

VIENNA: ICC roadshow pulls into town

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The ICC Court came to Vienna on 3 and 4 October to market its revised arbitration rules. **Jarred Pinkston**, of counsel at Dorda Brugger Jordis in Vienna, reports.

With the release of the long-awaited new ICC Rules on 12 September in Paris, the ICC officially began its promotional tour to inform the arbitration community about the revisions, which take effect on 1 January.

Michael Bühler, partner at Jones Day in Paris and co-chairman of the 180-strong ICC task force on the revision of the rules, began with the often critical first step of any arbitration: constituting the tribunal or appointing the sole arbitrator. The key provisions of the new rules are articles 11 (General Provisions), 12 (Constitution of the Arbitral Tribunal) and 13 (Appointment and Confirmation of Arbitrators). One of the more substantial changes is the encroachment into the national committees' spheres of responsibility. One of the strengths of ICC arbitration is the active participation of national committees, upon which the ICC can call – inter alia - to propose suitable, qualified arbitrators. In practice, the ICC has learned that all national committees are not equally reliable in making sound or prompt proposals. Therefore, the ICC has implemented a system whereby it can circumvent national committees in the event of untimely or unacceptable proposals (article 13.3); where “one or more parties is a state or claims to be a state entity” (article 13.4(a)); or if “the President certifies to the Court that circumstances exist which, in the President’s opinion, make a direct appointment necessary and appropriate” (article 13.4(c)).



Jarred Pinkston

Another issue of concern is the increasing propensity to raise challenges against arbitrators. The ICC receives 30 to 40 challenges per year. Article 14 addresses arbitrator challenges, which are ultimately decided by the ICC Court. After consideration of the issue, the ICC concluded that it would be best not to give a reason for any rendered decision regarding a challenge to an arbitrator because it would ultimately benefit the parties by limiting the avenues for a troublesome arbitral participant to create mischief in the courts. Bühler said that “parties are trusting the ICC Court to not make an arbitrary decision.” On a more cosmetic level, the new ICC Rules have removed the term “Chairman” and replaced it with the gender-neutral term “President”.

Peter Wolrich, the chairman of the ICC Commission on Arbitration and a partner at

Curtis Mallet-Prevost Colt & Mosle LLP in Paris, introduced the audience to changes in the arbitral proceedings. Under the current rules, the ICC Court will make a prima facie determination of whether a binding arbitration agreement may exist when a respondent fails to respond to the notice of arbitration or “if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement” (current article 6.2). This provision proved cumbersome in practice. The ICC considered completely extricating itself from the preliminary screening business and passing these issues directly to the arbitrators. It decided, however, to maintain a limited preliminary screening role because it helps to prevent frivolous claims. The new scheme (articles 6.3 and 6.4) embodies a compromise in that the ICC Court will no longer review every challenge but only those that the secretary general decides warrant the court’s attention.

New articles 22 to 24 are a response to a general need for more efficient arbitral proceedings and a push by users to transform certain guidelines into firm rules that have “teeth”. Sticking with traditional ICC practice, the new rules use a light brush with regard to the nitty-gritty details of arbitral procedure and consequently lack provisions, for example, on briefs, witness examination or document production. The rules still allow the parties and tribunal to steer their proceedings but now seek to compel the parties to use the flexibility inherent in the rules. The ICC had observed that with the continued growth of arbitration, fewer parties were taking the opportunity to tailor their proceedings. So “the process of tailor-making has become a formal part of the rules.” The clearest change is the new article 24, which directs the tribunal to convene a case management conference. Although this change is novel for the ICC, it is not without precedent as other arbitral rules have similar provisions: for example, Danish Arbitration Rule 30.2. Wolrich added that “speed and cheapness are not ends in themselves”, so one size does not fit all and the fact remains that some cases simply require a greater investment of time and effort.

The meatiest changes to the ICC rules can be found in the new provisions regarding multiparty or multi-contract arbitration – new articles 7 (joinder of additional Parties), 8 (claims between multiple parties), 9 (multiple contracts) and 10 (consolidation of arbitrations). **Francesca Mazza**, counsel at the ICC Court and secretary to the ICC commission on arbitration, outlined some key points. New articles 7 to 10 do not address jurisdiction, which is still to be decided by the ICC Court under new article 6.4 or by the tribunal. The changes can be best viewed as administrative in nature. Ultimately there are two issues in play: identification of the parties to an arbitration agreement; and the relationship between multiple arbitration agreements. Mazza noted that the ICC Court will not deny a joint request to consolidate: if the parties are happy to consolidate that is good enough for the court.

