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Update

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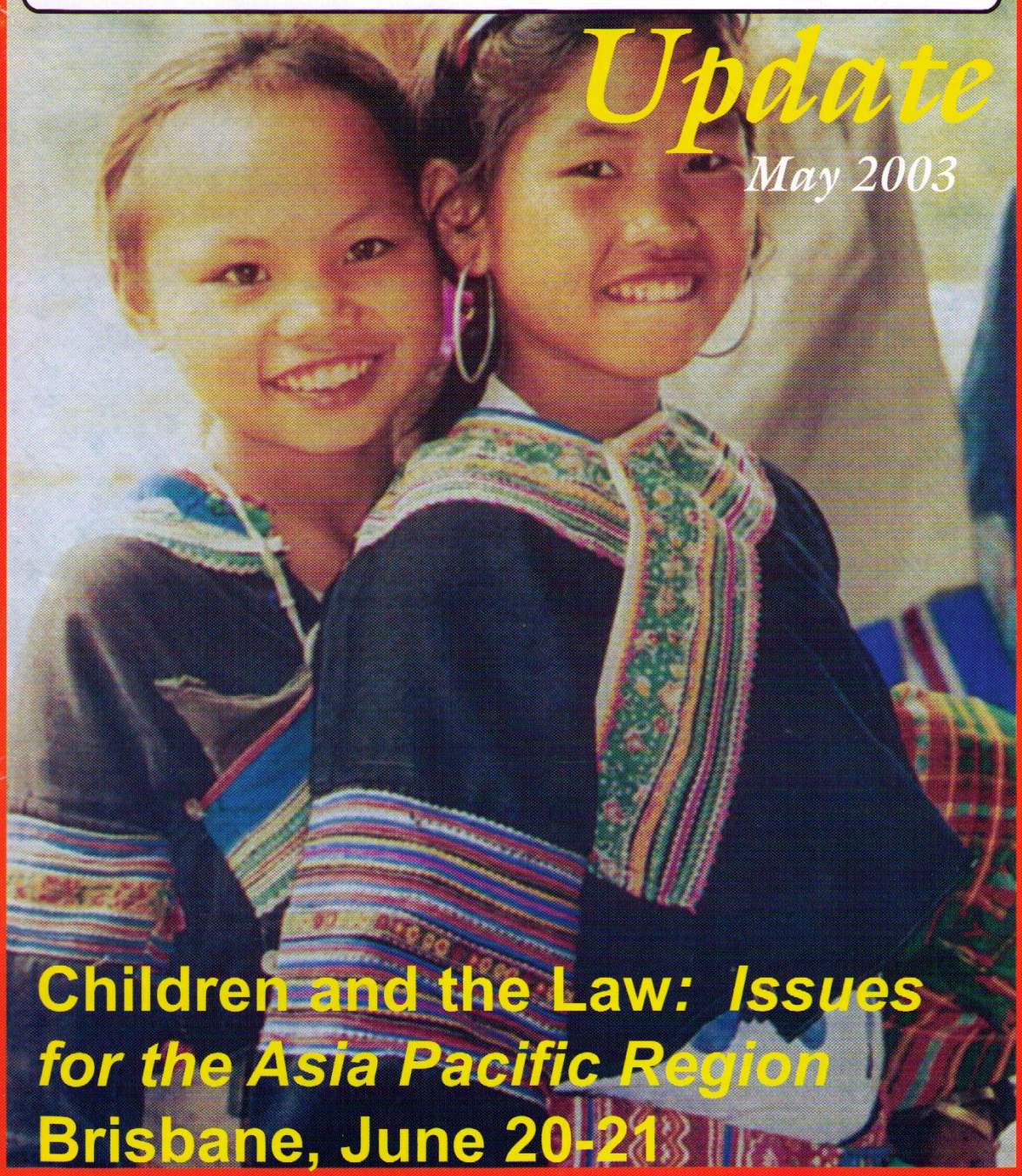

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ICC'S NEW GUIDELINES FOR ARBITRATING "SMALL" CLAIMS[1]

A view from behind the scenes in a global task force

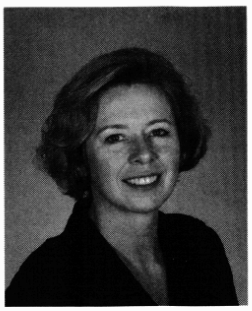
Louise Barrington

The ICC Court of International Arbitration, that grande dame of institutional dispute resolution, is looking forward. ICC has always provided a think-tank atmosphere for the venerable gentlemen who regularly arbitrated under ICC rules, but traditionally has declined to participate in formal training for arbitrators.

