CHICAGOLAWBULLETIN.COM

Serving Chicago's legal community for 157 years

FRIDAY, APRIL 6, 2012

Chicago Daily Law Bulletin

Volume 158, No. 68

# ICC completes far-reaching reform of arbitration rules

Tempora mutantur et nos mutamur in illis
(The times are changing and we with them)

• • • • •

Marguerite Duras, French author and winner of the "Goncourt Prize" for literature, said that, paradoxically, the freedom of Paris is generally associated with the belief that it is a city that never changes. This is not entirely true, as the International Chamber of Commerce (ICC), headquartered in Paris, just completed a far-reaching reform of its arbitration rules, which is actually the third revision (1988, 1998, and 2011) in the last 20 years.

Two main reasons have incited the ICC to revisit its arbitration rules. The first is to update and modernize arbitration given the astonishing increase that arbitration has experienced, both in the number and complexity of disputes subject to it and in the number of new countries that adopted this dispute resolution method and to introduce solutions to problems identified by arbitration practice and endorsed by the courts. The second reason is the need to reduce the time and costs of arbitration proceedings — the stereotypes of arbitration — which have grown considerably as a result of the mentioned problems and the increased use of litigation techniques and strategies by arbitration counsel.

Of course, the ICC is not alone. Similar reasons have also driven the recent modernization and reform of several national arbitration laws around the globe, including: Japan (2003), Italy (2006), Australia (2010), Ireland (2010), France (2011), Portugal (2003 and 2011) and Spain (2003 and 2011).

In addition, the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, covering a broad range of disputes, were revised in 2010. Similarly, the International Bar Association (IBA) modified its Rules on the Practice of Evidence in International Arbitration that same year. The IBA is also in the process of revising its Guidelines on Conflicts of Interest in International Arbitration. 2010 also saw the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), an organization that has facilitated arbitral proceedings in international disputes since 1917, revise its arbitration rules.

In September, the ICC finalized its own updates to its influential arbitration rules — changes put into effect beginning in January. Such significant changes were not made overnight. In October 2008, the ICC Arbitration Commission created a task force to review its arbitration rules, composed of 175 members from 41 countries designated by the ICC National Committees, which concluded its works three years later. The review was one of great depth and breadth — leading to the reaffirmation of the essential elements of ICC arbitration while revising several other elements. Those reaffirmed include: The terms of reference drawn by the arbitration tribunal at the start of the proceedings (Article 23); the system of appointment of arbitrators upon proposal of the ICC National Committees (Article 13, 3) and the scrutiny by the ICC court regarding the form of the awards (Article 33).

With regard to the modernized elements of arbitration, several merit highlighting:

• Allowing the inclusion of "additional parties" in arbitration proceedings (art. 7), a circumstance that is often requested by the parties;

• The overall regulation of multi-party arbitration, which today comprehends about a third of arbitrations, including multi-party arbitration strictu sensu (same arbitration clause signed by various parties) (art. 8) and multi-contract arbitration (several clauses signed by various parties in related operations) (art. 9);

• The consolidation of proceedings into a single arbitration by the court upon request of the parties (Article 10);

• The request that the arbitrator is and remains independent and impartial of the parties (the previous rules only referred to independence given it also embedded impartiality) (Article 11);

• The creation of an "emergency arbitrator" for the adoption of interim measures prior to the constitution of the arbitral tribunal (Article 29);

• The need to convene a case management conference on procedural measures at the start of the arbitration (Article 24);

• The opportunity for the court to order the confidentiality of the arbitration proceedings (Article 22, 3), in response to the Swedish Supreme Court ruling in 2000 that confidentiality was not of the essence of arbitration; and

• Recognizing that notification, communications and hearings may be made electronically (Article 3, 2).

**By Ramón Mullerat**

*Ramón Mullerat is a commercial arbitration attorney with Iuris, Valls, Abogados in Barcelona, Spain He is an honorary member of the Law Society and the Bar of England and Wales; former president of the Council of the Bars and Law Societies of the European Union (CCBE) and former co-chair of the Human Rights Institute (HRI) of the International Bar Association (IBA). He serves as an adjunct professor of The John Marshall Law School; as president of the European International Senior Lawyers Project (E-ISLP); and as president of the Association for the Promotion of Arbitration (AFA). He can be reached at ramon.mullert@iurisvalls.com.*

> ***"Today, the reformed arbitration rules order the arbitrators and the parties to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.' "***

Regarding the goal of reducing time and cost, the ICC Arbitration Commission already issued a report in 2007 for this purpose — "Techniques for Controlling Time and Cost in Arbitration" — one in which I had the honor of participating. Today, the reformed arbitration rules order the arbitrators and the parties to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute" (Article 22). Also the process of appointment of arbitrators, one of the most time-consuming, has been eased, extending the powers of the court and the president (article 13).

As advanced, the revised rules require that a preliminary conference occur to discuss the conduct of the arbitration, a useful approach that some arbitral institutions already practice successfully. Another notable modification targeted at reducing time and cost requires the candidate arbitrator, in addition to his or her statement of independence, to declare his availability to act diligently (Article 11). In addition, the rules include a new Appendix IV ("Case Management Techniques") where a few examples of practices to reduce time and cost are recommended.

The new arbitration rules entered into effect on Jan. 1 apply to all arbitration procedures initiated after that date, unless the parties agree otherwise. The new rules will bring considerable changes to ICC arbitration — targeting increased efficiency and reduced costs of the proceedings. In short, it's a good and expected reform and very well received by the international arbitration community. It now falls to the men and women in arbitration to make the best use of these changes.