may with the aim of making its arbitration an efficient and easily accessible mechanism for resolving disputes, the rules of arbitration requires the arbitral tribunal and the parties to take the necessary steps to conduct the arbitration expeditiously, by taking into account the complexity and value of the dispute[xxxiv], this will allow the normal time allowed for arbitration proceedings to be shortened by the use of procedures with short deadlines in normal arbitration as well as simplified procedures. Here, the parties have laxity in the choice of the procedures they deem fit for the resolution of the dispute when the tribunal is still being constituted (during the case management conference or during the arbitration process). One of such mechanisms that the court has which permits it to conduct a time effective arbitration includes the bifurcating procedures which are set forth in appendix IV of the rules. This will permit the tribunal to cut down on certain processes which it deems not necessary for the arbitration procedure. Although the rules lay emphasis on time efficiency as a criterion in dispute resolution, it does not *ipso facto* signify hasty and inefficient conduct from the side of the counsels, since the court holds demands that the selected counsels should have sufficient time to devote to the case[xxxv], without which any party can revoke his counsel(s).

- Emergency arbitrator

A party can equally opt to use the emergency arbitrator provided by Article 29 of the rules or go through the expedited procedure of Article 30 and appendix vi, which will hasten the arbitration process. The case management conference can be held at any time of the proceeding, at the convenience of the tribunal, though the rules of arbitration provide for a compulsory case management conference before drawing up the Terms of reference[xxxvi], during which the parties and their representatives will make a choice on whatever suitable procedures through which they intend the case to follow[xxxvii]. In this, the parties as well as the arbitral tribunal[xxxviii] benefits from a plurality of measures in carrying out a time-effective procedure.

Notwithstanding the choice of an emergency arbitrator, the tribunal[xxxix]may upon request from any of the parties in a dispute convene another meeting as they deem necessary during the proceeding, which will then permit it to use one or more of the case management techniques described in appendix IV such as; bifurcating the proceedings or rendering one or more partial awards on key issues, using amiable methods to resolve part of the dispute, restricting bureaucracy within certain phases, restricting the production of unnecessary documents as evidence and the use of multiple experts which will only lengthen the procedure[xl].

- Multifaceted disputes and the Joinder clause

More still, disputes arising from commercial activities are sometimes multifaceted (touching many domains) and involve two or more parties. This sometimes necessitates the claimant to engage in an arbitration proceeding for every case and for every party within the arbitration clause. This traditional form of practice is very tedious, time-sapping, and expensive to carry on, regarding the fees accrued to the ICC's proceedings. The opportunity offered by article 7 of the rules of the court in this regard provides for a joinder clause, which aims at merging multiparty and multi-contract scenarios into a single arbitration within the reach of the parties. Parties can be added at the beginning of the arbitration, and even when the proceedings are ongoing when this is successfully done, claims can be made by any party against any other member party[xli]. Equally, the demands arising from a single or interrelated agreement need not be carried out through multiple cases, they can be merged into a single arbitration following demands by the parties or by the arbitral tribunal by virtue of article 10 of the rules which in effect opens a situation where the party can authorize the court to consolidate into a single arbitration, two or more arbitrations pending before it, in such a situation, they will be consolidated into the arbitration that commenced first unless agreed otherwise by all parties.

- Interim and conservatory measures before the ICC

The interim or conservatory measure[xlii] is a sort of pre-arbitral motion which can be conducted by the tribunal after consideration of the severity and persistence of the violation by one of the parties in a dispute, which does not allow the other party to wait for the arbitral tribunal to be constituted, and may request such measures as per Article 28(1)[xliii]of the rules and Annex V,

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which state that *"Unless otherwise agreed by the parties and at the request of one of them, the arbitral tribunal may, as soon as the file has been handed over to it, order any conservatory or provisional measure that it considers appropriate"*. Consequently, to ensure that justice is done, a provisional measure before judgment may be taken in order to prevent further violations or the reduction of the effect of justice by one of the parties to the proceedings[xliv]. The interim measures apply only where there is an imminent risk of irreparable harm. The tribunal possesses reasonable interlocutory remedies which can preserve the rights of every demanding party, when they cannot wait for a definite arbitral sentence, considering the prejudice that might occur if such measures are not taken. The court may through a provisional ruling request the partial payment of a claim, proceed in making attachment of properties, make injunctions or orders to safeguard or aimed at preserving perishable property, or imposing the posting of security for costs, preservation of evidence and determination of conduct.

