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SYMPOSIUM

The International Arbitrator: From the Perspective of the ICC International Court of Arbitration

*Stephen R. Bond**

I. INTRODUCTION

Every arbitration aficionado knows the expression: "An arbitration is only as good as the arbitrator" (*"Tant vaut l'arbitre, tant vaut l'arbitrage"*). However, the party or arbitral institution which wishes to find a "good" arbitrator must nonetheless step back before making any selection in order first to formulate a clear definition of "arbitration" itself and its objectives.

Of course, articles, books and entire conferences have been devoted to the subject of arbitration, but for the purposes of this article it is possible to be brief. From the point of view of the International Chamber of Commerce and the International Court of Arbitration[1] it established in 1923, arbitration is a means of helping to promote and facilitate interna-

* Secretary General of the International Court of Arbitration. The opinions expressed herein are those of the author and do not bind or necessarily reflect those of the International Court of Arbitration.

[1] The word "international" was added to the Court's name by a decision of the Council of the International Chamber of Commerce in 1989 in order to better reflect the nature of the composition of the Court (as of 1991 there are some 55 Court members of 47 different nationalities) and the basic premises underlying its Rules and its approach to the arbitrations it administers.

tional commerce and investment by providing a neutral, independent and impartial method of resolving international commercial disputes through effective and reasonably predictable procedures.

These objectives should be achieved as rapidly and inexpensively as the circumstances of each case permits as it cannot be forgotten that for the business person time is money and money is also money. Moreover, the parties will accept the alternative of arbitration only insofar as they are confident that the objectives sought are truly obtainable and the means required to reach these objectives are available. In this regard, each international contract permits the parties to "vote with their arbitration clauses" for the arbitral institution or set of rules which they consider to best meet their needs.

Let it also not be forgotten that, as Eric Robine, Chief of the Legal Service of GEC Alsthom recently stated,[2] "if the parties have resort to arbitration, it is because they have not been able to reach a friendly settlement. The only thing that the arbitrators must do then, is to decide in law. . . . A request for arbitration, and this should be obvious, is not a request for conciliation."

In short, an arbitrator must have what Professor Pierre Lalive has called[3] the "ability to judge," which implies a capacity to evaluate conflicting statements of law and/or fact and to have the wisdom, courage and expertise to reach and render a decision in such a way that the parties — and perhaps most of all the losing party — will recognize both the essential fairness of the procedure and the futility of efforts to overturn the award or oppose its execution. Only when this occurs, as happens in about ninety percent of ICC cases, can arbitration truly achieve the relative economy, celerity and finality sought by the business community.

With this understanding of what the "good" arbitration consists of, we return to the question of how best to select the "good" arbitrator only to realize that the observation with which this paper began, repeated so often as to become a cliché, in fact offers no practical guidance to the parties and the arbitral institutions facing the daunting task of selecting, and sometimes removing, arbitrators.

Inspired by Lord Justice Michael Mustill's statement that the ICC Court's "recent concentration on practical issues, rather than debates on overworked theoretical questions, has created a climate in which the serious problems which face international commercial arbitration today can

[2] *Le choix des Arbitres*, REVUE DE L'ARBITRAGE 330 (1990).

[3] P. Lalive, Remarks at the CCPIT-ICC International Commercial Arbitration Seminar (Beijing, June 1988).

be faced in a truly ecumenical intellectual spirit,"[4] this paper will endeavor to provide concrete, practical information by drawing upon the experience of the ICC International Court of Arbitration.

During the past twelve years, some 3500 arbitration cases have been submitted to the ICC Court[5] (itself composed of experienced lawyers of some forty-seven nationalities) involving many thousands of parties from over 100 countries around the world. From the thousands of arbitrators of over fifty nationalities proposed by parties and confirmed (or, more rarely, not confirmed) by the ICC Court, from the thousands of sole arbitrators or chairpersons of Arbitral Tribunals appointed by the ICC Court, and from the hundred or so challenges of arbitrators acted upon by the ICC Court, certain pragmatic observations may be distilled even if eternal verities are harder to find.

II. THE QUALIFICATIONS OF THE "IDEAL" ARBITRATOR

One "eternal verity" is, however, immediately apparent. Just as there does not exist an ideal arbitration clause suitable for every contract,[6] neither does there exist any arbitrator suitable for every arbitration.

While perhaps also true for purely domestic arbitrations, it is especially evident that the "perfect" arbitrator does not exist in the field of international commercial arbitration given the multiplicity of changing elements (nationalities, languages, situs, applicable law(s), etc.).

A. Selection of Arbitrators by a Party: Some Factors to Take into Account

1. How Many Arbitrators Should There Be?

This question arises because in their arbitral clause the parties may, under the rules of many arbitration systems including the ICC, either decide the point or leave it open (as does the standard ICC Clause). In 1990, 58.3% of the cases initiated before the ICC Court had three-member arbitral tribunals. Regarding the stage at which the decision was made to have an arbitral tribunal consisting of three persons, in 50% of the cases the decision was contained in the arbitral clause itself, in 30% of the cases there was a subsequent agreement to this effect by the parties,

[4] Mustill, *Arbitration: History and Background,* 6 J. INT'L ARB. 48 (1989).

[5] Case 7000 was submitted to the ICC in late 1990. It took 55 years for the first 3500 cases to be submitted to the ICC, this simple statistic being one evidence of the growing importance of international commercial arbitration in a world of expanding international trade and investment.

[6] Bond, *How to Draft an Arbitration Clause (Revisited),* 1 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 14 (1990).

and in the remaining 20% of the cases the decision was made by the ICC Court.

