Towards greater efficiency and transparency in international arbitration

Created: Thursday, 29 September 2016 15:52

Print

International arbitration continues to be by far the preferred dispute resolution mechanism for cross-border disputes according to the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (the "Survey"). The Survey also concludes that institutional arbitration is preferred over ad-hoc arbitration, with ICC being the overwhelming favorite arbitration institution among the respondents of the survey. These results can be seen as a very positive development both for the arbitration community and the ICC in particular.

However, the Survey also identifies areas of concern and potential improvement such as costs, lack of insight into arbitrators' and institutions' efficiency and lack of transparency with respect to appointment of arbitrators. In addition to these concerns raised by the users, the public perception of international arbitration has been affected by a series of recent developments. Indeed, events such as the European Commission's opposition to investor-state arbitration in the context of the negotiations of the Transatlantic Trade and Investment Partnership, irrespective of its merits, diminish the legitimacy of international arbitration as a legal institution in the public eye. As public perception is often driven by the amount of publicly available information or lack thereof, the need for greater transparency in international arbitration becomes critical.

Against this backdrop, the ICC International Court of Arbitration (the "ICC Court") has taken in the past year a number of important measures that are aimed at injecting greater efficiency and transparency to its procedures. It is important to note that these recent measures are a continuation of the efforts that the ICC has been making over the past decade to tackle some of these concerns. In that respect, since 2006 the ICC has published a number of guidelines related to time, costs and effective case management, and revised its arbitration rules in 2012 focusing heavily on tackling efficiency and transparency of institutional practices.

These new policies and practices can be divided into six categories: (1) increased efficiency and transparency with respect to rendering of awards, (2) increased transparency regarding constitution of arbitral tribunals, (3) increased transparency and guidance with respect to disclosure of conflicts of interest, (4) increased transparency with respect to the reasons behind the decisions of the ICC Court, (5) increased transparency and guidance regarding ICC Court's practices with respect to costs of the arbitration, and (6) new rules. These policies and practices are now included in the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (the "Note").[1] Each of them will be addressed in turn.

Awards

One of the aspects of the arbitration procedure where users have expressed a significant concern is delay by arbitrators in delivering an award.

The responsibility for the conduct of the arbitration is shared between the institution, the arbitral tribunal and the parties and their representatives. The procedural time table is prepared in consultation and very often in agreement with of all the parties. Thus, to a certain extent, parties have some degree of control over the length of the arbitration as of the constitution of the arbitral tribunal until the last hearing or written submission. Thereafter, the proceedings are mainly in the hands of the arbitrators – who are in charge of drafting the awards – and, in ICC arbitrations, in the hands also of the ICC Court – which is in charge of the scrutiny and approval of such awards. Delay and lack of information during this phase often generates frustration on the side of the parties.

In ICC arbitration, unlike other institutional arbitration systems, the institution is in charge of fixing the fees of the arbitrators and it does so by applying an *ad valorem* scale. The ICC Rules of Arbitration (the "Rules") provide that, when fixing the fees

of the arbitrators, the ICC Court takes into account various factors including "the timeliness of the submission of the draft award."

In order to provide greater transparency and encourage greater efficiency during this phase, the ICC Court has decided to take five measures:

(1) The first measure consisted in publishing what used to be, as a matter of practice, the period of time expected by the ICC Court for submitting a draft award for scrutiny and approval. In the case of a three-member arbitral tribunal such period of time is three months as of the hearing or the last substantive written submission (excluding submissions on costs), and in the case of a sole arbitrator the period is two months.

(2) The second measure was to highlight to the parties and arbitral tribunals that, according to the Rules, delay during this phase could result in a decrease of the arbitrators' fees, while efficiency could be rewarded by fixing fees at a higher level within the applicable scale. At the same time, the ICC Court decided to pre-establish and publish a set of reductions to arbitrators' fees which will be applicable in case of unjustified delays. The reductions can go from 5% to over 20% depending on the amount of delay. The ICC Court exercises extreme care in examining the circumstances that can lead to a reduction of fees.

(3) The third measure was to keep the parties apprised of the different stages of the scrutiny process. According to the new policy of the ICC Court, parties are now systematically informed when a draft award for scrutiny and approval has been received by the ICC Court Secretariat (the "Secretariat) and when such award was submitted by the Secretariat to the ICC Court. The parties are equally informed as to whether the award has been approved or whether it has to be resubmitted to the ICC Court at a later date.

