

The International Court of Arbitration®

By Josefa Sicard-Mirabal

Introduction

Created in 1923, the International Court of Arbitration® (“Court”) of the International Chamber of Commerce (“ICC”) is currently the world’s leading institution for resolving international commercial and business disputes, pioneering international commercial arbitration, as it is known today. The Court is not a “court” in the traditional sense, but rather it administers the arbitration process under the ICC Rules of Arbitration (the “ICC Rules”). The Court has administered more than 16,000 cases in its 86-year history. In 2008 alone, 663 cases were filed, involving 1,758 parties from 120 countries, and an additional 1,300 cases were ongoing. The Court is assisted by a Secretariat, headed by the Secretary General, headquartered in Paris and staffed full-time by over 70 persons, including more than 30 lawyers covering 20 nationalities and 15 different languages. Each case is monitored by one of eight case teams, one of which is located in Hong Kong, headed by a Counsel using computerized case management and information retrieval systems that function in four different languages. In addition to case management, the Secretariat provides educational and documentary support services to promote and facilitate the use of arbitration. Through ICC Dispute Resolution Services, the ICC also administers other forms of dispute resolution, including ADR, Expertise proceedings including DOCDEX (documentary instruments dispute resolution expertise), and Dispute Boards.

In addition, as part of its global outreach, the ICC Court has five Regional Directors who represent the Court and serve as liaisons to users of ICC dispute resolution services around the globe, and it recently opened a state-of-the-art hearing center in the heart of Paris serving all users worldwide of ICC and non-ICC dispute resolution services.

Why Arbitration?

In today’s borderless business world, disputes pose unique difficulties and challenges that the ICC is particularly well-poised to navigate. Often parties to a business dispute will have different national, cultural, legal and linguistic backgrounds. Additionally, the parties may have very different notions about how to resolve a dispute reasonably and fairly. Finally, the physical distance between the parties and one party’s perceived “home court advantage” often make resorting to national courts undesirable. In response to this need for a neutral forum for business dispute

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resolution, the ICC has led the way in providing parties with alternatives to court litigation, for international and domestic disputes. Furthermore, the ICC offers arbitration services that are confidential, usually less costly, less time-consuming, more flexible and more adaptable to the needs of the parties than court litigation.

Functions of the International Court of Arbitration®

With the help of its Secretariat, the Court performs the following functions:

Monitor the Arbitral Process – The ICC Court monitors the entire arbitral process, from the initial Request to the final Award to check whether case timetables are being followed and to ensure that the proceedings are being conducted in conformity with the ICC Rules. The Counsel at the Secretariat follow the case closely and receive copies of all written communications and pleadings exchanged in the arbitration proceedings. One of the ICC’s tools for monitoring the arbitral process is the Terms of Reference, a key feature of ICC arbitration. The Terms of Reference serve the useful purpose of bringing the arbitrators and parties together at an early stage, to identify the issues they will be required to deal with and the procedural details that need to be addressed. In fact, a significant proportion of ICC arbitration cases are amicably settled at the stage of the Terms of Reference, the discussions leading to their drafting and adoption bringing parties together.

Appoint and Confirm Arbitrators – Under the ICC Rules, the arbitral tribunal is composed of one or three arbitrators. The parties are free to select the arbitrator or arbitrators of their choice or to select the procedure for selection of their arbitrator or arbitrators. If the parties cannot agree on whether to have one or three arbitrators, the Court appoints a sole arbitrator, except where that the dispute would be better served by the appointment of three arbitrators. The Court confirms arbitrators nominated by the parties, appoints arbitrators on behalf of defaulting parties and appoints sole arbitrators or third arbitrators in a three-member tribunal. The ICC is unique in its appointment process in that it consults with national committees in 92 different countries to aid in identifying potential arbitrators with appropriate qualifications all over the world. Furthermore, the ICC does not require that arbitrators be selected from pre-established lists, thus ensuring the greatest possible freedom of choice and flexibility in the constitution of the Arbitral Tribunal.

Make *Prima Facie* Determinations of Arbitrability – If a party disputes the validity of the arbitration agreement or whether the arbitration should proceed under the ICC Rules, under such circumstances, the Court may be prompted to decide

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whether it is *prima facie* satisfied that an agreement to arbitrate under the ICC Rules may exist between the parties.

Fix Arbitrator Remuneration – The ICC Rules are unique in its method of fixing arbitration costs. Under ICC Rules, the administrative costs and arbitrator fees are fixed by the Court at the end of the arbitration based on a published scale related to the amount in dispute, rather than according to an hourly or daily rate. The Court also considers the diligence and efficiency of the arbitrators, the time spent, the rapidity of the proceedings and the complexity of the dispute. This system encourages the efficient handling of cases within a financial framework that is proportionate to the amount at stake in the arbitration, discourages the submission of frivolous claims and counterclaims and helps the parties to plan, generally, for the cost of the arbitration. A handy arbitration cost calculator appears on the ICC website, available at <http://www.iccwbo.org/court/arbitration/id4097/index.html>.