Of the 41.7% of the cases in which a sole arbitrator was decided upon, in only 10% of these cases was the decision contained in the arbitral clause. The parties subsequently agreed to have a sole arbitrator in 44.7% of the cases and the ICC Court itself made this decision in the remaining 45.6% of the cases.

Obviously, the choice of three arbitrators generally permits each party to participate in the constitution of the arbitral tribunal by proposing a co-arbitrator, with all of the attendant advantages and disadvantages. The general consensus seems to be that in cases involving complex questions of law or fact, the deliberations of a panel of arbitrators help assure a more thorough analysis of the issues.

In contrast, the ICC experience indicates that where there is a sole arbitrator, he or she will be selected by a third-party, most often the institution administering the arbitration. Thus, in only 14% of the 1990 cases with a sole arbitrator did the parties themselves reach agreement on the actual person who should be named. It can, therefore, readily be seen that in exchange for the economy and rapidity of a sole arbitrator as compared to a larger arbitral tribunal, the parties in most instances relinquish the opportunity to have any role whatsoever in the selection of the arbitral tribunal. This may help explain why in the past many parties from Eastern Europe and developing countries have been quite insistent that there be three arbitrators, even when this is counterproductive from the point of view of cost. (The explanation for this is given below.)

2. *When Should the Selection of an Arbitrator Be Made?*

Occasionally a desire for absolute certainty leads parties to insert in the arbitration clause contained in their contract the identities of the arbitrator(s). The problems apparent in this approach are obvious: when a dispute actually arises sometime thereafter, the person(s) named in the clause may no longer be independent, available, trusted, or even alive.

Of course, there may still be a few countries in the world where legislation or jurisprudence requires that the arbitrators be named in the arbitral clause. For example, this appears to be the case for domestic Egyptian arbitrations. Some Egyptian defendants in certain arbitrations have argued that the relevant provision of the civil code is also applicable in international arbitrations. This is, apparently, a minority view. The Egyptian Cour de Cassation already decided[7] that the provision did not

[7] Judgment of Apr. 26, 1982, Decision No. 714 of the judicial year 47.

apply in a case where the situs of the arbitration was outside of Egypt. The Court of Appeal of Cairo recently decided along the same lines in a case where the situs of the international arbitration was within Egypt.[8] However, in general it is certainly preferable to avoid naming the arbitral tribunal in the arbitration clause. Indeed, during the six years during which the author has been with the ICC, such a clause has appeared but once or twice.

3. Professional Qualifications

In certain countries, especially those of the common law, a debate over professional qualifications can degenerate into something akin to a gladiator contest. Those with experience in "maritime" or "commodity" arbitration, for example, will point out that non-lawyers can and do handle such arbitrations to the general satisfaction of all concerned.

However, in international commercial arbitrations, where awards must generally set out the reasoning of the arbitral tribunal; where the validity and enforceability of awards, if challenged, are decided upon by judges; and where questions of jurisdiction, applicable law and statutory interpretation must often (and increasingly) be decided upon by the arbitral tribunal, legal training is a minimum requirement and legal practice is preferable.

In ICC arbitrations the latter position, with some notable exceptions, has essentially carried the day in that at least 95% of the arbitrators proposed by the parties themselves are lawyers, professors of law, inhouse counsel, or other legal professionals.

The author can recall one case where the arbitration clause called for a three-person tribunal to be composed of "commercial-men" and each party ended up proposing a lawyer.

4. Nationality

Except for a decreasing number of arbitral institutions with a closed list of arbitrators who have the nationality of the country where the institution is located, parties are generally free to choose an arbitrator of any nationality whatsoever. The ICC does not even have a "list" of arbitrators.[9]

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[8] Hohafazat of Port Said, Suez Canal Authority v. Polaco Holding S.A., Casino Palace Port Said SAE, International Chamber of Commerce.

[9] On occasion one sees a C.V. or other document where a person denominates him or herself as an "ICC Arbitrator". No such qualification in fact exists, as a French Court pointed out several years ago. Tribunal de Grande Instance, Paris (ord. réf.), January 15, 1988, Revue de l'Arbitrage 316, 1988. At most, a person can say that he or she has served as an arbitrator in one or more ICC arbitrations.

The question thus arises whether the co-arbitrator to be proposed should have the nationality of the proposing party, of the country which is the situs of the arbitration, or of the country the law of which is applicable.

While no statistics are yet available, the general impression of the author is that parties from developing countries and Eastern Europe have traditionally placed considerable importance on proposing a co-arbitrator of their own nationality while Western parties place more priority on proposing a co-arbitrator with a particular expertise in the applicable national law, the field of law concerned (construction, high-tech, etc.) or a general expertise in arbitration regardless of nationality. Of course, the arbitrator proposed by the non-Western party may be of equal or greater expertise than his or her Western counterpart. The point is simply that the non-Western party will make greater efforts to find a person with the requisite expertise and the same nationality as that party.

The main reason for this differing approach can well be imagined: the non-Western party often considers that an arbitrator with an intimate knowledge of the legal and economic context within which the party operates and coming from the same social, cultural and linguistic milieu as that party best ensures that the party's position on the issues before the arbitral tribunal is well understood by all of the arbitrators. This would be an entirely legitimate objective, fully consistent with the requirement for independence and will be further discussed below. Interestingly, the former "socialist" countries of Central and Eastern Europe now appear to be increasingly willing to accept a sole arbitrator as opposed to three (see point A (1) above) and this trend may eventually translate into a lessening of the traditional preference to appoint a fellow national as a co-arbitrator.

