The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases

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Introduction

1. A diligent, qualified and independent arbitral tribunal is central to effective international arbitration proceedings. The ICC International Court of Arbitration ('Court') sees its roles in connection with arbitrator appointments, confirmations, removals and challenges as critical to the conduct of proceedings under the ICC Rules of Arbitration ('Rules'). Several factors in today's highly diversified world of global commerce can complicate this task.

2. First, cultural and socio-political backgrounds heavily influence one's view of an arbitrator's role, and one's perception of a concept like 'independence'. One need only compare differing standards for arbitrator disclosures on either side of the Atlantic Ocean to realize that arbitral practice on this fundamental issue may never reach consensus, even between the world's most developed economies. Indeed, a consensus may not even be desirable. Looking from north to south, what may appear to a German or Swiss lawyer as a strict but fair arbitral procedural direction may shock their Indonesian or Saudi opponents. The latter may view it as an example of clear and evident bias, unsympathetic to differing notions of time, and warranting a challenge to the chairman, the rejection of which is construed as bias of the arbitral institution itself. Similarly, the extent of ex-parte communication between an arbitrator and the counsel by whom he or she was nominated, which a party from a less developed country considers acceptable, may shock its English opponent.

3. Second, the commercial pressures on global law firms, of which many international arbitrators are partners, add to the difficulties. Parties have come to expect perfection in conflict of interest checks and arbitrators may well be held to have constructive knowledge of all that is known to their hundreds or even thousands of law firm colleagues.[1]

4. Third, the Court is regularly faced with the tension between an individual party's right to nominate any person it chooses as an arbitrator and the Court's duty to assist the parties in securing a diligent, qualified and independent arbitral tribunal.[2] This tension arises not only in connection with arbitrator independence, but also in connection with arbitrator qualifications. Qualifications may be (i) expressed, such as those stipulated in

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* Respectively Secretary General and Deputy Secretary General of the ICC International Court of Arbitration. This article expresses the views of the authors only, which are not necessarily those of the ICC International Court of Arbitration or its Secretariat. Nothing in this article binds the Court or Secretariat. Kind thanks are due to Mr Eammon Atkinson for his assistance in the preparation of this article.

1 The Paris Court of Appeal recently suggested that an arbitrator's actual knowledge of a potential conflict of interest involving his firm was not necessary, and that constructive knowledge should suffice (Paris Court of Appeal, 12 February 2009 (07/22164), *J & P Avax SA* v. *Tecnimont SpA*, application for annulment of an award rendered on 10 December 2007 in ICC case no. 12273).

2 In respect of the latter requirement, see Article 7(1) of the Rules.

an arbitration agreement or (ii) implied, such as the basic expectation that an arbitrator speak the language of the arbitration. Should a party be permitted to nominate an arbitrator who cannot speak one of the possible languages of arbitration?

5. Fourth, a priority is speed and efficiency. How much should an arbitrator have to disclose concerning his or her availability over the future life of the arbitration, or the future life of the arbitrator? And should the Court refuse to confirm an over-booked arbitrator? The Court has sought to address this issue by being much stricter on arbitrator performance, and recent changes in the Court's practices for dealing with slow arbitrators are having a marked impact. But at what point should an arbitrator be removed for want of diligence?

6. Finally, should decisions on matters like challenges and removal of arbitrators be made public, so that consumers of arbitration are better informed on the finer points of what is expected and accepted? There is unquestionably a call for greater transparency in the arbitral process, but the corollary of catering to this concern may be a loss of efficiency.

7. Some of these issues are addressed below in a new analysis[3] of the Court's practice in relation to the selection, appointment, challenge and removal of arbitrators in proceedings conducted under the Rules. After a brief overview of the process for constituting ICC arbitral tribunals, recent examples of contested confirmations and appointments, challenges and replacements will be discussed.

8. Before setting out the examples, it should be recalled that the Court's decisions relating to the appointment, confirmation, challenge or replacement of an arbitrator 'shall not be communicated'.[4] So, while the examples provided below are from real cases, for reasons of confidentiality the identifying details have been removed. The facts may occasionally have been modified slightly to avoid identification of the parties or arbitrators, or in the interests of simplicity. Finally, all Court decisions turn on the entirety of each case's unique facts and circumstances. Thus, while the examples below may provide guidance as to what the Court has decided in the past, they are not necessarily indicators of what it will decide in future cases, especially given that detailed facts are not provided.

