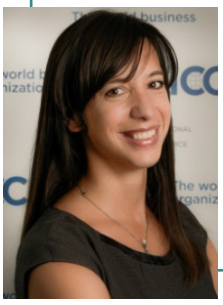
INTERNATIONAL CHAMBER OF COMMERCE: A CENTURY OF BUSINESS



Živa Filipič
Managing Counsel of the ICC Court

Maria Hauser-Morel
PhD, Case management team focusing on the CEE and CIS region, Counsel in charge

With the help of ***Veronika Pavlovskaya***

ICC Court is a part of the International Chamber of Commerce or ICC, the world business organization. ICC promotes international trade and investment through resolution of commercial disputes, policy advocacy, development of rules and guidelines, training courses and other practical tools. This year marks the 100th anniversary of ICC and this article takes advantage of this occasion to describe the history of the ICC Court and highlights the recent developments in its rules and practices.

ICC at a glance

This year International Chamber of Commerce (ICC) celebrates its 100-year anniversary[1]. Although established in Paris, ICC was created in 1919 in Atlantic City, New Jersey[2] after the First World War in order to set the rules for peaceful development of business, trade and commercial relations between the companies. The founders of the ICC were a handful of businessmen from Belgium, France, Italy, the UK and the USA who called themselves "the merchants of peace", an idea that still very much felt and lived by ICC today.

Throughout its history, ICC has pioneered the development of international business: from the first rules for the Uniform Customs and Practice for documentary Credits (UCP) in 1933, to the first edition of the Incoterms

[1] *Full list of the ICC@100 celebrations in different countries: https://100.iccwbo.org/.*
[2] *B. Reinalda, Routledge History of International Organizations: From 1815 to the Present Day, p. 145.*

rules featuring six trade terms in 1936, representing business at the Bretton Woods Conference in 1944 or still the issuing of the first anti-corruption rules in 1977.

The ICC Court was created in 1923 in order to provide an effective dispute resolution mechanism for companies located in different countries. The number of the pending cases dealt with by the ICC Court has been constantly growing and tripled from 580 cases pending at the end of 1982 to 1,578 cases pending at the end of 2017[3]. To date, the ICC Court has registered over 24,000 arbitration cases[4].

The ICC Court is composed of the President, 17 Vice-Presidents, and 176 members representing 104 countries. Gender balance has been one of the priorities of the current President of the ICC Court, Mr Alexis Mourre, and the Court members now they include 88 women and 88 men[5].

The Court is assisted by the Secretariat headed by Mr Alexander G. Fessas as Secretary General. Currently the Secretariat consists of 11 case management teams, 7 of which are located in Paris, with New York, Sao Paulo, Hong Kong and Singapore hosting one case management team each. Each case management team is headed by a Counsel and assists the parties and arbitral tribunals and the parties at each stage of ICC arbitration: from processing and notification the Request for Arbitration to notification of the final award. The other important aspect of a case management team's assist the ICC Court with respect to its decisions, such as fixing the place of arbitration, appointing arbitrators and scrutinizing arbitral awards.

Among the 11 case management teams also the team which focuses in cases from Central and Eastern Europe and the CIS. This team was established in 2008 in light of the rapid growth of arbitration in the region and increase of the number of disputes in the CEE and CIS region being referred to ICC arbitration.

In 1995, 89 cases involved parties the CEE and CIS, whereas this number rose to 105 in 2000 and to 261 in 2010.

In the period between 2007 and 2017, Romania, Poland and Russia were the leading countries of origin of CEE and CIS parties (Chart 1).

[3] https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf
[4] *Ibid.*
[5] https://iccwbo.org/media-wall/news-speeches/2018-10-key-moments-iccs-dispute-resolution-year/

