Rules of the game

The popularity of international arbitration as a means of resolving cross-border commercial and investment disputes has continued to grow in recent years. Gary Born and Rachael Kent of **Wilmer Cutler Pickering Hale and Dorr LLP** examine the current situation

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Arbitration is widely regarded as providing significant advantages over national court litigation for resolving international disputes, including neutral, expert decision-makers, internationally enforceable awards, confidentiality and procedural flexibility. In many regions and industries, arbitration has become the preferred means of resolving international disputes.

New participants

The dramatic increase in foreign trade and investment over the past decade has introduced many important new participants to international arbitration. A number of countries in the former Soviet Union, Asia, the Middle East and Latin America have shed their historic hostility to arbitration and have introduced new legal regimes that are supportive of international arbitration. In particular, the unprecedented increase in trade and investment in China necessitates an effective, predictable and neutral dispute resolution mechanism for China-related disputes.

There has been a proliferation in recent years of bilateral and multilateral trade agreements, many of which provide for arbitration as a means of resolving disputes related to foreign investments. There has also been a commensurate increase in the number of arbitrations initiated under these agreements. For example, the International Centre for the Settlement of Investment Disputes, which administers arbitrations between states and foreign investors, reports that it

currently has 102 cases pending, compared to only five pending cases in 1995.

Multiple parties

The nature and complexity of the disputes that are submitted to arbitration and the procedural issues they raise are also changing. For example, arbitrations today are much more likely to involve multiple parties on one or both sides of the dispute. Even where arbitrations are initiated with only two parties, third parties may be joined as a party to an existing arbitration, or may even seek to intervene in a pending arbitration.

Multi-party arbitrations raise complex, and sometimes novel, jurisdictional questions that tribunals and arbitral institutions must grapple with. They also raise a myriad of procedural issues, including how the arbitral tribunal should be constituted, whether there should be joint or individual submissions, how costs and fees should be apportioned among the parties, and how relief can properly be structured.

As multi-party arbitrations have become more common, parties have also been more aggressive in seeking to consolidate separate pending arbitrations (arising under the same or different arbitration agreements) and to initiate 'class-action' arbitrations, by seeking to bring claims on behalf of a defined class of unnamed and absent claimants. These procedures, once seen only in domestic litigation in relatively few national courts, are now being widely used in domestic arbitration in those states.

As acceptance of consolidated and class arbitrations grows, parties are beginning to seek to import these procedures into international arbitration as well.

Seeking interim relief

It is also becoming more common for parties to seek interim and injunctive relief from arbitral tribunals, which have authority under most arbitration rules and national laws to issue such relief. Moreover, the types of interim relief sought by parties are expanding. For example, requests for interim measures aimed at preserving evidence or facilitating the arbitral process are now common, in addition to more traditional requests for preservation of the status quo or securing assets. Parties are also using national courts, both within the situs and in other jurisdictions, to secure their claims by freezing assets, ordering the posting of bonds, or otherwise exercising control over the assets of their opponents.

Litigants also sometimes seek to involve the national courts of various jurisdictions in disputes over the jurisdiction of the arbitral tribunal, by seeking anti-suit injunctions to prevent parallel national court litigation, or by seeking anti-arbitration injunctions to prevent the parties or the arbitrators from continuing with an arbitration while litigation is pending.

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Stepping up the pace

As the pace of international business quickens, dispute resolution has not always kept up. Parties are increasingly looking for ways to expedite the resolution of certain time-critical business disputes, particularly where a delay in a final decision will potentially render the relief of little or no value to either party. Parties are not only looking to arbitral institutions and published rules for means of expediting their disputes, but also are increasingly including time-limits for rendering a final award in their arbitration agreements or terms of reference.

Access and transparency

There have also been calls in recent years for increasing the transparency of the international arbitral process. There have been numerous proposals for publishing more arbitral awards, with redactions if necessary, to create a body of precedent and a public record of prior decisions made by particular arbitrators. Particularly in the field of investment arbitration, where arbitrations often involve issues of public interest, there have been proposals for allowing third parties who are not participants in a case to file '*amicus*' briefs to advance arguments on issues that affect the public interest and may not be adequately addressed by the participants.

Conflicts and challenges

Finally, in the past several years, there has been an increased focus on conflicts of interest, particularly on the part of the arbitrators. Arbitral institutions are reporting an increasing number of challenges to arbitrators, generally based on potential conflicts of interest.

In response, there have been efforts to further define what types of conflicts should be disclosed by potential arbitrators and when those conflicts should lead to the removal of an arbitrator.

