

INSIDE ARBITRATION: AN INTERVIEW WITH ALEXIS MOURRE, PRESIDENT ICC INTERNATIONAL COURT OF ARBITRATION

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Legal Briefings

The International Chamber of Commerce (ICC) is one of the main international arbitral institutions. Indeed, in the 2018 Queen Mary survey on the evolution of international arbitration, the ICC had a pre-eminent position as the preferred institution of 77% of respondents. In this issue of Inside Arbitration, we interview Alexis Mourre, President of the ICC International Court of Arbitration. We discuss with him the ICC's expansion and plans for the future with a particular focus on Latin America.

ALEXIS, CAN WE PERHAPS START WITH YOUR OWN BACKGROUND AND, IN PARTICULAR, HOW YOU CAME TO BE THE PRESIDENT OF THE ICC COURT?

I've been practising as a lawyer for over 30 years. I started my career as a litigator in the French courts, specialising in private international law and cross-border dispute resolution. I then became more involved in arbitration. My first arbitration matter as counsel for a client was in 1995, and my first appointment as arbitrator in 1998. I was fortunate enough to be able to specialise in the field. Since that time, I've served as parties' counsel, president of the tribunal, co-arbitrator, sole arbitrator and expert in more

than 260 international arbitrations, both ad hoc and before most international arbitral institutions (ICC, ICSID, LCIA, ICDR, SIAC, SCC, DIAC, VIAC, etc). I've also held a number of institutional positions, as Co-Chair of the IBA Arbitration Committee, LCIA Court member and member of the Arbitration Council of the Milan Chamber of Commerce. In terms of my involvement at the ICC, I was in 2009 appointed as Vice President of the ICC International Court of Arbitration, and held that position for 6 years under the presidency of John Beechey. On 1 July 2015, I was elected as President of the ICC Court. I was elected for a second three-year term earlier this year.

THE ICC HAS BEGUN A PERIOD OF GLOBAL EXPANSION IN THE LAST FEW YEARS. AS PART OF THAT EXPANSION, YOU RECENTLY OPENED A CASE MANAGEMENT TEAM IN BRAZIL AND WERE INVOLVED IN THE HEARING CENTRE THAT OPENED IN SÃO PAULO EARLIER THIS YEAR. CAN YOU TALK US THROUGH THE ICC'S RATIONALE FOR OPENING IN BRAZIL?

We launched a case management team in São Paulo in November 2017, which is led by Gustavo Scheffer da Silveira. At the time, it was the third ICC case management team outside of Paris, the first one being in Hong Kong (founded in 2008) followed by New York (founded in 2012). We have since then also launched a case management team in Singapore.



We took the decision to establish a case management team in Brazil to meet the demands of our users in Brazil, who wanted to see the ICC have a physical and active presence there. Brazil is a unique and important market for the ICC, as there are a large number of large Brazilian transactions which include ICC arbitration clauses. Many of these cases are domestic, in that all parties are Brazilian, Brazilian law applies, the seat of arbitration is in Brazil and the members of the tribunal are Brazilian. Brazil is also a country where there are other active arbitral institutions, and it was important that the ICC be closer to our users by no longer dealing with these cases from Paris. São Paulo has been a great success. In one year, we have registered 31 cases there, involving more than 100 parties for a total amount in dispute in excess of 7 billion BRL. We expect that the team will be even more successful in the years to come, and we are extremely encouraged by the very positive reactions to our opening.

I should also mention that the national committee of the ICC in Brazil has worked with us to open a new hearing centre facility in São Paulo. The hearing centre is now up and running, and is a fantastic facility which surpasses anything else available in the region. It is available to parties to use it for any arbitration or dispute resolution process, not just for ICC arbitrations.

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YOU MENTIONED THAT THE ICC HAS A LARGE NUMBER OF DOMESTIC BRAZILIAN CASES. DO YOU BELIEVE THERE IS A PARTICULAR REASON THAT THE ICC HAS BEEN SUCCESSFUL AT ATTRACTING BRAZILIAN PARTIES TO CHOOSE THE ICC TO ADMINISTER THEIR ARBITRATIONS?

I think that there are several reasons for this. First and foremost is of course the very high quality of the service that the ICC provides, in particular its scrutiny of awards. In a recent survey published by the Queen Mary University of London and the law office of White & Case, 77% of respondents ranked the ICC as their most preferred institution. The ICC is a premium arbitral institution which is able to retain the trust of the parties in large, high-value, multi-party and multi-contract disputes. We also are the most trusted institution in disputes involving the public interest. That is particularly true in Brazil, where a very significant part of our cases involve the Brazilian state or Brazilian state entities. The proportion of our cases where a State or a state entity is present has grown steadily. Globally, it has doubled from 2008 to 2018, from less than 7% to more than 15%. We are seeing the same trend in Latin America, with that proportion increasing from less than 5% in 2008 to more than 12% now. These cases come to us because of the unique experience of the Court, its complete neutrality and because of the high level of quality of our services.