5. *Age and Health*

Law is one of the blessed professions in which age is considered to impart wisdom. Nonetheless, where an arbitration will obviously be complex and lengthy, a party may wish to try to determine whether the health of a potential co-arbitrator will allow him or her to function efficiently under conditions of stress, travel, etc.

6. *Sex*

Very few arbitrators have been women, but this is no doubt a reflection of what has been the past situation in the legal profession, a situation which is rapidly changing. Apart from a very few special cases (in Saudi Arabia, for example, an arbitrator apparently must be male, Muslim and

of good character, although these requirements appear not to be applicable to arbitrations outside of Saudi Arabia unless the parties have agreed that the procedural rules of Saudi Arabia govern the arbitration), there is no evident reason why any distinction should be made between qualified arbitrators on the basis of gender.

7. *Linguistic Ability*

A formal requirement that a co-arbitrator have particular linguistic skills is exceedingly rare. However, where the co-arbitrator does not speak the agreed language of the arbitration, the proposing party may well end up bearing the costs of translation and/or interpretation. Perhaps more importantly, the co-arbitrator who can converse with the other members of the tribunal in a common language may establish greater rapport with them, a psychological factor which should not be underestimated.

8. *Availability*

The availability of an arbitrator is an essential concern that is often overlooked or ignored by the parties. Many claimants who wish their case to proceed as rapidly as possible will make strenuous efforts to secure a "top" arbitrator yet fail to inquire whether he or she has the time available to permit the case to be brought to a rapid conclusion. Too often we have heard of an arbitral tribunal of three highly sought-after arbitrators who are simply unable to find an available date for a hearing during the next six months or before the next university vacation period.

9. *Independence*

Under the rules of many arbitral institutions, including those of the ICC, an arbitrator must be "independent" of both of the parties. The party which proposes a non-independent arbitrator not only risks having its choice refused confirmation, or challenged and removed, but also runs the risk that even if not removed the non-independent arbitrator will lack credibility with the other co-arbitrator or chairperson of the arbitral tribunal.

The author is firmly convinced that the wisest choice for any party is a co-arbitrator who is sympathetic to the proposing party and who will endeavor to see that this party's position is clearly understood by the arbitral tribunal, while at the same time maintaining the required distance from the proposing party (meaning no discussion of the merits of the case prior to appointment and no unilateral contacts with the party subsequent to appointment unless authorized by the arbitral tribunal)

and an absolute and obvious freedom of mind to find against that party should the facts and the law lead to that conclusion.

B. Selection of Arbitrators by the ICC Court: The Factors to be Taken into Account

While every arbitral institution may have its own rules and procedures, each institution which wishes to have more than a fleeting existence must also endeavor to meet the legitimate expectations of the parties which select it over the national courts or another arbitral institution. The arbitral institutions therefore have a vital interest in protecting their integrity, i.e. their ability to carry out the responsibilities incumbent upon them by virtue of their rules. In addition, the best of the arbitral institutions also recognize a general mission not tied to any specific arbitration case, namely to encourage and promote international arbitration as a means of dispute resolution with advantages not elsewhere available (relative speed and economy, independence and neutrality, confidentiality, etc.) and which promotes the general good by facilitating the international flow of trade and investment.

The two interests coincide with but are not subsumed by the narrower interests of the parties. The arbitral institutions are therefore not only conscious of their responsibility to satisfy as best they can the legitimate expectations of the parties, but that failure to do so places in jeopardy their own reputation and perhaps that of international arbitration as a means of dispute resolution. Under these circumstances, it can safely be said that the ICC Court is keenly aware of the importance that must be attached to the selection of arbitrators in every one of its cases.

Indeed, the hope of the ICC Court in each case is that it will not have to undertake this task at all because the parties will have done it. Consistent with a philosophy that endeavors to combine the safety-net and guarantees of supervised arbitration along with a high degree of party autonomy, the ICC Rules provide that the parties may not only decide the number of arbitrators, but also that the parties may nominate the sole arbitrator (Art. 2 (3)) and the co-arbitrators may nominate the third arbitrator (Art. 2 (4)). ICC practice obviously also permits the parties themselves to nominate the third arbitrator, i.e. the Chairperson of the Arbitral Tribunal. The English practice whereby an "umpire" may be appointed is not authorized by the ICC Rules.

Understandably, however, the ICC Court is often called upon to carry out the duty of selecting the sole arbitrator or chairperson. Thus, of the sole arbitrators appointed in 1990, as has already been mentioned, only 14% were agreed upon by the parties themselves. Of the Chairper-

sons appointed, last year some 30% were named by either the parties themselves or the co-arbitrators. Thus, some 70% of the Chairpersons were appointed by the ICC, almost always through proposals made by the various ICC National Committees around the world. Much more rarely, the arbitration clause calls for direct appointment by, for example, the President of the ICC or the Chairperson of the ICC Court.

When it is the ICC Court in lieu of the parties that must select a sole arbitrator or chairperson of a National Committee, what qualifications are sought by it and the relevant National Committee of the ICC?

Obviously, the general considerations set out above concerning the number of arbitrators, age and health, gender, linguistic ability, availability, and professional qualifications are also relevant for the ICC Court. However, the considerations concerning nationality and independence comprise elements which go beyond what the parties take into account when selecting a co-arbitrator.