Changing the rules

These current procedural challenges, together with the continuing growth in the breadth and scale of international arbitration, have led a number of leading international arbitration institutions to introduce significant changes to their published rules. They have also led institutions such as the International Bar Association and the United Nations Commission on International Trade Law to form new working groups and draft new guidelines.

UNCITRAL

The UNCITRAL working group on arbitration recently recommended that the UNCITRAL Model Law on international commercial arbitration should be revised to expand the tribunal's authority to award interim measures of relief. The Model Law currently allows tribunals to order parties to take any interim measure 'necessary in respect of the subject matter of the dispute.' The working group has proposed expanding this authority to allow interim measures to:

- maintain or restore the status quo;
- prevent current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant and material.

The working group has also proposed that arbitral tribunals should be granted the authority to make a provisional order of interim relief, on application by one party, without notice to the other party. Provisional orders issued *ex-parte* would be effective for a maximum of 20 days, and the party against whom the measure is directed would be informed of the order and given an opportunity to present its case as soon as possible. Nevertheless, this proposal has generated significant controversy.

CIETAC

With regard to dispute resolution in China, in May 2005 the China International Economic and Trade Arbitration Commission issued revised arbitration rules.

The new rules provide greater party autonomy and flexibility, and make it more attractive for non-Chinese parties to arbitrate under the auspices of CIETAC. For example, the new rules provide that parties can appoint arbitrators from outside of the CIETAC panel, agree to CIETAC arbitration outside of China, and modify the CIETAC rules by agreement, or even agree to apply other arbitration rules. The new CIETAC rules also provide for broader disclosure of potential conflicts of interest by the arbitrators.

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It remains to be seen how foreign investors will react to these rules, particularly in light of the willingness of Chinese entities to accept foreign arbitration (at least in some situses) and the patchy experience of parties with CIETAC historically.

ICSID

ICSID is currently considering whether to revise its arbitration rules. The ICSID Secretariat published a working paper in May 2005, proposing changes in its rules addressing many of the procedural concerns outlined above. In particular, ICSID has proposed:

- adding provisions that would allow arbitrators to address requests for interim measures on an expedited basis;
- adding procedures to allow tribunals to summarily dismiss claims that are 'manifestly without merit';
- requiring the publication of ICSID awards (at least in excerpted form);
- giving tribunals the authority to allow third parties to make written submissions and attend the hearings; and
- requiring broader disclosures of potential conflicts of interest by ICSID arbitrators.

Swiss Chambers of Commerce

In January 2004 the Swiss Chambers of Commerce, which historically had each published a separate set of international arbitration rules, published a revised, common set of rules.

The new Swiss rules have specific provisions directed to multi-party proceedings, interim relief, and expedited proceedings. Most notably, under the Swiss rules, the chamber administering the arbitration has the authority to consolidate arbitrations, even without the consent of the parties, and even if the parties in the two proceedings are not the same. The Swiss rules also give the arbitral tribunal the power to join a third party to an existing arbitration or to allow a third party to intervene in an existing arbitration, even without the consent of the parties.

International Bar Association guidelines

In May 2004 the International Bar Association issued guidelines on conflicts of interest in international arbitration, with the aim of introducing greater uniformity to questions regarding the independence and impartiality of arbitrators in international disputes.

The guidelines were drafted by a working group, made up of highly-experienced arbitration practitioners from a wide range of jurisdictions, and were meant to 'reflect the working group's understanding of the best current

international practice.' Although the guidelines are not mandatory, they represent a step towards collecting the prevailing views of the international arbitration community on issues of substantial importance to the arbitral process.

Conclusion

These initiatives, and numerous others like them, are aimed at ensuring that the procedural rules that govern international arbitration reflect the current business environment and the parties' needs and expectations with respect to the arbitral process.

They strive to maintain the proper balance between predictability and flexibility, between the tribunal's authority and party autonomy, and between experience and innovation. These are not easy balances to strike, and it is inevitable that there will need to be further revisions, and occasionally even course corrections, to address the procedural issues outlined above, as well as those that are bound to emerge over the next several years.

What is most important is that lawyers who have experience in, and a commitment to, international arbitration continue to engage in discussions about the trends and challenges they are experiencing, and that they continue to look for innovative ways to address those issues within the framework of the arbitral process. ●

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Gary Born is the author of several leading treatises on international arbitration and litigation, including *International Commercial Arbitration: Commentary and Materials* (expanded second ed 2001), *International Arbitration and Forum Selection Agreements: Planning, Drafting and Enforcing* (1999) and *International Civil Litigation in United States Courts* (third ed 1996).