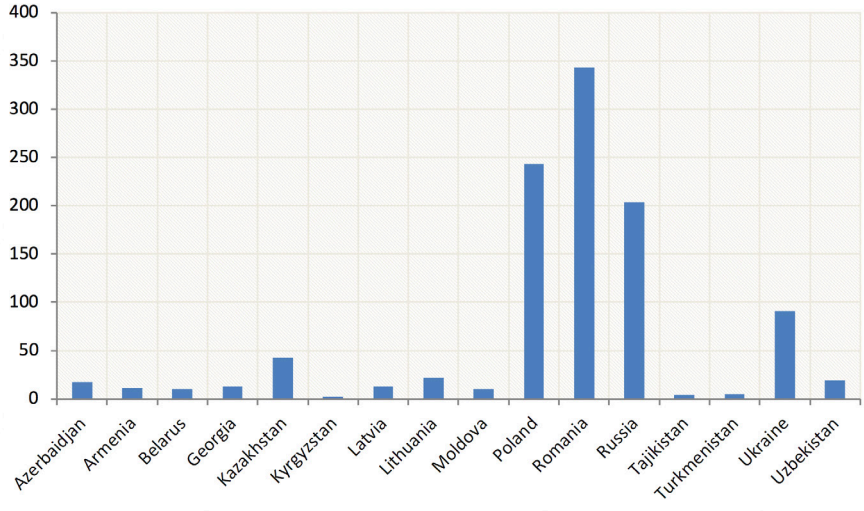


Chart 1. Parties from the Eastern Europe and CIS (2007-2017).

Similarly, Polish, Romanian and Russian were the leading nationalities among arbitrators from the CEE and the CIS (Chart 2).

However, regarding the place of arbitration, the parties more rarely chose a seat in the CEE region, with the leading places being in Romania, Poland and Russia (Chart 3).

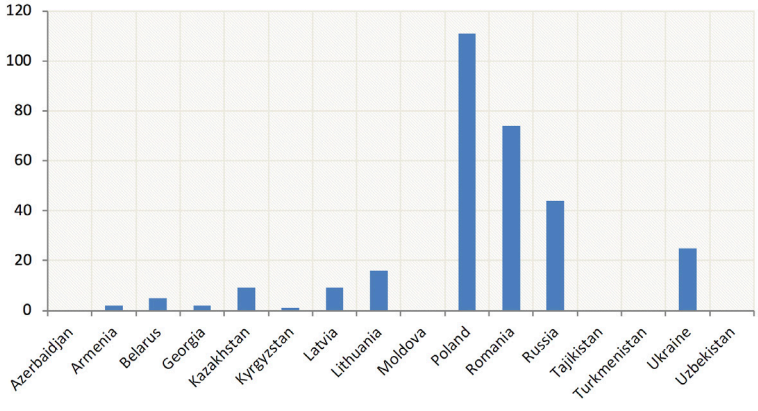


Chart 2. Arbitrators from the Eastern Europe and CIS (2007-2017).

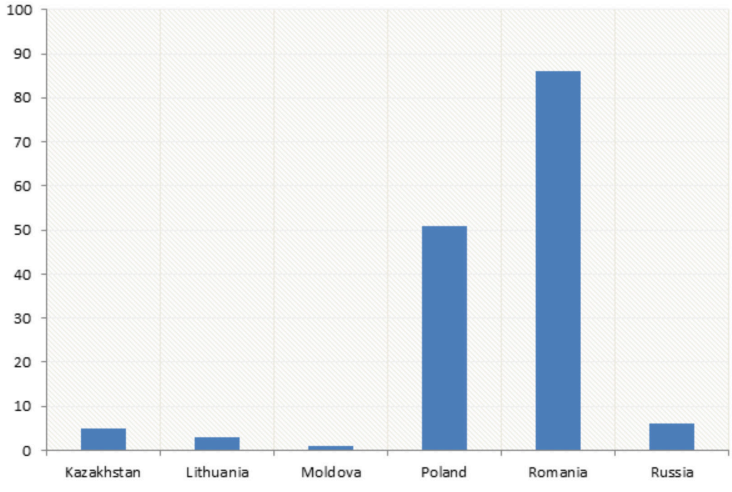


Chart 3. Arbitration places from the CIS and Eastern Europe (2007-2017).

New Rules and new developments of the ICC

On 1 March 2017, a new edition of the ICC Rules came entered into force, further enhancing the efficiency and transparency in the resolution of disputes referred to ICC arbitration

Efficiency

ICC Court attaches particular attention to efficiency, as reflected in its Rules (Article 22 introduced already in the 2012 version of the Rules). It is notable that the obligation to "make every effort to conduct the arbitration in an expeditious and cost-effective manner" applies to both arbitrators and the parties. The arbitral tribunal can then take into account whether the parties conducted the arbitration in an expeditious and cost-effective manner (see Article 38(5), which was introduced in the 2012 version of the Rules). Annex IV of the Rules contains examples of case management technics that can be used to control time and costs. More detailed recommendations can be found in the ICC Commission's report "Controlling Time and Costs in Arbitration"[6] published in 2007.

As early as 1990, ICC introduced the Pre-Arbitral Referee rules, which were the first to offer urgent arbitral relief for before the constitution of the arbitral tribunal. While the Pre-Arbitral Referee relief was available on an opt-in basis, the Emergency Arbitrator procedure included in Appendix V of the 2012 Rules were made applicable to all cases where the arbitration agreement was entered into after 1 January 2012, unless the parties exclude their application. The ICC Emergency Arbitrator rules became the most widely used emergency arbitration rules, with almost 100 Emergency Arbitrator orders rendered by end of 2018.