It is worth nothing that interim orders and measures are enforceable under national law in some jurisdictions, though having relative chances of being challenged before national courts on appeal. The reason behind taking these measures is that, while the Court of Arbitration is trying to organize the arbitration, it can suspend activities perpetrated by the one party to the dispute that could interfere with the enforcement of the final arbitral award. By taking these measures, the tribunal does not only safeguard the rights of parties but equally reaffirms that its awards are effective and can be enforced. This is since it would be unreasonable to make an award that could not be enforced due to the non-existence of the elements necessary to implement its remedies.

- Parties' objection before the ICC

A party's objection does not impede the process, as the ICC has very formal procedural measures that ensure that objections are considered when raised. If the objection appears prima facie unfounded and reveals that there is a basis for the parties to be bound by the arbitration agreement, such objections will simply be sent to the arbitral tribunal[xlv]. If the respondent attempts to obstruct the arbitration proceedings, the Court of Arbitration may use the anti-obstruction provisions included in its rules. For example, if an objection is raised as to the competence of the ICC to determine a matter, it does not *ipso facto* stays the hearing, the

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tribunal will simply continue to hear the matter provided there is a clause allowing it to determine the matter. Mention of the objection raised will simply be made on the award.

Apprehending the right to a fair trial before the ICC

"Every arbitrator shall be impartial[xlvi] *and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated"*[xlvii]. The right to a fair trial means the case is heard within a legally constituted, independent, and impartial tribunal, and having parties are treated fairly based on the principles of equality of arms between the parties, giving them the adequate opportunity to prepare a case, present their arguments and evidence as well as challenging those of their opponents, receive judicial aid and being represented legally by a qualified arbitrator at all stages of the proceedings[xlviii]. The ICC has a rich track of dealing with the arbitrator's independence and impartiality[xlix].

- The right to equal treatment

In a single or multi-arbitrator case, the ICC entitles the parties to equal treatment in the choice of whomever they desire to represent them, and the court ensures that they provide arbitrators based on their experience, social ranking, efficiency, and availability. In case any party is unable to choose a suitable arbitrator, the ICC proceeds upon consultation with the national committee representing the country from which the party originates to choose one. When the arbitrators have been appointed by the parties, the court subjects them to obligatory preliminary scrutiny by the secretariat through its available mechanisms to ensure that they are apt and fit for the task[l] (article 11), and this by providing a written statement on the existence of a fact or element that might vitiate their impartiality, independence, or availability. They will have to sign an **"Arbitrator's Declaration of Acceptance and statement of independence and impartiality"** in which they are required to disclose any relationships that may compromise their impartiality and independence, or links they share with the parties. The arbitrators are required to carry out their responsibilities in accordance with the rules of the court, failing which, the arbitration rules establish situations in which the parties may challenge arbitrators even when the tribunal has already been composed, notably on any ground they deem is sufficient to compromise arbitral justice[li]. The court can ex officio decide not to confirm an

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arbitrator even without none of the parties raising any challenge against him[lii]. Aside from the impartiality of the arbitrators, the arbitral tribunal has to be impartial too. This means that the tribunal is called upon to base its decisions on the evidence, arguments, and facts produced by the parties during the proceedings, without any obstructions or improper influence from anyone[liii].