COULD YOU EXPLAIN WHY IT IS IMPORTANT FOR THE ICC TO OPEN REGIONAL CASE MANAGEMENT CENTRES? ARE THERE ANY OTHER MARKETS THAT YOU FEEL WOULD BENEFIT FROM AN ICC CASE MANAGEMENT CENTRE AND DO YOU ANTICIPATE OPENING ANYWHERE ELSE?

The ICC is the only truly global arbitration institution. We are not civil law or common Law. We are not French, European, Asian, American or African. Our Court members originate from more than 130 different jurisdictions. Our secretariat is able to work in more than 25 languages. We are culturally neutral and not rooted in any particular legal culture. Hence, our global footprint and our presence in different continents where we are easily accessible to our users. This is what the market rightly expects from us, and this why we have expanded our network of offices. In addition to the two new case management teams in São Paulo and Singapore, we have also opened two new representative offices, one in March 2016 in Shanghai and another in Abu Dhabi in autumn 2017. We have no immediate plans to open more offices, but we will of course in due course consider future moves, in particular in the Middle East where I think that we are particularly strong.

DO YOU SEE THE DEMAND FOR ARBITRATION ADMINISTERED BY THE ICC CHANGING OR GROWING IN ANY WAY? DO YOU EXPECT DEMAND TO GROW OR ALTER IN ANY PARTICULAR SECTORS?

We have seen a steady growth in our caseload and, perhaps more importantly, in the average amount in dispute in our cases. This average value in dispute was in 2017 of US\$137 million, which is a testament to the fact that parties recognise the added value of the ICC in complex cases.

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At the moment, the largest sectors that are represented in arbitrations administered by the ICC are energy and construction. I don't expect that to change. These two categories overlap to a certain extent; many construction arbitrations relate to energy projects, and many energy arbitrations to questions of construction. Energy is also a vast, multifaceted, industry, and we administer cases in the oil, gas and electricity sectors, concerning both upstream, downstream, gas pricing, transportation and all other sectors of the industry.

YOU MENTIONED THAT THE COURT AND THE SECRETARIAT COME FROM MULTIPLE JURISDICTIONS AND SPEAK MANY DIFFERENT LANGUAGES. DIVERSITY IN TERMS OF AN ARBITRAL INSTITUTION IS OBVIOUSLY VERY IMPORTANT, AND THERE HAS BEEN A LOT OF FOCUS ON GENDER DIVERSITY IN ARBITRATION. DO YOU THINK REGIONAL DIVERSITY OF ARBITRATORS IS ALSO IMPORTANT?

Diversity is extremely important to us. As I said, we are neither a civil law or common law institution, and want to be home to parties of different horizons and legal cultures. We are also making a very significant effort to increase the gender and generational diversity of our Court and our tribunals. I am in this respect very glad that we have complete gender parity in the Court, and of the fact that 50% of our Court members are less than 50 years of age and first time appointees to the Court. However, we need to do more to increase the diversity of our population of arbitrators, the 1600 or so individuals that the Court each year appoints or confirms. The proportion of arbitrators originating from Western Europe and North America is still too high, and not reflective of the global diversity of international arbitration. Parties are far too conservative in their selection of arbitrators, with a tendency to pick from the "usual suspects". In the years to come, we will see many more arbitrators coming from India, China, Indonesia and Malaysia. I also expect to see many more excellent arbitrators coming from Africa, where we need to provide more support to the local arbitration community. To that effect, we have in July 2018 created the Africa Commission of the Court, which is ably led by one of our Court Vice Presidents, Ms. Ndanga Kamau from Kenya. I am very hopeful that this group will help us increase in a very significant way the ICC footprint in Sub-Saharan Africa.

Latin America is a stronger and more consolidated arbitration community with excellent and well-respected arbitrators. Our recent regional conference in Miami was an all-times record in terms of attendance, which reflects the unique position of the Court in the region. However, we definitely need to continue to do more to encourage young Latin American arbitrators to come to the forefront.

YOU MENTIONED THAT YOU OPENED IN SÃO PAULO TO MEET THE NEEDS OF YOUR USERS. WHAT DO YOU THINK ARE THE CHALLENGES FACING THE ICC IN LATIN AMERICA? IS COMPETITION FROM REGIONAL INSTITUTIONS INCREASING?