(4) The fourth measure consisted in publishing what used to be, as a matter of practice, the period desired by the ICC Court for duration of the scrutiny, which is between three and four weeks. Draft awards are normally submitted for scrutiny and approval to weekly committee sessions of the ICC Court. The duration of the scrutiny process may increase by one or two weeks if the draft award needs to be submitted to one of the monthly plenary sessions of the ICC Court. Draft awards containing a dissenting opinion or involving States or State entities are normally submitted to such plenary sessions.

(5) Finally, the ICC Court decided to apply to itself the same degree of accountability that it applies to arbitrators when fixing their fees. According to the new policy, the ICC Court may also apply reductions to the administrative expenses in case of unjustified delay by the ICC Court or the Secretariat during the scrutiny process.

Constitution of Arbitral tribunals

Another ground breaking policy that the ICC Court has adopted is the publication on its website[2] of information related to the composition of the arbitral tribunals in all ICC arbitrations, including the identity and nationality of the arbitrators, the role they play within the arbitral tribunal, the method of their appointment, and their status and that of the case. The measure is being applied to arbitrations registered on or after 1st January 2016 where terms of reference have been established. The benefits of this new policy are numerous and include the following:

(1) A widespread perception which has led to concerns by the public at large is that international arbitration is limited to a small and closed circle of players whose identity is often unknown as they operate behind closed doors. The public in general will now be able to verify by themselves that such is not the case when it comes to ICC arbitration. In fact, ICC statistics show that only in 2015 the ICC Court appointed or confirmed 1313 arbitrators from 77 countries, which represent over 907 different individuals;[3]

(2) Availability of arbitrators is another concern of users of international arbitration. Being able to identify the number of ICC arbitrations in which a particular arbitrator is sitting will allow the parties to have immediate information on the availability of arbitrators. While this information is very limited (as for instance, information about relevant characteristics of the case or the stage of the proceedings would not be available) and would require the parties to make further enquiries, it may constitute a useful starting point;

(3) Another concern that arbitration users sometimes have is that lack of publicly available information regarding the individuals sitting in international arbitration cases may raise issues of asymmetry of information between parties and their representatives. While law firms or companies appearing often in international arbitration cases have access to information by way of their participation in these cases, those who do not have such experience would lack information sources. The information provided by the ICC levels the playing field, at least with respect to basic information;

(4) The website allows parties to perform different searches that may be useful for them in the process of constitution of the arbitral tribunal. For instance, parties may be interested in searching the number of cases where a concrete individual appears, or individuals of a certain nationality, or the number of individuals having experience in a particular role within an arbitral tribunal. The website also allows parties to identify individuals who are sitting with other individuals in different cases;

(5) The publication of the identity of arbitrators will also foster diversity. It may allow parties to come across and consider for appointment individuals who would otherwise have been unknown to them;

(6) Finally, by publishing the method of appointment of arbitrators, the ICC Court submits itself to public scrutiny and accountability with respect to the individuals that it appoints. It is worth noting that, pursuant to the Rules, the ICC Court may appoint arbitrators directly or upon proposal of one of the ninety two ICC National Committees or Groups spread around the globe. In that respect, the ICC Court has recently made publicly available a Note to National Committees and Groups of the ICC on Proposals of Arbitrators indicating in detail how ICC National Committees and Groups should exercise their right to propose arbitrators for appointment by the ICC Court, highlighting ethical rules that should be observed, the level of quality which is expected from their proposals and an open policy to foster different types of diversity.

Disclosure of conflicts of interest

Another move towards greater transparency in the ICC arbitration system has been the publication in the Note of guidance with respect to disclosure of conflicts of interest by arbitrators. The Rules, as many other rules and arbitration laws, only provide for a general standard of disclosure without providing for specific examples of situations that ought to be disclosed. With respect to independence, the Rules provide that arbitrators shall disclose “any facts or circumstances that might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties.” With respect to impartiality, arbitrators are required to disclose “any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality.”

Limited guidance as to how to apply such standards are to be applied could only be found until recently in the Statement of Acceptance, Availability, Independence and Impartiality (the “statement of acceptance”) that arbitrators are required to complete when they accept their mandate. In that respect the statement of acceptance indicates that, when deciding whether to make a disclosure arbitrators should take into account “whether there is any past or present relationship, direct or indirect, whether financial, professional or of any other kind between [the arbitrator] and any of the parties, their lawyers or other representatives, or related entities and individuals.”