1. Objective Neutrality

Objective neutrality is a formal requirement of the ICC Rules. Article 2(6) states that "The sole arbitrator or the chair[person] of the arbitral tribunal shall be chosen from a country other than those of which the parties are nationals."

This requirement (which can be and occasionally is waived by the agreement of both parties) is designed to help instill in the parties the conviction that the arbitral tribunal is neutral and independent. It is this conviction, the ICC believes, that facilitates the decision of so many losing parties to honor voluntarily ICC arbitral awards.

2. Subjective Neutrality

Going from the objective to the subjective, the best international arbitrators must have an open-mindness, a cultural openess and a lack of prejudice, as well as be "internationally minded."[10] Too often one hears complaints from parties, often from Eastern Europe or a developing country, about an arbitrator, no doubt a competent jurist, who is perceived as displaying a combination of arrogance, superiority, contempt and impatience with the party in question.

Even if those perceptions are inaccurate, or a function of hyper-sensitivity, the superior arbitrators will never lose sight of the importance of being perceived as independent and impartial as well as actually being so and make significant efforts to avoid conveying negative impressions.

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[10] Lalive, *supra* note 3.

3. *Managerial Ability*

Today's arbitrations are sufficiently complex and hard-fought to require sole arbitrators and chairpersons who can "manage" the arbitration in every sense of the term.[11] They must be able to inspire and lead the co-arbitrators, tread the very thin line between laxity and undue delay on the one hand and dictatorial, unreasonable demands on the other. They must be able to sort, store, and retrieve what may be mountains of evidence and other information. The brilliant student of law who knows not the world beyond his or her doctoral thesis has no place here.

4. *Competence*

An able lawyer of a neutral nationality who antagonizes no one and is completely open-minded may nonetheless not be fit to be a sole arbitrator or chairperson should he or she not be able to analyze, understand and appreciate the various different national legal systems and the reasons for the differing assumptions, presumptions, expectations and demands of the parties. Such "legal internationalism" is the professional complement to the "subjective neutrality" described above and the arbitrator with this quality will fully understand that one of the reasons why the parties chose arbitration was precisely to avoid having the rigors of the procedural rules of any one legal system applied as though they were before the national courts of the arbitrator's country.

The description could go on, but by now the attentive readers will realize that the "perfect" arbitrator does not exist on this side of heaven. It can be hoped, though, that the above may serve as a check-list whenever the reader has the very heavy responsibility of selecting a co-arbitrator, sole arbitrator or chairperson.

III. Independence of the Arbitrators: Confirmation and Challenge

Of the various qualities to look for when selecting an arbitrator, few constitute requirements in the strict sense of the term (i.e. conditions which if not met would lead the ICC Court to refuse to confirm or appoint a prospective arbitrator or even to remove a sitting arbitrator).

"Independence" is one of the few ICC mandated requirements and continues to be the subject of tremendous interest in both legal literature and actual practice. The ICC Rules and practice in this area will be outlined below.

We first return to the underlying presumption that parties would

[11] Wetter, *The Conduct of the Arbitration*, 2 J. Int'l Arb. 7 (1985).

never agree to arbitration in the first place unless they had confidence that the arbitration system would take every reasonable measure to ensure the independence and neutrality of the arbitral tribunal. The word "reasonable" is stressed for reasons that will be made apparent in the last paragraphs of this paper. This has long been the position of the ICC and it appears that the international arbitration community is swinging decisively to the view that all arbitrators, including those proposed by the parties, should be neutral and independent.[12] (The AAA still maintains certain reservations on this matter.[13]) Thus, an unstated corollary to the dictum with which this paper opened is that "an arbitrator must not only be good, but should appear to be good."

The ICC Rules and practice relative to the constitution of the arbitral tribunal are precisely designed to produce an arbitral tribunal which is "good" both in reality and in the eyes of the parties. This task is especially challenging in ICC arbitration because of the extreme diversity of nationalities, legal systems, and cultures involved in ICC arbitrations. During 1990, for example, the 365 requests for arbitration received (the highest number in the history of the ICC) involved parties from eighty-six different countries and the ICC Court confirmed or appointed arbitrators of forty-nine different nationalities.

A. ICC Rules and Procedures Relative to Independence

In an ICC arbitration, parties may propose a co-arbitrator, sole arbitrator or chairperson of any nationality or profession. However, "[e]very arbitrator appointed or confirmed by the Court must be and remain independent of the parties involved in the arbitration" (ICC Rules, Article (7) paragraph 1).

ICC Rules and practice provide for a number of overlapping procedures aimed at advising the parties and prospective arbitrators of the requirement of independence and enabling the Secretariat and the International Court of Arbitration to fulfill their responsibilities with respect to this requirement. Underlying these rules and practices are three fundamental principles.

First, no one may become an arbitrator without being either confirmed or appointed by the International Court of Arbitration. In general, the ICC Rules utilize the term "confirms" when the ICC Court acts upon an arbitrator nominated by one or more parties and the term "ap-

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12 Werner, *Editorial*, 7 J. INT'L ARB. 5 (1990).

13 R. Coulson, AN AMERICAN CRITIQUE OF THE IBA'S ETHICS FOR INTERNATIONAL ARBITRATION 103 (1987).

points" when the ICC Court acts in regard to an arbitrator not nominated by a party.

Second, regarding the requirement of independence, no distinction is made in the rules between persons nominated by a party and those appointed by the Court. All must be independent.

Third, the parties are automatically notified of any matter disclosed by an arbitrator relative to his or her independence so that the party may comment prior to the Court's decision. Facts so notified may not, after a set period of time, become the basis for a challenge. (Art. 2 (8)).

