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# PAW2023: Here's to the ICC's next 100 years

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**Paris Arbitration Week's first day featured a reflection on the ICC International Court of Arbitration's achievements on the 100th anniversary of its founding, and the challenges that arbitration is likely to face in the future.**

Leading arbitration lawyers gathered at the ICC European Conference on International Arbitration yesterday (27 March), focused on developing new skills and structures to adapt the rapidly evolving transitions in technology and the environment faced by governments and businesses.

The conference dominated the first day of Paris Arbitration Week, and the importance of evolution was at the forefront of delegates' minds, with the secretary general of the **ICC International Court of Arbitration Alexander Fessas** saying: "Private justice that does not rest on sound foundations will fail; therefore our duty is to build those foundations and ensure they remain solid, and to do that we [all] need to work together, and there is a lot we [still] need to do."

ICC president **Claudia Salomon** spoke of the importance of staying aware of the trends that have an effect on business: "If we are better able to understand economic and geopolitical trends impacting business, then we have a better understanding of how business is being conducted, of how disputes arise and how to position ourselves to help resolve them."

The most prominent of those trends is environmental expectations, and in discussion with Salomon, CEO of French transportation corporation **Alstom, Henri Poupart-Lafarge** said: "There is a lot of pressure as transportation has become top of any political agenda; colleagues believe they are under huge pressure, but customers are under even more." He viewed his role as creating a work culture and framework to deal with that pressure.

Dressed in blue and wearing a red necktie, colours referencing the ICC and PAW, Fessas was keen to emphasise that the ICC cannot thrive on past glories alone, and must also **look to the future and be sensitive to concerns in order to continue to safeguard its legacy**, with reference to the 10 pledges contained in the ICC Centenary Declaration on Dispute Prevention and Resolution, the Court's blueprint for the next 100 years, of which transparency, **diversity** and cooperation are but three areas of focus.

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He called the **institution's 100th anniversary** "a milestone of great importance" in allowing improved access to justice and the rule of law. "The ICC rules are a benchmark for many [other arbitral] institutional rules and processes, and we have seen their influence on many different institutions."

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Energy transition, and need to reflect on what this means".

**Kai-Uwe Karl**, **GE Renewable Energy** global chief litigation counsel, pointed out the tension between innovation to create an arbitration environment that will serve for the next 100 years, and the obvious incentive to maintain the status quo: "Most arbitration institutions offer mediation, but how often is mediation used in practice?" he asked.

In environmental energy disputes, **Aisha Nadar**, senior consultant for procurement management and dispute resolution at **Advokatfirman Runeland** in Sweden, suggested going back to first principles as arbitration between a buyer and seller, but "now with energy transition, it's the 'E' in ESG, ...[a] totally new way of thinking" since reparations under ESG provisions are now a quantifiable risk.

Joining remotely, **Sara Rayment**, the founder of law firm consultancy **Inkling Legal Design** in Australia, described the paradigm shift in this area of law as "not incremental innovation but larger and more far-reaching change". She suggested that developing the legal skill-sets and capability to deal with it are stymied by the profession's inherent tendency to be "detail-oriented, risk-averse and deeply sceptical".

"Most of the people who designed the ICC arbitration system were outsiders with a very idealistic, almost utopian vision of what arbitration should be like," offered **Mikaël Schinazi**, an associate at arbitration-focused French firm **Gaillard Banifatemi Shelby Disputes**, adding: "Change and innovation start at the margins, [so] we need to zoom out, as experts in arbitration have different ways of seeing the arbitration world, and today's margins might become the mainstream of tomorrow."

## ARBITRATION'S CHALLENGES

The second discussion centered on potential challenges that arbitration may soon be faced with, and the constantly shifting legal and regulatory environment in which it operates. Entitled 'Crossing Pitfalls: Navigating arbitration's potential risks and challenges', it was co-chaired **Elena Gutierrez García de Cortázar**, a partner at **Mourre Gutierrez Chessa Arbitration** in France, and ICC vice-president and founder of **Ndanga Kamau Law** in the Netherlands.

**Bernard Eder**, an international arbitrator and mediator at London set **24 Lincoln's Inn Fields**, spoke about proposed reforms to the English Arbitration Act, including to section 69 which deals with challenges based on points of law, and to Section 67 which allows a rehearing when a tribunal has decided whether it has jurisdiction or not. **Dominique Hascher**, a judge in the Supreme Judicial Court of France and a former deputy secretary general of the ICC, drew parallels between the English and French law's approach to jurisdiction.

Netherlands-based independent arbitrator **Brooks Daly** discussed proposals to improve transparency of arbitral awards, suggesting that a stronger push for greater disclosure might "risk compromising expectations of confidentiality, [...] go too far, and you might repel users".

A reality-check is a necessary part of the debate according to head of arbitration at **Airbus SAS**, **Alma Forgo**, "as the real clients – that is companies using commercial arbitration... – are not so much focused on developing the rule of law; rather they want their disputes resolved in a fast [way]... without publicity and without [negative] implications for long-term relationships".

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In an ever more regulated world, the result is likely to be increasing compliance requirements for companies. "The right compliance programme can provide a defence under certain offences like the UK Bribery Act 2010, or grounds for leniency where there is a breach of antitrust law," said ICC Institute of World Business Law Council Member and Africa-focused firm **Asafo & Co** partner, **Jacob Grierson**, while **Anna-Maria Tamminen**, a partner at **Hannes Snellman Attorneys** in Finland, used cartoon characters from *Peppa Pig* to illustrate a number of concepts including the role of a judge.

## THE ENERGY QUESTION

French-headquartered **Darrois Villey Maillot Brochier** partner **Carine Dupeyron** moderated the third discussion which examined disputes related to energy transition. With increased legal uncertainty in the face of disruption to international agreements such as the **Energy Charter Treaty (ECT)**, **Francesca Salerno**, head of group significant litigations at Italian energy company **Enel**, said: "Our investment might be jeopardised, because the system we've been used to is now heavily criticised, but somehow it's criticised without a new system [being suggested]."

That uncertainty has been created because "energy transition is imposed by state policy, but that policy tends to change, and [that] transition is likely to be interrupted or [affected] by disruptive technology which cannot be foreseen," agreed **Thomas Voisin**, managing partner of **Quinn Emanuel Urquhart & Sullivan's** practice in France

**Marnix Leijten**, a partner at **De Brauw Blackstone Westbroek**, noted the change in mood since the "sunny June day in Dublin in 1991" when the ECT was founded, spearheaded by the late Dutch Prime Minister Ruud Lubbers, and governments now wish to take back control and ownership of the energy sector.

Nonetheless, the ECT still has its defenders, such as **Carlos Lapuerta**, an economist and principal at **The Brattle Group**, who described it as a useful multi-lateral instrument which lays down specific legal standards to protect all parties: "The ECT is just a tool for civility, not a fossil-fuel protection instrument, and is needed."

For more on Paris Arbitration Week: ***Diversity concerns in focus for arbitration's future***

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59 Tanner Street, London SE1 3PL, UK  
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