Traditionally, arbitrators have sought guidance in the IBA Guidelines on Conflict of Interest in International Arbitration (the "IBA Guidelines"). Indeed, the IBA Guidelines are broadly accepted and used worldwide as demonstrated in the recently released 2016 IBA Report on the Reception of the IBA Arbitration Soft Law Products.[4] However, as valuable as they are, the IBA Guidelines are not meant to be binding on arbitrators or arbitration institutions and they do not and cannot cover every single situation that may arise in the context of a case.[5]

It was therefore necessary, in light of the increasing number of arbitration cases and players and increased scrutiny by state courts and the public at large, to provide greater guidance to arbitrators as to what is normally expected to be disclosed.

The guidance now contained in the Note is not intended to have the same scope or role as the IBA Guidelines. Arbitrators in ICC arbitrations can in fact continue seeking guidance in the IBA Guidelines. Unlike the IBA Guidelines, the guidance contained in the Note does not specify specific situations that should or should not be disclosed. The Note instead provides simply a number of potential areas of conflict, described in a broad manner, that the arbitrator should consider when deciding whether to make a disclosure. Those areas of conflict were drawn from the Court's vast experience in dealing with conflict of interest issues and they include: (i) whether the arbitrator and his or her law firm presently or in the past represent or have acted against the parties or their affiliates, (ii) past or present relationships between the arbitrator or his or her law firm and the parties or their affiliates, (iii), whether the arbitrator or his or her law firm has an interest in the outcome of the case, or have been previously have had any involvement in the case, (iv) past or present relationships between the arbitrator or his or her law firm and counsel to the parties, (v) involvement of the arbitrator in cases involving parties or their affiliates or which otherwise are related, (vi) previous appointments by the parties, their affiliates or their counsel, (vii) relationships between arbitrators in the same arbitral tribunals, and (viii) relationships between the arbitrator and his or her law firm with related entity having a direct economic interest in the dispute.

Finally, the Note highlights three general principles applicable the context of disclosure of conflict of interests. Firstly, the Note reiterates the principle already contained the statement of acceptance and the IBA Guidelines that an arbitrator should opt for disclosure in case of doubt. Secondly, the Note clarifies that a disclosure does not imply a conflict. And thirdly, the Note clarifies that, while failure to disclose is not in and of itself a ground for disqualification, the ICC Court will consider such failure when assessing whether a challenge or an objection to the confirmation of an arbitrator is well founded.

Communication of reasons behind decisions of the ICC Court

Another major step towards greater transparency *vis a vis* the users of ICC arbitration relates to the communication of reasons for certain decisions taken by the ICC Court pursuant to its Rules.

The Rules contain a prohibition for the Court to communicate to the parties the reasons behind its decision related to appointment, confirmation, replacement and challenges of arbitrators. The reasons for such a prohibition include, among others, considerations of cost-efficiency, constraints related to the manner in which the ICC Court operates and reaches its decisions and, for a long period of time, a concern by the majority of ICC arbitration users that reasoned decisions could be challenged before state courts.

The overall increase in the number of arbitrations and players, the increase in the number of commercial and investment arbitration involving states and state entities and increased overall public scrutiny, has brought as a consequence a demand for increased transparency in all aspects of arbitration proceedings, whether commercial or investor-state. This has led the ICC Court to modify its policy regarding the provision of reasons for its decisions and it has done so in four stages:

(1) A first stage was the publication of a report of the task force of the ICC Commission on Arbitration and ADR (the "Commission"), which addressed the needs and characteristics of arbitration involving states and state entities. The recommendation of the task force contained in the report was for the Court, if all parties agreed to waive the prohibition contained in the Rules, to communicate reasons for decisions concerning challenges against arbitrators in the context of investor-state arbitration.

(2) A second stage was the implementation of such recommendation. In implementing the recommendation, the ICC Court decided to go beyond the recommendation and communicated reasons, upon agreement of all parties, for decisions on challenges in two commercial arbitrations involving state entities.

(3) The third stage has been to expand further the policy to all cases and to other decisions such as replacement of arbitrators, *prima facie* jurisdiction and consolidation of arbitrations. The details of the policy have been published in the Note and include the requirement for all parties to have agreed to the communication of reasons in advance on the decision of the ICC Court.