1. "Independence" and "Impartiality"

What are the standards of independence applied by the Court? What are the responsibilities of the arbitrators as regards their duty of disclosure?

The term "independence" was explicitly added to the ICC Rules as regards co-arbitrators in 1975, and only in the 1980 Internal Rules of the Court was "independence" explicitly required for sole arbitrators and chairpersons.

Just before completion of the review that resulted in the amended ICC Rules in force as of January 1, 1988, the suggestion was made to include the concept of "impartiality" in the rules as a requirement for ICC arbitrators. This proposal was not accepted for several reasons. First, the suggestion was made late in the revision process and to fully examine the meaning and implications of the proposal would have significantly delayed adoption of the amended rules. Second, discussion focused on the more "objective" nature of the concept of "independence" as compared to the "subjective" nature of the concept of "impartiality." Third, no one could offer a satisfactory definition of "impartiality." However, partially in response to this debate, Article 2, paragraph 8, of the ICC Rules now explicitly provides what the Court had always understood, namely that an arbitrator could be challenged "whether for an alleged lack of independence or *otherwise*" (emphasis added).

Thus, the absence of a mention of "impartiality" in the ICC Rules must not be understood as an endorsement of the idea that an arbitrator has the right to be biased so long as he or she is independent. Nor must the absence be understood as implying that the ICC considers that arbitrators nominated by a party are inherently incapable of being "impartial" (however that concept is defined).

2. The Arbitrator's Responsibility of Disclosure Prior to Confirmation/Appointment

If the concept of arbitrator independence is to be a reality upon which the confidence of the parties may legitimately be based rather than a mere theory to be greeted with cynicism, the parties must demand more than blind faith. Most especially, a meaningful procedure must exist whereby prospective arbitrators disclose relevant information to the parties for assessing the independence of the prospective arbitrator concerned.

Article 2 (7) paragraph 2 of the ICC Rules provides that "Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."

Regarding the phrase "in the eyes of the parties," it must not be read as limitative (i.e. as encouraging the potential arbitrator to say, "Well, I would consider that fact X is pertinent to an assessment of my independence, but I doubt the parties would do so and therefore I won't disclose it"). Rather, the phrase is intended to encourage the arbitrator to stretch his or her mind, to disclose facts that he or she might not consider as "calling into question" his or her independence, but which might do so "in the eyes of the parties." In an ICC arbitration, the parties are generally of different nationalities, and therefore at least one party is of a nationality other than that of the prospective arbitrator. In the case of a sole arbitrator or chairperson, usually neither party is of the same nationality. Accordingly, it is especially important that a prospective arbitrator reach beyond a purely national and domestic perspective and make a special effort to consider the facts and circumstances relative to his or her independence as the parties might view and construe them.

This is also desirable because, pursuant to a provision added to the ICC Rules in 1988, a party must raise a challenge within thirty days from the date when the party is informed of the facts on which the challenge is to be based. Thus, it is preferable to disclose as early as possible any matters which might lead a party to question an arbitrator's independence in order to minimize the likelihood of a challenge at a later stage of the arbitral procedure when the consequences are most costly in terms of both time and money, especially should the challenge be sustained.

3. The ICC "Arbitrator's Statement of Independence"

To further the objectives just described, in late 1989 the Bureau of the ICC Court (consisting of the Chairman and seven Vice-Chairmen of

the Court from, respectively, France, Egypt, India, Japan, Mexico, Sweden, Switzerland and the United States) approved a revised text of the "Arbitrator's Statement of Independence" which every ICC arbitrator must fill out.[14]

One element of the new form has aroused some controversy among several arbitrators in Switzerland and Belgium, namely that past or present relationships with the counsel of the parties as well as with the parties themselves should be mentioned if the relationship "might be of such a nature as to call into question [the arbitrator's] independence in the eyes of any of the parties."[15]

One expressed reason for concern is that in a country such as Switzerland or Belgium where the legal community is relatively small and many jurists know or have professional relations with each other, the addition of the word "counsel" to the Statement of Independence can unfairly disqualify well-known attorneys in these countries from ever becoming arbitrators.

A second and broader concern is premised on the proposition that in general lawyer-to-arbitrator relationships should be considered as different than party-to-arbitrator relations in that when they are routine (i.e. not close or lasting or involving the earning of significant professional fees in the context of these relations) they are of such a nature as not to warrant disclosure.

The author believes that for a number of reasons such concerns are unwarranted and/or miss the essential point.

First, there must not be a misunderstanding about the objectives and consequences of the Statement of Independence. The fact of disclosure itself is in no way conclusive as to the independence or lack thereof of the prospective arbitrator. A mention on the Statement of a particular relationship does not mean that the arbitrator concerned automatically lacks independence and cannot be confirmed or appointed. It simply means that while confirming an independent status, the prospective arbitrator has set down points which might, in the eyes of a party, call into question his or her independence. The disclosure thus serves to provide the parties with an opportunity to raise, sooner rather than later, any concerns they might have regarding the prospective arbitrator's independence.

Second, the world of arbitration is growing in both scope and sophistication. Of those Statements of Independence where the arbitrator has called certain facts or circumstances to the attention of the parties, in

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[14] *See* Appendix I.

[15] Hirsch, *Les arbitres peuvent-ils connaître les avocats des parties?*, 1 ASA BULLETIN 7-11 (1990).

over 95% of the cases the parties raise no objections to the arbitrator concerned.