- The principle of contradiction

ICC arbitration is tied to the principle of fair hearing through the principle of contradiction[liv].Article 15 of the rules provides that the hearings held by the Tribunal shall be adversarial, and the ICC shall ensure its follow-up from the start of the proceeding. It offers all parties every opportunity on an equal basis, to be represented at each hearing, to have a reasonable opportunity to present their claims and arguments[lv], to know and refute those of their opponent, and to provide all the evidence which he/she considers necessary for the determination of the case.

- Production of evidence

Requests relating to evidence or to the hearing of witnesses, parties, or experts are examined by the judge hearing the case and/or the bench of judges or the bench of judges. The judge decides whether to grant these requests. In the event of debates and if the judge refuses the request, he will rule by means of a reasoned order. Any person may be heard as a witness, as the case may be, by the decision of the judge hearing the case or of the court. When a party withholds from the court a document, exhibit, or item of evidence essential to a fair trial, and it happens that he/she refuses to produce it at the request of the opposing party without legitimate impediment, the ICC has such means that permits it to obtain the evidence (court assistance in obtaining evidence).

- The right to information

Lastly, every party has the right to know what is happening during the hearings and should not be kept in abeyance or ignorance of whatever issue. Although the working languages of the ICC are French and English, the hearings, however, are entitled to be translated by a sworn interpreter into any other language at the request of the party who does not understand either

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of the languages used, they may still be translated by an interpreter into any other language if one of the parties so requests, at his or her own expense, for example, because of the presence at the hearing of a foreign client.

Limited implementation of the rights to access to justice and fair trial at the ICC

Although the ICC has appraisable mechanisms to materialize the rights to access justice, it can, however, be perceived that the state of its effectiveness in assuring the desired results is still criticisable. Considering the relativity of this work and the privacy of arbitral sentences, it is worth noticing that our analysis is based on the ICCs' rules of arbitration, and from there, we can deduce certain lapses in the rights. Arbitration as every form of justice mechanism has its own complexities in relation to the rights of individuals which must be addressed if assuring justice is its finality. The rights to access justice and to have a fair trial before the ICC are still vitiated by issues classifiable under material and procedural hindrances[lvi].

The material hindrances to the right to access justice and a fair trial in the ICC

- High cost of procedure

The arbitration agreement establishes the competence of the ICC to hear a dispute and thus turns to binding only the parties who are signatories therein. This means that in certain extreme cases where non-signatories to the agreement, people who have nothing to do with the dispute carry out a prejudicing activity, the court will just have to declare its incompetence in this regard and cannot proceed to hear or include them in the arbitration process. Also, the arbitration clause that is drafted such as to submit only a certain part of an agreement or contract to the competence of the court cannot further see a unilateral submission of a dispute in connection to the contract if it has not been mentioned in the agreement to the competence of the court, and this stands as a hindrance to the jurisdiction of the court in ensuring accessible justice to those claiming it.

Added to the above, arbitration as a means of resolving commercial disputes must be able to serve the needs of individuals, and this by having effective costs, defining the cost of

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proceedings is an important criterion in the promotion of accessibility to any institution, the rationale being to facilitate and ensure recourse to a specific number of people, considering that not everyone is able to pay the fees for filing their claims. The adage qualifying justice to be free does not effectively apply to arbitration in the ICC, it is more imperative to specify that arbitral justice requires exorbitant sums to initiate proceedings especially when it relates to small disputes involving small sums of money.

Commercial activities around the world differ in the number of monies generated as a result of divergent economic and political factors, one commercial agent in one part of the world might not be generating as much as others from different parts of the world, and to this regards, they might deny the stance of arbitration due to the exorbitance in the fees of proceedings. Although the ICC fee system is fairly simple to understand by being set on a scale in relation to the amount involved in the dispute, the fees are nevertheless exorbitant and turn to discourage people from soliciting its services. The total arbitration cost in the ICC comprises of the filing fees, administrative fees, arbitrators' fees for normal arbitration, experts' fees where experts are necessary, translator fees, rentals fees, and transportation fees, parties seeking to go through the expedited procedure, or the emergency arbitration are required to pay the accruing fees set out in their respective annexures[lvii].