One of key amendments of the 2017 Rules was the introduction of an expedited procedure providing for a streamlined arbitration with a reduced scale of fees. The Expedited Procedure is automatically applicable in cases where the amount in dispute does not exceed US$ 2 million, unless the parties de-

[6] https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/

Case management team, CEE and CIS region, in the order from the left: Veronika Pavlovskaya, Sergii Melnyk, Jennifer Debruyne, Ivana Blagojevic, Maria Hauser-Morel and Tomasch Kubiak

cide to opt out. It will apply only to arbitration agreements concluded after 1 March 2017. At any stage, the Court may decide that the Expedited Procedure does not apply, for instance where this is no longer appropriate in light of the developments in the case. One of the important features of the Expedited Procedure Rules is that the ICC Court may appoint a sole arbitrator, even if the arbitration agreement provides otherwise.

In this procedure some steps were and the arbitral tribunal has more power to limit the number of submissions and decide on the need to hold a hearing. Moreover, there are no Terms of Reference.

This procedure is automatically applicable in cases where the amount in dispute does not exceed US$ 2 million, unless the parties decide to opt out. It applies to arbitration agreements concluded after 1 March 2017. The expedited procedure is also available on an opt-in basis for higher-value cases.

These provisions became popular quickly after their introduction in March 2017 and by end of 2018, more than 160 requests to opt-in were received by the ICC, with 35 of these resulting in an agreement to opt-in. Moreover, in 17 cases the provisions applied by virtue of the Rules. Together, more than 50 cases were administered as ICC Expedited Provisions procedures before end of 2018 involving around involving 90 parties from 41 countries, including Central and Eastern Europe. 18 final awards were rendered in the timeframe of 6 months with the exception of 2 cases with delays of 1 and 3 weeks respectively, and the Case Management Conference prescribed to be held within 15 days was held on average within 16 days, taking into account the parties' agreement to suspend it in a couple of cases.

Finally, the Court takes into account the tribunal's efficiency when fixing the fees of arbitrators. Similar to Article 38(5) referred to above, which gives the arbitral tribunal the possibility to take into account whether the parties contributed to the expeditious and cost-effective resolution of the matter when deciding on the costs, when setting the arbitrators' fees, the Court shall take into consideration the efficiency of the arbitral tribunal and the timeliness of the submission of the draft award[7].

The Court has applied the policy of fee reduc-

[7] *See para. 118 et seq. of the Note to the parties and arbitral tribunals on the conduct of Arbitration under the ICC Rules of Arbitration (hereunder the "Note"), https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf*

tion in case of delays for many years. However, this practice has been formalized in 2016[8], when the ICC set clear information as to the costs consequences of unjustified delays in submitting draft awards to the ICC. For instance, if a draft award is submitted more than 10 months after the last substantive hearing or written submissions, the fees could be reduced by 20% and more. The Court has been consistent in reducing arbitrators' fees in case of delays. As a result of this practice, there have been significantly less long delays in submitting draft awards to the ICC.

Transparency

In order to increase the transparency now the Court shall provide reasoning for a number of its decisions upon the request of the parties: (i) a decision made on the challenge of an arbitrator pursuant to Article 14; (ii) a decision to initiate replacement proceedings and subsequently to replace an arbitrator pursuant to Article 15(2); and (iii) decisions pursuant to Articles 6(4) and 10. 15.

Any request for the communication of reasons must be made in advance of the decision in respect of which reasons are sought[9]. While the Court has full discretion to accept or reject a request for communication of reasons, so far, it has never refused to provide reasons.

Also in the spirit of transparency, the Court publishes on the ICC website the following information: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within a tribunal, (iv) the method of their appointment, and (v) whether the arbitration is pending or closed. The arbitration reference number and the names of the parties and of their counsel will not be published. The parties may object to the publication of this information.

For arbitrations registered as from 1 July 2019, the Court will also publish the sector of industry involved and counsel representing the parties in the case.[10]

Gender balance and diversity

Another landmark in the last few years of ICC has been the increase of diversity within arbitral tribunals: diversity in terms of nationality, gender and age representation.

The same diversity may be observed within the parties: the number of the party nationalities reached 142 in 2017.