For example, in one recent case a proposed co-arbitrator filed a Statement which contained the following:

> I know well two senior members of the law firm representing the claimants: Dr. X (a fellow examiner at the Law Faculty at the National University) and an Englishman who has now retired out of Singapore. But I have yet to meet Mr. Y who has been handling this case; I have only spoken to him on the phone a few times.
> I also know well a senior lawyer (Mr. Z) representing the respondent.
> Both Singapore and Malaysia are small countries, and it is common for judges and senior lawyers to know each other — some professionally, some socially and some both professionally and socially.

Neither party raised an objection and the co-arbitrator was confirmed.

Such examples are not unusual and illustrate the utility of the revised form of the Statement of Independence, namely that information is brought out as early as possible in the arbitration process and may not be used by a party as a basis for challenging the arbitrator concerned except within the brief period provided for in the Rules (Art. 2 (8)).

The third reason why a proposed arbitrator need not be overly concerned about automatic disqualification should they disclose a relationship with a counsel for one of the parties is that even should a party object to confirmation on the basis of the information disclosed, the ICC Court makes the final decision regarding confirmation. In doing so, it will obviously evaluate carefully the information disclosed and the objections of the party. Should the objections be frivolous or in bad faith, the Court can and will reject them.

The fourth reason why the concerns expressed are not convincing is that should there indeed be a relationship between an arbitrator and a counsel which creates a situation where independence is not only perceived as being lacking but actually is lacking, it would serve neither the interests of the parties nor of the legal community concerned to refuse disclosure of such a relationship on the grounds that a Statement of Independence contained no mention of relationships with counsel for the parties as a factor to be taken into account by the prospective arbitrators. Openness in this regard can only help instill a renewed or confirmed confidence in the parties that, notwithstanding the relatively small legal community of the country concerned, its arbitrators are aware of the possible apprehensions of parties from beyond that country and are ready to meet those apprehensions with full and frank disclosure. This is but another aspect of the "internationally minded" qualification which is so important for arbitrators involved in international commercial arbitration.

Finally, the ICC has no desire to deprive itself of qualified arbitrators for frivolous reasons. Should the new Statement of Independence ever lead to that result, the Statement can and will be modified in an appropriate manner.

IV. The Experience of the ICC

A. Facts and Figures

What standards does the ICC apply when confirming or appointing independent arbitrators? Given the different procedures and consequences involved, are the standards applied by the Court the same when it decides whether or not to confirm an arbitrator at the commencement of an arbitration, as when it decides whether or not to accept a challenge of an arbitrator on the basis of an alleged lack of independence after the arbitral tribunal has been constitued and possibly has proceeded far along in the matter? Has a "case law" developed from decisions by the ICC Court? The following discussion draws upon a 1989 study bearing on these questions.[16]

1. The number of instances in which a party raised a point related to the independence of a prospective arbitrator is rare.

Only in regard to approximately 3% of the arbitrators were matters related to independence raised. Of these, the majority were either not confirmed or withdrew from consideration. Of the remaining persons who were confirmed or appointed, only one had been subsequently challenged during the seven years prior to 1989 and the Court rejected the challenge.

2. More prospective arbitrators have not been confirmed/appointed on the basis of independence-related considerations than have sitting arbitrators been removed due to a challenge based on an alleged lack of independence.

Of the 3% of the prospective arbitrators in regard to whom matters relating to independence were raised, about three-quarters (72%) were not confirmed or appointed by the Court either because they withdrew voluntarily or, in most cases, because the Court did not confirm them. This figure of 72% can be compared to the 10.5% of challenges against sitting arbitrators accepted over the past seven years. (Only seven of sev-

[16] For a lengthier treatment of this subject see Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 Arb. Int'l 300 (1988).

enty-five challenges were accepted by the ICC Court during the past seven years. However, it should be noted that in the year and a half prior to 1990, while only one challenge out of sixteen was accepted, in five of the sixteen cases the challenged arbitrator resigned before the ICC Court could act.)

Does this mean that different, more strict standards are applied by the Court when deciding upon confirmation/appointment as opposed to when deciding upon a challenge? The response is of necessity a nuanced one, for to take the raw data at face value could lead to erroneous conclusions.

First, it is quite likely that the Court's refusals to confirm/appoint prospective arbitrators result in weeding out the more obvious, easier cases of non-independence, leaving the more difficult or dubious cases to the challenge procedure. Second, parties have somewhat less incentive to request the non-confirmation of a prospective arbitrator merely as a delaying tactic at such an early stage before they have a sense of how the arbitral tribunal is leaning. Thus, requests for non-confirmation most often appear to reflect deeply-felt concerns rather than procedural ploys or delaying tactics.

It can also be imagined that the members of the International Court of Arbitration are extremely conscious of the desirability of commencing each arbitration with the greatest possible degree of party confidence in the arbitral tribunal, and the Court may accord more weight to party objections which are obviously not frivolous or in bad faith than would be the case if the same objections were raised in the form of a challenge during the course of an arbitration.

Likewise, in the face of a serious concern raised by a party which might not present a conclusive case of lack of independence on behalf of a prospective arbitrator, the ICC Court, for the reasons stated above, is no doubt less reluctant to have the prospective arbitrator voluntarily withdrawn prior to confirmation than the Court would be to have a challenged arbitrator voluntarily resign in the absence of facts that established a strong likelihood of lack of independence. (Indeed, the ICC Rules now require that the Court explicitly accept an arbitrator's tendered resignation.)