The filing of the request is subjected to a non-refundable and mandatory deposit and a filing fee of US$ 5,000 for each dispute. Upon receipt of the Request, the Secretary-General may order the claimant to pay an advance on costs[lviii]in an amount intended to cover the costs of the arbitration. The court may fix the advance on costs at an amount[lix] likely to cover the arbitrators' fees and expenses, the ICC's administrative expenses, and any other expenses incurred by the ICC in connection with the arbitration for claims submitted to it by the parties. The disputing parties share costs equally during an arbitration. Where experts are required for the proper functioning of the arbitral dispute or to obtain certain evidence, ICC may provide them at the parties' expense (ICC is responsible for fixing the payment statistics between the parties).

The cost is calculated based on a scale set out in Annex III (Article 3) of the rules of the Court and will vary according to whether the arbitration procedure is normal or accelerated. Given that all the necessary services are financed by the parties, this scale may be burdensome for the

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parties and sometimes lead them to abandon the proceedings halfway. For example, the scale for calculating the cost of arbitration involving sums ranging from US$ 500,001 and US$ 1,000,000 is as follows:

- Mandatory filing fee of US$ 5,000,
- Administrative costs are calculated on a scale of 1.62% of the amount in dispute.
- The arbitrators' fees have a minimum scale of 0.9540%, while the maximum is calculated on a scale of 4.0280%.

Other costs such as rentals, experts' fees, transportation, and translation fees are fixed by the decision of the president of the court.

- Absence of provisions on legal aid

We might depict a situation where someone who finds him/herself in an insolvable situation is unable to pay for the procedural fees, in order to make sure they are not denied justice, the court fees are waived for those who cannot afford to pay procedural fees or for a solicitor. This is what is known as legal aid. In other words, Legal aid is the provision of assistance to people who are unable to afford legal representation and/or procedural fees and access to the court system.

Legal aid is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial. Legal aid is essential to guaranteeing equal access to justice for all, especially for those who have insufficient financial means, the provision of legal aid to clients increases the likelihood, within court proceedings, of being assisted by legal professionals for free or at a lower cost, or of receiving financial aid.[lx] Legal aid plays a strong role in ensuring respect for economic, social and cultural rights and as Mauro Cappelletti rightly said, legal aid is essential in providing access to justice for those who have insufficient or limited financial means to access the court. [lxi]Despite the importance of legal aid in guaranteeing access to justice, the ICC Rules has no provision guaranteeing legal aid for companies who cannot afford procedural fees. consequently, access to justice before the ICC is limited.

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The procedural impediments to the rights of access justice and fair trial

The tendency of the court in adopting procedural measures relating to the admittance and choice of evidence to be presented before the tribunal is tantamount to compromising the principle of fair trial in the court proceeding. Parties in a court proceeding should be given the possibility to present evidence at all stages of the proceeding without restrictions. The arbitrators may consider evidence that would not be admissible in a tribunal setting, which may affect the fairness of the outcome. Another issue relates to the use of videoconferencing technology for a particular witness or expert to present their oral evidence for cross-examination; this has become almost unexceptional where a witness has a valid reason for being unable to attend the hearing, or the parties agree for a witness to give their testimony remotely to conduct proceedings as efficiently as possible. An unfair or apparently illogical arbitral sentence conducted from a remote hearing is prejudicial, given the unshakable and difficult appealable nature of the final decision. Also, the rule that the production of evidence be it through a witness statement or physical attendance adds to the costs of the proceeding will turn to dissuade the parties from providing some evidence since they will want to save cost and only provide witnesses on key issues.