Challenge decisions are decided by the ICC Court in one of its monthly plenary sessions. At such sessions a court member prepares a report and issues a recommendation. The floor is then opened for debate and the court members try to reach a consensus on the outcome. When a request is made for the communication of reasons, court members are required to reach a consensus not only on the outcome but also on the reasons. A letter recording such consensus is then is drafted by a three member committee of the Court and is communicated to the parties. To date, the ICC Court has communicated reasons with respect to decisions on challenges in two different cases. There have been no requests for the communication of reasons in other types of decisions.

(4) The fourth stage has been the submission to the ICC Commission of a proposal to the ICC Court for the modification of Article 11(4) of the Rules which contains the prohibition. Once such proposal is accepted and published, the ICC Court will further develop its practice in a future revision of the Note.

ICC Court's practices with respect to costs of the arbitration

As noted above, costs are one of the main concerns of arbitration users. According to a recent study, arbitrators' fees and the ICC's administrative expenses amount to 18% of the total costs of the arbitration.[6] The ICC's *ad valorem* costs system, unlike systems where such costs are charged on an hourly rate basis, provides users with transparency and predictability. The ICC's ad valorem scale provides for a minimum fee and a maximum fee for arbitrators on the basis of the amount in dispute. An online costs calculator[7] allows parties to have a very concrete idea, even before a dispute has arisen, of the total amount of arbitrators' fees and administrative expenses that they will incur in a given arbitration.

Nevertheless, having the total amount of costs is often not enough for parties as they may reach a settlement and withdraw their case at any moment. As a matter of fact, a very significant 57,7% of the cases registered by the ICC Court are withdrawn before the rendering of a final award.

It was therefore necessary for the ICC Court to develop practices for the payment of arbitrators' fees and administrative expenses in different stages of the proceedings. Such practices have now been published in the Note.

The Note first clarifies that advances to cover these costs will normally be fixed at the average fee pursuant to the scales and that it can be readjusted on the basis of a lower or higher amount. The Note also clarifies that the advance on costs may not necessarily be used in its entirety when fixing the costs at the end of the arbitration.

The Note then includes a general estimate of percentages of fees that will be paid to arbitrators when they request an advance on fees or when the case is terminated before reaching the final award stage. For instance, for guidance only, the Note indicates that arbitrators may be paid 50% of the minimum fee upon establishment of the terms of reference, the minimum fee upon issuance of a partial award or conclusion of a major hearing and between 50% of the average and the average fee for multiple awards or stages, and the average upon rendering the final award. With respect to the ICC, 25% of the administrative expenses may be charged once the file has been transmitted to the arbitral tribunal, 50% upon the establishment of terms of reference, 75% for major procedural milestones completed and 100% upon scrutiny of the final award.

Conclusion

As service providers, arbitration institutions need to adapt its rules and practices to the ever demanding needs of private and public users. But arbitration institutions also have a role to play in maintaining the legitimacy of international arbitration as a legal institution which is more than ever under public scrutiny.

The ICC Court has led the dispute resolution services field worldwide for almost a century. It has been capable of innovating and adapting its rules, practices and procedures to the needs of its users while maintaining the utmost quality of the services it provides. This new set of policies and practices is yet another example of the ICC Court's leadership in the field. At the same time, it is a contribution to making arbitration a more transparent and efficient and, thus more legitimate, dispute resolution mechanism.

José Ricardo Feris, Deputy Secretary General, ICC International Court of Arbitration

---

[1] The Note and other ICC case management documents can be accessed at: http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Practice-notes,-forms,-checklists/

[2] http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/ICC-Arbitral-Tribunals/

[3] For the full 2015 statistical report *see 2015 ICC Dispute Resolution Statistics, reference page 9*, ICC Dispute Resolution Bulletin 2016 No. 1, 2016

[4] The report can be accessed at: http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx

[5] A recent study shows that only around 60% of the situations analyzed by the ICC Court in the context of challenges and confirmation of arbitrators were covered by the IBA Guidelines. *See Appendix: References to the IBA Guidelines on Conflicts of Interest in International Arbitration when Deciding on Arbitrator Independence in ICC Cases*, Simon Greenberg, José Ricardo Feris, ICC International Court of Arbitration Bulletin Vol. 20 No. 2, reference page 33, 2009

[6] *See Techniques for Controlling Time and Costs in Arbitration (Second Edition)*, 2012 and *Commission Report: Decision on Costs in International Arbitration*, ICC Dispute Resolution Bulletin 2015, Issue 2, reference page 13, 2015

[7] http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/