It is well known that there is a difference in the ICC procedures for deciding upon confirmations/appointments and upon challenges. The former are handled by a Committee of the Court while challenges, by virtue of an explicit provision in the Internal Rules, are considered only in the Plenary. (Of course, should there not be unanimity in the Committee the matter is sent to the Plenary. This occurs very rarely.) This

distinction is probably in part due to a recognition that the consequences for the challenged arbitrator and for the parties in terms of time and cost can be far greater if a challenge is upheld than if a prospective arbitrator is not confirmed/appointed.

In sum, the standards of what constitutes a lack of independence do not differ according to the point at which an allegation of a lack of independence is raised; rather, at the confirmation/appointment stage, Court members are more ready to take into consideration not only the relative seriousness of the facts presented regarding the independence of a proposed co-arbitrator, but also the desirability of commencing an arbitration on as solid a footing as possible and of preventing challenges later in the arbitration when the consequences to the parties in terms of lost time and money could be of far greater magnitude.

B. Grounds for Non-Confirmation or Appointment

As with challenges, the Court does not communicate its rationale regarding appointments or confirmations. This is consistent with the administrative, as opposed to jurisdictional, nature of the Court's role. Of course, in virtually every instance the parties and the prospective arbitrator concerned are fully aware of the facts relating to independence which have been placed before the Court. These facts are set out either in the Statement of Independence of the prospective arbitrator or in the request for non-confirmation of a party, and each of these documents would have been notified by the Secretariat to all concerned for comment within a fixed time-period. The ICC Rules do not provide for an exchange of any comments subsequently submitted by the parties or other arbitrators.

Regarding the source of the Court's standards in deciding upon matters of independence, it has correctly been observed that the Court does not act as an institutional appendage of any national court system. At the same time the Court does bear in mind the general mandate of Article 26 of the ICC Rules that the Court of Arbitration shall act in the spirit of the rules and shall make every effort to make sure that the award is enforceable at law. As stated above, the Court members certainly have in mind the desirability of promoting to the greatest extent possible the confidence of the parties in the arbitral tribunal, although such an objective must be balanced against the objective of avoiding unwarranted delays and discouraging dilatory manoeuvres.

Likewise, the ICC Court takes into account in assessing each case whether the particular facts demonstrate a close, substantial, recent and proven relationship between a party and a prospective arbitrator. Great weight is also accorded to the views of the parties. Where, in the face of

a Statement of Independence with reservations, the parties raise no objections to the prospective arbitrator, the Court almost always confirms or appoints the arbitrator. (Of course in every one of these instances the prospective arbitrator will have stated that the disclosed facts do not affect his or her independence and that he or she is, in fact, independent.) Further, in almost each instance where a party has objected to a confirmation of a prospective co-arbitrator based on reservations in the Statement of Independence, the Court has refused confirmation. Thus, the parties' views are not necessarily decisive, but this author's assessment is that the Court is reluctant to be "more royalist than the King" by refusing confirmation of a proposed arbitrator when the non-proposing party has no objections after having an opportunity to weigh the relevant information. In addition, as noted, the Court would be reluctant to confirm someone over objections which are grounded on non-frivolous concerns and do not appear to be made for solely dilatory purposes.

Turning from the general to the more concrete, the most common basis for refusal by the ICC Court to confirm or appoint a prospective arbitrator is a past or present direct professional link between the arbitrator and a party, or between a business associate of the arbitrator and a party or an entity connected to a party. Typical in this regard are prospective arbitrators who as lawyers had recently represented a party in other matters or whose partners had done so, and persons having acted in the past as advisors for a party.

It is essential to take note, however, of the many nuances present in decisions where such links were alleged and/or disclosed. For example, in one case a prospective arbitrator submitted a Statement of Independence with the reservation that another partner in his 800 lawyer firm had acted for a party in an unrelated matter about which the prospective arbitrator knew nothing. The other party to the arbitration did not request non-confirmation and the Court confirmed the arbitrator. The Court has also confirmed as co-arbitrator, in the absence of objection from the other party, a nominee who had provided legal services to a corporation one of whose officers was also an officer of the party proposing the nominee.

In another case, even without an objection raised by the other party, the Court refused to confirm a nominee whose law firm was concurrently acting for the party which had proposed the nominee.

Nominees have been refused confirmation in instances where the nominee had professional ties to a party's counsel. (In one case a prospective arbitrator who was a Q.C. had been retained by defendant's

counsel to plead a matter unrelated to the arbitration and the opposing party objected.)

The ICC Court has not considered that a nominee's having the same nationality as a party constitutes a lack of independence. This point generally, although not always, arises in connection with nominees coming from Eastern Europe when proposed by a party of the same nationality.

The ICC Court bases its decisions in each case on the concrete facts regarding the relationship of the prospective arbitrator and the parties involved and not on sweeping generalizations about the legal, political or social conditions in particular countries.

C. Challenges

Much of what has just been said in regard to confirmation and appointment of arbitrators also pertains to challenges. The standard of what constitutes independence is the same. However, for reasons set out above, the Court will accept a challenge only when the party introducing the challenge has met the burden of demonstrating that the arbitrator has failed to comply with the duty to be independent.[17] Over the past seven years only seven challenges have actually been accepted, generally because of a professional relationship between the arbitrator and the party, or the Counsel of a party. In a few instances the removal of the arbitrator was because of errors in conduct such as where an arbitrator insisted on deciding a case on documents alone although one party had requested a hearing. (See Art. 14 (1) of the ICC Rules.)