Under national arbitration statutes, the parties are left with the freedom to choose to be represented by local or external counsels[lxii], this discretion allows them to base their choice on reputation, values, competence, and cordiality. However, this point is not the ICC's stand as it does not authorize the parties to use local arbitrators who are versed with national laws governing the domain on which the commercial activity is exercised. A characteristic of the ICC arbitration is the existence of multiple arbitrators coming from diverse legal backgrounds, it sometimes turns not to concord with the party's standards since they are not always guided by equivalent values and ethical principles. A faulty, inconsistent, and incompatible relationship between a party and his counsel or even an overworked arbitrator is an enormous disadvantage to the tenure of the proceeding and will have a direct effect on the right to a fair trial. The rules of the court provide only for a foreign person with whom the parties share no relationship and give them a deadline of 15 days each (totalizing a period of 30 days)[lxiii] as such, before their confirmation, the court takes into consideration such points as the prospective

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arbitrator's nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals.

Conclusion

From the above analysis, it is commensurate to conclude that within contemporary international law, the rights to access justice and to have a fair trial in a remedial process such as arbitration is capital for the protection of the interests of physical and corporate commercial entities that have invested lump sums of monies on financial instruments[lxiv]. From a contemporary viewpoint, the materialization of these rights should be guaranteed from the commencement of the arbitration proceeding to the stage of enforcement of the arbitral sentence. The ICC has adopted integrative measures which not only enunciate but materialize them within its arbitral circumference, to the extent that it can assure the public of the appropriateness of its arbitration. Not forgetting the fact that for arbitration to efficiently serve as a tool for rendering justice, it must ensure accessibility to a larger audience. Strength however is to consider that despite the successes registered by the ICC in upholding these rights, some factors as pointed out above still reveal that there are still some loopholes to be filled if the ICC arbitration must outstand the proliferation of new arbitral instances.

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13. NgothoNjung James, *A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya*, JournalofcmsdVol 2(1), 2018.

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16. Tankeu Joseph, *Le recours aux modes alternatifs de règlement des litiges en matière de propriété intellectuelle*, Paris éd. L'Harmattan, 2018.

17. The 2021 ICC Rules of Arbitration.

18. The United Nations Convention on Electronic Communications, adopted on 23 November 2005.

19. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

20. United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice (Bangkok: UNDP, 2005).*

21. Whitesell, (A.-M.), "Independence in ICC Arbitration: ICC Court practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators", ICC International Court of Arbitration Bulletin, 2007 Special Supplement, Independence of Arbitrators, ICC Services 2008

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Endnotes

[i]From ancient times, the sphere between justice and politics are intimately related, a situation which led to the personification of the judicial function by the executive power since justice was considered as an "arbitration by the sovereign" *Histoire de la justice* — Wikipédia (wikipedia.org)

[ii]*ibid*

[iii] Borrowed from the French word "Arlessiene" symbolism of an "Herculean task" which describes a situation where an awaited thing never comes.

[iv] An English translation of the quote of the French author Jules Renard in "JUSTICE DIT ET MONTAGNE" wherein he stated "*Si tu as soif de la justice, tu auras toujours soif".*

[v] ELLA ELLA. (A-S.), « Le droit à un procès équitable à l'épreuve de la lutte contre le terrorisme dans le Sahel »,*in annales Africaine nouvelle série, Revue de la Faculté des Sciences Juridiques et Politiques de l'Université Cheikh AntaDiop de Dakar*, Vol 2, No. 15, 2021, p. 151.

[vi] Alternative dispute resolution is a manifestation of a liberal vision of rendering justice, wherefore the State admits its inefficiencies in the resolution of certain disputes and hence accepts that they be treated by certain particulars themselves. It is a technique wherefore the parties to a dispute make recourse to a third party, within a competent institution, for him/her to resolve a dispute by using legal rules governing the sector of activities in which they exercise and rendering a decision known as the arbitral sentence which is coated with the same authority as those rendered by national judges of first-degree courts.