In recent years however, ICC does appear to be recognizing that the proliferation of arbitration clauses in international contracts has brought a host of new practitioners into the field. Newer arbitrators can always use practical advice and the more experienced don't mind being reminded about best practices. Over the past decade the ICC has produced an impressive body of material for the guidance of arbitrators, whether first-timers or old hands. The ADR Rules published in late 2000 are one example. The remarkable Guidelines for Arbitrating Large Construction Cases, prepared by a group headed by Humphrey Lloyd and Nael Bunni, are another. The most recent addition to the ICC's basket of helpful hints is the brand-new "Guidelines for Arbitrating Small Claims Under the ICC Rules of Arbitration".

All of these documents originate in the ICC Arbitration Commission. The Commission itself is one of the ICC's specialized groups which study and establish policy in a number of areas of interest to international business operators. Each of the ICC's 70-odd national committees may send one or more delegates to the semi-annual meetings; between meetings a number of Task Forces and Fora address specific projects. The Arbitration Commission works closely with the ICC Court, whose members are *ex officio* members of the Commission.

The ICC had received a number of requests from its national committees around the world, as well as from arbitration users, to provide some re-



Louise Barrington, Chartered Arbitrator, Head of ICC Task Force on Arbitrating Small Claims, founded ICC Asia and is currently on the faculty of City University School of Law in Hong Kong. She chairs the LAWASIA International Trade and Arbitration StandingCommittee.

E-mail: louiseb@netvigator.com

lief to parties faced with small scale arbitration. The ICC Rules' multiple procedural safeguards provide fertile ground for those wishing to sow the seeds of delay and disruption. In a case where the amount in dispute is relatively small, the process risks running away with the parties. A winning party may discover that the victory has been pyrrhic. ICC arbitrators, whose compensation is not tied to the hours they spend on a case, are frustrated by a multiplicity of motions and delays. Time and resources (both in cost and in personnel) can easily outstrip the value of the case at hand, so that in the end, no one profits but the lawyers.

To assist parties in rationalizing the use of their resources, the Arbitration Commission established a Task Force to explore ways to reduce the time and cost of arbitrating smaller claims.

From the start, it was a challenging mandate. The Task Force, the largest in ICC history, comprised nearly 60 representatives from every continent. Some of those who were unable to attend Task Force meetings in Paris participated by telephone or followed the process by e-mail.

Predictably, the first question on everyone's lips was, "Just what is a small claim?" It soon became glaringly obvious that there was no consensus at all. While a national or regional institution can use its own economy as a reference point, the globally-based ICC had some members who argued that "small" was any claim under US$5 million, while others felt that US$5000 should be the ceiling.

To complicate matters further, *small* claims are not necessarily *unimportant* claims. Decisions in small cases can still turn on complex legal questions. A dispute over a relatively small amount may have repercussions in a vast number of other similar cases. A test case may be brought to provide guidance for hundreds of standard form contracts. And a small claim may be answered with a massive counterclaim. A subsidiary question arose: How to reduce the time and cost of arbitration, without sacrificing the quality control for which ICC arbitration is famous?

Rather than attempt to resolve the size conundrum, the Task Force members decided to take a different tack. What kind of action would be appropriate, accessible and acceptable in a global context? The Task Force examined the small claims systems of a large number of arbitral institutions around the world, including CIETAC and the Hong Kong International Arbitration Centre, WIPO, AAA, and the Japan Shipping Association, as well as national centers in a number of European countries and UNCITRAL documents. They canvassed a vast spectrum of opinion, distilling it into four alternatives which it then presented to the November 2001 Commission meeting:

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1. Relaying small claims to an ad hoc system outside the ICC Court
2. A special "streamlined" process, to be administered in the ICC Court secretariat in parallel with the regular ICC Rules
3. A decentralized system to be administered by ICC affiliates in a number of regions
4. Non-binding guidelines for use in conjunction with the existing ICC Rules of Arbitration.