The ICC Rules relative to challenges, in effect since January 1, 1988, codify the concept that challenges must be introduced in a timely manner in order to be receivable. Together with the new Statement of Independence which is intended to bring into the light as early as possible most of the likely grounds for challenge, the ICC Court has witnessed a slight decline in the number of challenges over the past two years, reversing what had been an upward trend.

V. CONCLUSIONS

1. Even if a satisfactory definition of the concept of independence were possible, it would be of very limited use to the ICC Court in deciding specific instances of whether or not to confirm or appoint prospective arbitrators.

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[17] This is not a formal definition of a strict legal standard. Clearly, more than mere allegations are required. However, an argument which convincingly raises substantial doubts about the arbitrator's independence might well suffice.

For example, the most obvious fact of a financial interest in a party only offers a general guideline. After all, ownership of shares worth $100 in a company cannot be equated with ownership of shares worth $1 million. And where would shares worth $10,000 fall on the scale? Would it depend on the relative wealth of the prospective arbitrator? Each case requires an appreciation of the relevant facts and no code of ethics, however, detailed, can substitute for such an appreciation.

2. The decisions of the ICC Court on questions of independence should not be used to establish a "case law" on the subject.

Every decision takes into account such unique factors as the specific information available, who provided it and when, the views of the parties, as well as the balance to be drawn among the goals of trying to ensure the confidence of the parties in the procedure, the desire to avoid unwarranted delay and the need to ensure insofar as possible the enforceability of the award.

3. The present ICC system of considering matters related to the independence of arbitrators at the stage of confirmation or appointment as well as the possibility of challenges later in the procedure generally meets the difficulties arising from the broad diversity of participants, counsel and arbitrators involved in ICC arbitrations. One can judge this success from the relative rarity of challenges to arbitrators once confirmed, the continued high rate of voluntary compliance with ICC awards and the paucity of efforts to annul ICC awards based on an alleged lack of independence of arbitrators.

4. Satisfaction with the present ICC system is not complacency. One continues to hear occasional stories of arbitrators whose behavior does not meet standards of independence upon which all could agree.

5. The greatest care should be exercised before indulging in "radical" efforts to ensure the complete independence of every arbitrator. Such efforts might include requiring extremely detailed disclosure statements, appointing all arbitrators directly by an arbitral institution without participation of the parties, or establishing a mandatory and binding code of ethics.

Without going into a discussion of the pros and the cons of such measures, any consideration of them must have as a leitmotif the question of whether the adoption of radical solutions would be in the interests of those whom international arbitration is primarily intended to serve: not the lawyers, or the arbitrators, or the arbitral institutions, but the parties.

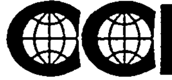
Those public, quasi-public and private entities, as well as individu-

als, from everywhere on the globe, voluntarily agree to international arbitration because it is a system of dispute resolution that provides a means of deciding disputes that is, at least in comparison with litigation before national courts, neutral, confidential, relatively rapid and less expensive, more flexible, and generally final. The confidence of these parties in the fairness and justness of arbitration as a means of dispute resolution is also in part, but only in part, based on their expectation that arbitral tribunals will be composed entirely of independent arbitrators. It is questionable whether parties would be willing to forego many of the other advantages of arbitration as the price to be paid for efforts to ensure the absolute independence of every member of every arbitral tribunal.

This paper noted the importance of an independent arbitrator for a "good" arbitration. Nonetheless, in considering proposals aimed at reaching to the greatest extent possible the laudable objective of the independence of every arbitrator, let us never forget that "The best is the enemy of the good."

APPENDIX I

International Chamber of Commerce
38, Cours Albert 1er, 75008 Paris
Chambre de Commerce Internationale



International Court of Arbitration - Cour Internationale d'Arbitrage

Arbitration Case No. ____________

To: The International Court of Arbitration
International Chamber of Commerce
38 Cours Albert 1er F - 75008 Paris

ARBITRATOR'S STATEMENT OF INDEPENDENCE*

I, the undersigned,

Name ______________________________ First Name ____________________

☐ hereby declare that I accept to serve as arbitrator under the ICC Rules of Arbitration in the instant case.

(If this box is checked, please also check one of the two following boxes. The choice of which box to check will be determined after you have taken into account, inter alia, whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether financial, professional or of another kind and whether the nature of any such relationship is such that disclosure is called for pursuant to the criteria set out below. Any doubt should be resolved in favor of disclosure.

☐ I am independent of each of the parties and intend to remain so; to the best of my knowledge, there are no facts or circumstances, past or present, that need be disclosed because they might be of such nature as to call into question my independence in the eyes of any of the parties.

☐ I am independent of each of the parties and intend to remain so; however, in consideration of Article 2, paragraph 7 of the ICC Rules of Arbitration**, I wish to call your attention to the following facts or circumstances which I hereafter disclose because I consider that they might be of such a nature as to call into question my independence in the eyes of any of the parties. (Use separate sheet if necessary.)

☐ hereby declare that I decline to serve as arbitrator in the subject case. (If you wish to state the reasons for checking this box, please do so.)

Place: ________________ Date: ________________ Signature: ________________

* *Please mark the relevant box or boxes.*

** *Article 2 (7):*

"Every arbitrator appointed or confirmed by the Court must be and remain independent of the parties in the arbitration. Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.

Upon receipt of such information, the Secretary General of the Court shall provide it to the parties in writing and fix a time-limit for any comments from them.

An arbitrator shall immediately disclose in writing to the Secretary General of the Court and the parties any facts or circumstances of a similar nature which may arise between the arbitrator's appointment or confirmation by the Court and the notification of the final award."

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