[vii] Arbitration, as defined by David R., is "a technique whereby a question concerning the relations between two or more persons is settled by one or more other persons - the arbitrator or arbitrators - who derive their power from a private agreement and rule on the basis of that agreement without being entrusted with that task by the State". in David Rene., *L'arbitrage dans le commerce international*, Economica, 1982, p. 9.

[viii] Upheld by the French Cour de Cassation in arrête Civ. of 29 juin 2007, JDI 2007, 1236, note Clay T. (dir), le nouveau Droit Français de l'arbitrage, acte du 28 février 2011, à paraitre éd. *Lextenso*, 2011

[ix] In their day-to-day interactions, multinationals and other commercial institutions involved in superfluous and generally complex profit-making activities do not want to find themselves before ordinary, time-consuming state courts, which in fact do not always deliver satisfactory decisions. In this situation, they will likely recourse to arbitration, which is unquestionably an appropriate means of resolving disputes in commercial, civil and business relations.

[x] The parties may refer a dispute to arbitration by means of arbitration clauses or an arbitration agreement, which are documents by which the parties decide to submit a dispute to arbitration for resolution.

[xi]Tankeu Joseph, *Le recours aux modes alternatifs de règlement des litiges en matière de propriété intellectuelle*, Paris éd. L'Harmattan, 2018, p. 17

[xii]Francioni Francesco, *Access to Justice, Denial of Justice, and International Investment Law*, EJIL, Vol. 20 No. 3, 2009, p. 729

[xiii]Ngotho Njung James, *A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya*, JournalofcmsdVol 2(1), 2018, p. 80

[xiv] Francioni Francesco, *op. cit.* p. 730.

[xv] The Universal Declaration Of Human And Peoples Right was adopted by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

[xvi] See article 8 for access to justice.

[xvii] Article 10 for the right to a fair trial.

[xviii] Adopted by the United Nations General Assembly in its resolution 2200 A (XXI), concluded at New York on December 16, 1966, they included International Covenant on Civil and Political Rights (ICCPR).

[xix] Adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), and entered into force on the 21st of October 1986).

[xx] Article 8 of the convention

[xxi] The European Convention ON Human Rights, drafted in 1950 only entered into force on September 3rd 1953.

[xxii] United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice (Bangkok: UNDP, 2005).*

[xxiii]Luis Alfonso Gómez Domínguez**,** "Causes and Consequences of Faulty Arbitration Clauses",Estud. Socio-Juríd vol.9 no.2, 2007, ISSN 0124-0579, Causes and Consequences of Faulty Arbitration Clauses (scielo.org.co)

[xxiv] The rules that were previously in force at the ICC were those adopted in 1998.

[xxv] Preface to the 2021 amendments to the ICC Rules of Arbitration.