Scrutinize Arbitral Awards – In ICC arbitration, scrutiny is a key element ensuring that arbitral awards are of the highest possible standard and thus less susceptible to challenges in the national courts. Under Article 27 of the ICC Rules, the Court must approve all draft awards as to their form and that the Court may also, without affecting the arbitrators' liberty of decision, draw their attention to points of substance. This unique quality-control mechanism provides the parties with an additional layer of protection, since arbitral awards are not subject to appeal, and thus enhances the reliability of ICC arbitration.

ICC Dispute Resolution Services

In addition to administering arbitrations, the ICC provides six other dispute resolution services: ADR, Expertise, DOCDEX and Dispute Boards, pre-arbitral referee procedure and appointing authority.

ADR

The ICC ADR Rules offer a framework for settling business disputes and differences amicably with the help of a third party, known as a Neutral. The ICC ADR Rules allow the parties to choose from several settlement techniques: mediation, where the Neutral acts as facilitator to help the parties come to an amicable settlement by negotiation; neutral evaluation, where the Neutral gives an opinion on one or more matters; a mini-trial, where a panel comprising the Neutral and an executive of each party to the ICC ADR proceedings, if such parties are companies, gives an opinion or

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seeks a solution acceptable to all concerned; or another technique or combination of various techniques. The parties may jointly designate the Neutral or may agree upon the qualifications or attributes of the arbitrator to be appointed by the ICC.

Expertise

Experts with specialized knowledge in technical, legal, financial or other areas may be useful in a variety of situations: to serve as witnesses, to help solve differences, or simply in the ordinary course of business. The ICC International Centre for Expertise, established in 1976, may be called upon for any or all of the following services: the proposal of an expert, the appointment of an expert, and the administration of expertise proceedings. When administering proceedings, the Centre appoints or confirms experts, initiates and supervises various aspects of the procedure, and reviews and issues the expert's report.

DOCDEX

The International Centre for Expertise also administers the ICC Rules for Documentary Instruments Dispute Resolution Expertise (DOCDEX), drawn up by the ICC Banking Commission to facilitate the rapid settlement of disputes under the ICC Uniform Customs and Practice for Documentary Credits, the ICC Uniform Rules for Bank-to-Bank Reimbursement under Documentary Credits, the ICC Uniform Rules for Collections and the ICC Uniform Rules for Demand Guarantees. Cases are decided by a panel of three experts, whose decision is scrutinized by the technical adviser of the Banking Commission or his substitute to check that it complies with the applicable ICC Rules and their interpretation by the Banking Commission. The DOCDEX decision is issued by the International Centre for Expertise and is not binding unless the parties have agreed otherwise.

Dispute Boards

Dispute Boards are standing bodies, comprising one or three members, normally set up at the outset of a contract to help the parties resolve any disagreements and disputes that may subsequently arise during its performance. The Dispute Board fulfils this role by offering the parties informal assistance, if they so desire, and by making Recommendations or Decisions regarding disputes referred to it by any of the parties. For this purpose, the Dispute Board is kept fully informed of the performance of the contract by such means as progress reports, meetings and, if relevant, site visits. ICC has established a set of documents providing a comprehensive and flexible framework for establishing and operating Dispute Boards

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in a wide range of contracts in different industries. These documents include the ICC Dispute Board Rules, which govern Dispute Board proceedings, and a Model Dispute Board Member Agreement, covering such matters as the Dispute Board member's undertaking and remuneration and the duration of the Dispute Board Member Agreement. The three types of Dispute Boards are the Dispute Review Board, which issues Recommendations; the Dispute Adjudication Board, which issues Decisions; and the Combined Dispute Board, which normally issues Recommendations but may issue Decisions at a party's request.

Finally, the ICC also administers the **Pre-Arbitral Referee Procedure** for parties who require urgent provisional measures in relation to a dispute and serves as an **Appointing Authority** to help constitute a tribunal or rule on challenges in an *ad hoc* arbitration at the request of the parties.

For more information about ICC Arbitration and other ICC Dispute Resolution services, please contact the office of **ICC North America** at 212-703-5044 or lea.felluss@iccwbo.org.

About the Author: Josefa Sicard-Mirabal graduated in law from the Universidad Catolica Madre y Maestra in the Dominican Republic and continued her studies in the US at Fordham University School of Law. She began her legal career as judge and subsequently chief justice in the Dominican Republic. Since 1989 she has been a practicing attorney with major law firms in the US, specializing in international arbitration and litigation, and international business transactions including mergers and acquisitions and capital market transactions. Ms Sicard-Mirabal is admitted to practise in both the Dominican Republic and the State of New York and speaks English, French and Spanish.

As Director of ICC Arbitration and ADR in North America, Ms Sicard-Mirabal represents and promotes ICC dispute resolution services in the US and Canada. She is assisted by Suzanne Ulicny and Victoria Shannon, the Court's Deputy Directors, Arbitration and ADR, North America.

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