Arbitrators appointed and confirmed by the Court in 2017 represented 85 different nationalities. The number of female arbitrators rose from 7.2% in 2010 to 16,7% in 2017. The percentage of female arbitrators is considerably higher when the ICC Court makes (for the Court appointments: in 2017 the percentage was 30% of all appointments made. The number of appointments of arbitrators from the CEE region has also risen from 12.2% in 2010 to 31% in 2017[11].

The average age of arbitrators confirmed or appointed in 2017 was 56 years, while arbitrators appointed by the Court (directly or following a proposal by a National Committee) were, in average, five years younger. In addition, 8 % of the arbitrators confirmed or appointed by the Court were below 40.

These numbers show the work done by the ICC for promotion and support diversity in arbitration. In this regard, ICC Young Arbitrators Forum (ICC YAF) plays an important role in promoting diversity in arbitration, by organizing numerous educational and professional events all over the world, where young practitioners can share their experience. YAF events took place in Bratislava, Budapest, Cracow, Kiev, Moscow, Prague or Warsaw. New YAF events in Vilnius and Minsk are scheduled to take place soon. Activity of the ICC YAF allows young practitioners to become visible and known in their jurisdictions.

---

[8] *https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/*

[9] *See para. 14 – 16 of the Note, op.cit.*

[10] *See para. 36 of the Note, op.cit.*

[11] *https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf*

ICC expertise for quality of awards

The distinctive feature of the ICC arbitration is scrutiny of the draft awards, i.e., their review before they are signed by arbitrators and notified to the parties. Scrutiny of the awards was provided already in 1927 version of the Rules in relation to the form and extended to the merits in 1933[12].

Scrutiny of the award is aimed to enhance the quality and enforceability of awards. Pursuant to Art. 34 of the Rules, "the Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to the points of substance"[13].

Within the scrutiny the ICC Court makes the (i) formal, (ii) quasi/possibly substantial, and (iii) substantial comments[14]. For example, formal comments relate to citation of the arbitration and applicable law clauses, description of the procedural history, spelling, dates and syntax. Quasi substantial comments are connected, inter alia, with the facts whether award deals with all issues in Terms of Reference, whether the reasoning is sufficient, whether the interest claims are addressed, reasoned and decided. And substantial comments relate to the application of the correct provisions of law, quality and completeness of legal analysis, consistency between factual findings and application of the law.

When scrutinizing awards, the Court also makes sure that they comply with any local regulations or relevant public policy rules. For instance, a tribunal seated in Russia deciding on jurisdictional objections in an M&A dispute was invited to consider the specific legal regulations in this regard and case law regarding the arbitrability of corporate disputes. The Secretariat's and the Court's knowledge of the local regulations and public policy in the region allow the Court to draw the attention of the tribunal to these peculiarities and to reflect them in the award. These actions can sometimes "save" an award before it has been rendered and maintain its enforceability under the national legislation.

The ICC's centenary is a good moment to celebrate past achievements and remind us that that, as ICC has done, any leading arbitral institution has to constantly evolve and innovate in order to remain able to remain to high quality services responding to its users' needs.

ICC Centre for ADR

The International Centre for ADR is a special division at the ICC which deals with these procedures, each of them has its own set of procedural rules. All ICC Mediations are administered by the ICC Centre for ADR according to the 2014 ICC Mediation Rules[15]. Just as the Court is the only body empowered to administer proceedings under the ICC Rules of Arbitration, the Centre is the only body entitled to administer proceedings under the ICC Mediation Rules.

ICC ADR Centre can also administer and supervise expert proceedings starting from proposal of an expert and their appointment to scrutiny of the draft expert report. In these proceedings ICC is guided by 2015 ICC Expert Rules[16]. Parties might wish to obtain an expert opinion on an issue of importance in the ordinary course of business or in the arbitration, or they might want to call upon a neutral to facilitate their negotiations and act as a mediator or member of the dispute resolution board. The ADR Centre has a large pole of experts from different regions with expertise in the very specific spheres, and communicates with the National Committees on day-to-day basis looking for new experts.

---

[12] *M. Hauser-Morel, Duty to Provide Reasoning under the ICC Rules – Recent Experience (pp. 355-364) – The Challenges and the Future of Commercial and Investment Arbitration. – Court of Arbitration LEWIATAN. - Warsaw, 2015.*

[13] *2017 Rules, Art. 34.*

[14] *S. Greenberg, Arbitral Award Scrutiny under Scrutiny: An Assessment – Chapter 6 – Arbitral Institutions Under Scrutiny: ASA Special Series No. 40.*

[15] https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf

[16] https://cdn.iccwbo.org/content/uploads/sites/3/2015/01/2015-ICC-Expert-Rules-ENGLISH-version-1.pdf