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[xxvi] The United Nations Convention on Electronic Communications, adopted on 23 November 2005, aims to facilitate the use of electronic communications in international commerce by ensuring the validity and enforceability of electronic communications before international and national courts.
[xxvii]Capucine du pac de Marsoulies describe it as "*the founding element of the arbitration procedure"*.
[xxviii] The request is the act/submission through which the individual refers the case before the arbitral tribunal.
[xxix] Art 24(4) of the rules *op. cit.*, which states that the *«Case management conferences may be conducted through a meeting in person, by video conference, telephone, or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine how the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative. »*
[xxx] If the documents communicated in support of the pleadings cannot in practice be served electronically, in particular because of their volume, then they must be delivered to the court registry.
[xxxi] HRC, *CCPR Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, paras. 1-2, UN Doc No. CCPR/C/128/2 (30 April 2020).
[xxxii] Appendix IV to the ICC Rules of Arbitration titled "Case Management Techniques".
[xxxiii] Article 31(1) of the Rules and Article 4 of APPENDIX VI of the ICC rules relative to Expedited procedure rules
[xxxiv] Art 22 (1) of the rules *op. cit*. and appendix IV.
[xxxv] The parties are advised to carry out sufficient enquiries to ensure that the individuals selected have enough time to devote to the case in question, in case where the parties demand for speed, this must be made clear to the ICC so that it can be taken into consideration when making any appointments.
[xxxvi] The term of reference (TOR) is a written document containing the summary of claims and the relief sought by each of the parties.
[xxxvii] Art 24(4) rules of rules *op. cit.*
[xxxviii] To avoid any conflicts in a three-member tribunal, it doesn't appear to be necessary for all procedural issues to be decided by all three arbitrators, the president of the court can receive such empowerment by the parties to decide on certain procedural issues and measures by himself.
[xxxix] It should be noted that by virtue of article 22, the tribunal can as well, unilaterally and in the absence of an agreement of the parties, adopt appropriate procedural measures to ensure effective case management.
[xl] See appendix IV of the rules of the court.
[xli] Article 8 (1) of the rules
[xlii] Interim measures are provisional, enforceable awards made by the arbitral tribunal ruling on a matter where it considers that if these measures are not taken, the act of one of the parties will cause irreparable harm to the other party.
[xliii] "Unless otherwise agreed by the parties and at the request of one of them, the arbitral tribunal may, as soon as the file has been handed over to it, order any conservatory or provisional measure that it considers appropriate".
[xliv] PLANTEY (A), *L'arbitrage commercial comme instrument du Droit international*, R.Q.D.I, 1993-1994, p.239
[xlv] Article 6(3) of the rules *op. cit.*
[xlvi] Impartiality is a state of the mind which requires the arbitrator of the co-arbitrators to not be bias towards any of the parties.
[xlvii]*IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014 and Updated, 10 August 2015, p.4*
[xlviii]*African union commission on human and peoples' rights paper on principles and guidelines on the right to a fair trial and legal assistance in Africa, DOC/OS(XXX)247* p.5
[xlix]Whitesell, (A.-M.), "Independence in ICC Arbitration: ICC Court practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators", ICC International Court of Arbitration Bulletin, 2007 Special Supplement, Independence of Arbitrators, ICC Services 2008
[l] The term independence is used to describe a situation where the party to a dispute share no tie with the arbitrator.
[li] Art 14 (1) of the rules *op. cit.*
[lii] JUNG Helena, "The standard of Independence and Impartiality for arbitrators in International Arbitration: A comparative study between the standards of the SCC, the ICC, the LCIA and the AAA", Master's thesis, 2008, p.3
[liii]*Ibid p.4*
[liv] Art 25 (2) of the rules *op. cit.*
[lv] Art 22 (4) *ibid*

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[lvi]NgothoNjung'e (J.), "A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya", p.82

[lvii] Parties seeking an expedited procedure are required to pay fees of up to US$ 2,000,000 if the arbitration agreement under the Rules was entered into on or after 1 March 2017 and before 1 January 2021, or US$ 3,000,000 if the arbitration agreement under the Rules was entered into on or after 1 January 2021 (Article 1 of Appendix VI), while parties seeking emergency arbitration will pay fees of US$ 40,000.

[lviii] This provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court and shall normally not exceed the amount obtained by adding together the ICC administrative expenses, the minimum of the fees based upon the amount of the claim and the expected reimbursable expenses of the arbitral tribunal incurred with respect to the drafting of the Terms of Reference or the holding of the case management conference

[lix] These costs fixed by the Court pursuant to this Article 37(2) is shared in equal shares between the claimant and the respondent.

[lx] Regan, Francis (1999). *The Transformation of Legal Aid: Comparative and Historical Studies. Oxford University Press. pp. 89–90. ISBN 978-0-19-826589-4.*

[lxi] Regan (1999), *The Transformation of Legal Aid*, pp. 90–91

[lxii]Legal representation in arbitration | LexisNexis Blogs

[lxiii] Article 12 *bis* of the rules *op. cit.*

[lxiv]Francioni Francesco, *op. cit.* p. 743.

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