Beatrix Karl, the Austrian minister of justice, addressed Austrian arbitration in the context of the world economy. International trade, which goes hand-in-hand with effective cross-border dispute resolution, has been the key to Austria’s successful post-war economy, she said. The country has taken an active role in promoting the rule of law and trade in the EU and the CEE region and has benefited from UNCITRAL having a base in Vienna.

Effective dispute resolution does not remain static and must change with the times, she argued. Austria implemented its first arbitration act in 1895 and most recently amended it

in 2006. Nonetheless Austria is considering revising its arbitral regime again to stay ahead of the curve in its quest to be a leading arbitral destination. One of the biggest changes under discussion is to allow only one instance of review of arbitral awards. Currently, a challenge to an award can have up to three levels of court review. Under the current proposal (likely to be soon implemented) challenges to arbitral awards will be made directly to the Austrian Supreme Court. This naturally has the potential to promote efficiency and reduce costs.

The minister also praised the Vienna International Arbitration Centre, which has a proven track record in East-West disputes and saw 68 new cases filed in 2010.

John Beechey, who as chairman has navigated the ICC Court through an ever more globalised economy with increasingly aggressive competitors, ended the first day with a number of observations. The ICC made a conscious effort to avoid “kicking the can down the road” and attempted to address the pressing concerns of the arbitration community in the revised ICC Rules, he said. Although arbitration is not broken there is no room for complacency because arbitration is “big business”. The ICC saw 817 new requests for arbitration in 2009 and 793 in 2010, with an aggregate of US\$90 billion in dispute. These are just the numbers for the ICC; there are no reliable numbers regarding the total number of arbitrations worldwide. The ICC currently has a staff of 91, comprised of 35 different nationalities. A recent report from the French government concluded that the ICC brought US\$200 million to US\$300 million into the local French economy. “Arbitration is not just big business but it is effective business because most awards are honoured,” said Beechey.

One of the more dramatic changes in the ICC Rules will be the implementation of a procedure for the parties to call upon an emergency arbitrator at the outset of the proceedings before a tribunal has been appointed. **Christopher Boog**, partner elect at Schellenberg Wittmer in Zurich, introduced the nuts and bolts of the new emergency arbitrator procedure, while **Volker Mahnken** (head of project litigation at Siemens AG in Erlangen) provided a user’s perspective. New ICC article 29 is the emergency arbitrator provision and some of the key elements are as follows:

- the emergency decision will be in the form of an order;
- the order will not bind the subsequently constituted tribunal;
- the tribunal can rule on the costs of the emergency arbitrator proceeding;
- the emergency arbitrator provisions will not apply to ICC arbitration agreements entered into prior to the new rules coming into force in January 2012 (as such a significant change requires the parties to have taken it into consideration at the time of drawing up the contract);
- the one-time fee for the emergency arbitrator is \$40,000 (\$30,000 for the emergency arbitrator and \$10,000 for the ICC);
- the emergency arbitrator proceedings will end if the applying party does not file the request for arbitration within 10 days.

The emergency arbitrator can basically grant take any measure that an arbitral tribunal could. Boog added that there is “no reason to treat a decision of an emergency arbitrator differently from that of a regular arbitrator”. However, it remains an interesting question as what extent such orders are enforceable before the courts. The orders should be enforceable like interim measures under new ICC article 28(1), as is already the case under article 17 of the UNCITRAL Model Law, section 593 of the Austrian Code of Civil Procedure and section 1041 of the German Code of Civil Procedure. Mahnken noted that the ICC pre-arbitral rules are potentially broader than the new emergency arbitrator provision. However, “we have included the pre-arbitral referee rules in our contracts since their inception but have never had to use them; we will probably drop them in the future.” Peter Wolrich added from the audience that the emergency arbitrator provision was drafted with the FIDIC rules in mind, as the ICC worked closely with FIDIC during the drafting process.