Latin America is indeed a region where local arbitration institutions have been more active in recent years, with some of them aiming at playing a regional role. This is certainly a positive development, as it contributes to spreading the arbitration culture across the continent. It also encourages us to raise our game in order to remain the most preferred institution in all segments of our practice. We need to constantly innovate, and continue focusing on the quality of our services, on efficiency, transparency and of course ethics. Of paramount importance is maintaining the scrutiny of awards at the very high level where it is today. Scrutiny increases the quality of awards, and it reduces the likelihood of non-recognition or annulment. We also need to constantly improve the cost and time efficiency of our arbitrations. In this respect, we have recently adopted important measures such as the expedited rules, which are mandatory save contrary agreement of the parties in arbitrations where the amount in dispute is less than US\$2 million and the arbitration agreement postdates the entry into force of our 2017 Rules, and are also applicable to all other arbitrations in case of an agreement by the parties. The expedited rules allow to at the same time maintain the high quality of an ICC arbitration and to obtain an award within 6 months from the case management conference with limited costs. It has so far worked very well and is very popular with our users. We have also reduced the time limit for establishing the terms of reference and introduced a time limit for the submission of awards to the Court, with financial consequences for the tribunal in case of a delay that is not justified by the circumstances of the case. We are also aiming at establishing the highest level of ethics in ICC arbitrations, in particular by ensuring that conflict disclosures are made by arbitrators on a forthcoming and transparent manner. It is a fundamental principle in arbitration that the parties have the right to be aware of any circumstances that may in their eyes affect the independence or impartiality of the tribunal. Finally, it is important that the parties cooperate in good faith with the tribunal, and we have adopted guidance to that effect.

ON THE QUESTION OF COSTS, DO YOU BELIEVE COST IS LIKELY TO BE A FACTOR IN ATTRACTING PARTIES TO CHOOSE REGIONAL INSTITUTIONS OVER THE ICC?

First of all, I do not think that the costs of the institution are a major driver in the choice of an arbitral institution. Institutional costs are very small fraction of the overall costs. I also believe that it is important that arbitrators are properly remunerated in order for them to conduct cases efficiently and produce high quality awards. This being said, the Court gives a lot of attention to controlling arbitrators' fees in many respects. First, fees are normally fixed below the average provided by the scales when the amount in dispute is high or very high. Second, fees are reduced in case of unjustified delays. Finally, at the difference of other institutions, the Court does not allow tribunals to seek payments from the parties to remunerate the administrative secretary, if any. More generally, fixing fees on the basis of an ad valorem schedule allows the institution to control costs more efficiently. Remunerating arbitrators by the hour, to the contrary, makes it more difficult to control costs and may generate inefficiencies in case of delays. In an ad valorem system, arbitrators are not rewarded for delays, whereas an hourly rate-based system makes it more difficult for the institution to have oversight over the efficiency of the arbitration and it is very difficult to control effectively the number of hours that are declared by arbitrators.

YOU SPEAK VERY PASSIONATELY ABOUT THE ICC'S COMPETITIVENESS IN TERMS OF COST. OTHER COMPETITOR INSTITUTIONS SUCH AS SIAC, HKIAC AND LCIA HAVE PUBLISHED STATISTICS ON INSTITUTIONAL AND ARBITRATOR COSTS. ARE THERE ANY PLANS FOR THE ICC TO PUBLISH SOMETHING SIMILAR?

I do not think that arbitral institutions should be engaged in a race to the bottom on costs. This is not what the market expects. We want arbitrators to be properly remunerated because they have to deliver awards and decisions in a speedy and efficient way and at the highest level of quality. Our philosophy is certainly not to promote us by constraining arbitrators' fees to the lowest possible level. I also do not think that the ICC is at all more expensive than others. Many of the studies you just mentioned compare apples with pears, and the result they produce are flawed because they adopt as a benchmark the ICC average fee produced by the scale, without considering that the Court frequently departs from it by going below in large cases and on top of it in cases where the amount in dispute is limited. The perception that ICC is more expensive than other institutions arises, most of the times, from the fact that parties have to pay upfront a significant part of the costs of the arbitration, but this has the advantage of allowing parties to know where they are at the beginning, and parties may if they wish pay the advance in instalments. Overall, a protracted arbitration where arbitrators are able to charge significant hourly rates with no or little control from the institution will certainly result in higher costs than an ICC arbitration. Let me add that we will in the course of this year release the results of a completely transparent study conducted by the Miami University and Compass Lexecon on the costs of ICC arbitrations.

About the author

Alexis Mourre is an independent arbitrator and President of the ICC International Court of Arbitration.

Alexis is the author of numerous books and publications in the field of International Business Law, Private International Law, and Arbitration Law. He is founder and past editor in chief of *Les Cahiers de l'Arbitrage - The Paris Journal of International Arbitration*, a leading French publication in the field of Arbitration.

He lectures in different universities and participates as speaker or moderator in numerous conferences and seminars on international commercial arbitration.

He is fluent in French, English, Italian and Spanish, and has a working knowledge of Portuguese.

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