The first choice was quickly voted down, as no one wanted to send away people who had come to the ICC for assistance in resolving a dispute. The third met with violent opposition from those who felt that decentralization would impede quality control and risk a dilution of the ICC safeguards that have earned its reputation.

The real debate centered on choices Two and Four. In the end, though, it looked as if a parallel system would place an enormous burden on the ICC's secretariat, whose seven teams already administer over 130 cases each. A sudden deluge of small-value cases – many of which might be just as complex to administer as larger ones — would severely tax their resources and perhaps jeopardize the level of service they could provide.

This lively discussion finally produced a consensus that the Task Force should be working toward the fourth alternative, a set of non-binding guidelines that would assist parties to streamline their arbitrations under existing ICC Rules. An advantage of this voluntary option was that there was now no need to provide a definition of a "small" claim. The parties and arbitrators would recognize a small claim when they saw it. The Task Force returned to work, again comparing a number of existing systems, borrowing extensively from the Lloyd-Bunni report, and examining the interplay of various recommendations with the ICC arbitration process.

At the next Commission meeting, in March 2002, members debated extensively over a cornucopia of forty-one recommendations addressed to parties, their counsel and the tribunal. At this point, a small drafting committee of the Task Force sat down together in Paris with Commission chairman Peter Wolrich to streamline this "raw material" into a more digestible format. Several meetings and teleconferences later, the final document emerged - a set of fourteen voluntary guidelines set out in clear and simple language. The two-column design facilitates quick perusal of the main points, while enabling those with a more particular interest to explore the detailed commentaries.

The Guidelines address issues arising from When the Dispute Arises through Commencing the Arbitration, Terms of Reference, The Proceedings Timetable and Evidence. In the Introduction and throughout the Guidelines, party autonomy is stressed. No one is obliged to use the Guidelines. Parties who wish to use one or more of them can pick and choose as appropriate to their case. Many see them as a kind of checklist, which the parties and arbitrators can consult to ensure they will operate on an efficient basis.

The Guidelines range from exploring the use of ADR at the outset of the dispute, to filing complete pleadings at the Claim and Answer stage, and the use of specific procedures or time limits to encourage a speedy conclusion. A sole arbitrator is a key to efficient and inexpensive procedure, although some parties may not want to make this decision before knowing the nature of the dispute.

Clearly Terms of Reference, that ICC hallmark, cannot be eliminated. However, it may be useful to establish this document through telephone conversations or e-mail, thus avoiding considerable travel expense of the parties and tribunal. Arbitrators are encouraged to explore with the parties what kind of evidence is necessary. Is full discovery really necessary, or can it be limited or even eliminated? Can the use of experts be avoided or limited? Can procedural issues be debated by telephone or e-mail, again avoiding travel costs. Is it necessary to have a hearing at all?

Parties and tribunals should think about how to use technology both for communications and for the presentation and organization of evidence. This of course, is only possible if everyone concerned has compatible software – and knows how to use it!

At every turn, the Guidelines exhort both parties and tribunals not simply to accept that "we've always done it that way" and to consider ways in which they can be more efficient. It goes without saying that despite the hopes of the drafters and of the ICC, the adoption of these guidelines is in the hands of the individuals. The ICC Secretariat can call attention to them and arbitrators can encourage their use. Nothing can really deter the recalcitrant party who wishes to delay the award or crush the opponent in a mountain of evidence. There is no substitute for good faith. But for those parties and counsel who simply want – and need – an efficient commercial solution where the resources expended are proportional to the dispute at hand, these Guidelines will help to establish a balance between what is at stake and the cost of achieving it.

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1. The Guidelines will appear in the May 2003 issue of the *ICC Court Bulletin,* published by International Chamber of Commerce, 38 cours Albert 1er, 75008 Paris, France.