1. Constituting the right arbitral tribunal

1.1 Background

9. Articles 7 to 10 of the Rules are concerned with appointing and confirming arbitrators. A notable feature of Articles 8–10 is that they are default provisions, applying where the parties have not agreed on something different. Article 7(6) recognizes this by providing that: 'Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 8, 9 and 10.'

3 This subject has already been treated in the past in the *ICC International Court of Arbitration Bulletin*. See A.M. Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators', ICC ICArb. Bull. 2007 Special Supplement (ICC, 2008) 7; D. Hascher, 'ICC Practice in relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators' (1995) 6:2 ICC ICArb. Bull. 4. The former covers practice under the current (1998) Rules and the latter practice under the previous (1988) Rules. See also S.R. Bond, 'The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration' in *The Arbitral Process and the Independence of Arbitrators*, ICC Publication 472 (ICC, 1991) 9.

4 Article 7(4) of the Rules.

10. Before moving on, a word of explanation should be given about ICC terminology. The Rules distinguish between the *nomination*, *confirmation*, *appointment* and *proposal* of arbitrators.

11. A *nomination* can only be made by one or more of the parties, or by the co-arbitrators where they are empowered to nominate the tribunal chair. Once nominated, an arbitrator must be *confirmed* by the Court or the Secretary General.[5] When one or more parties or the co-arbitrators have failed to nominate an arbitrator, the Court will *appoint* the arbitrator. When the Court appoints an arbitrator, it generally does so upon the *proposal* of one of the ICC's National Committees.[6]

12. The difference between *confirming* and *appointing* an arbitrator therefore depends on how the arbitrator's name was put forward. If the arbitrator was nominated by a party or the co-arbitrators, he or she will be considered for confirmation by the Court or the Secretary General. If the arbitrator was proposed by an ICC National Committee or directly chosen by the Court, he or she will be considered for appointment by the Court.

13. Where possible, the Court will endeavour to uphold the parties' agreements concerning the nomination procedure, even where they may depart from the common norms established by the Rules. For example, the Court recently appointed the chairman of an arbitral tribunal upon the toss of a coin, as requested by the parties. The coin flip took place during a session of the Court and was duly recorded in the minutes.

14. Issues relating to arbitrator independence and other objections to an arbitrator come before the Court mainly in two situations: (i) where a party objects to the confirmation of an arbitrator (Articles 9(1) & 9(2) of the Rules) and (ii) where a party challenges an arbitrator (Article 11 of the Rules). Examples of both are addressed below after dealing with various preliminary matters.

1.2 Number of arbitrators

15. The parties are free to agree on the number of arbitrators. Failing party consensus, the Court will 'appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators'.[7]

16. When deciding on the number of arbitrators, the Court takes into account all the information with which it has been provided about the case, e.g. as contained in the Request for Arbitration, the Answer to the Request (if it has been filed by that stage), the parties' general correspondence and their specific comments on the number of arbitrators.

17. The starting place for the Court's determination is the stance in favour of a sole arbitrator taken in Article 8(2) of the Rules. However, that stance may be reversed by relevant factors such as the amount in dispute, the apparent complexity of the case, and whether or not a State entity is a party to the arbitration.[8]

5 Articles 9(1) and 9(2) of the Rules.

6 Articles 9(3) and 9(6) provide that when the Court is to appoint an arbitrator the appointment is made on the proposal of one of the ICC's National Committees. There are several exceptions provided in Articles 9(4) and 9(6). The role of National Committees is discussed further below.

7 Article 8(2) of the Rules.

8 In 2008, 71 of the Court's 663 cases involved a State or parastatal entity. One of those cases arose from a bilateral investment treaty (BIT). A further two ICC arbitrations arising from BITs were filed in 2009, in addition to two requests for ICC to appoint an arbitrator in *ad hoc* BIT cases.

18. There is no particular amount in dispute above which the Court will, as a matter of principle, decide in favour of three arbitrators. However, subject to all other relevant factors, it is unusual for the Court to decide in favour of three arbitrators where the amount in dispute is below about US$ 5 million, unless a State entity is involved. Likewise, it is unusual for the Court to decide in favour of a sole arbitrator where the amount in dispute exceeds about US$ 30 million.

19. It is rarely easy for the Court to assess the complexity of a case at the outset of the proceedings. A party seeking to rely on the complexity of a dispute in support of its preference regarding the number of arbitrators should therefore specifically identify why the dispute is complex or straightforward; a mere assertion of complexity is usually insufficient.

20. The appointment of a sole arbitrator usually brings significant cost savings and may be more time-effective. For example, meetings and hearing times should be easier to coordinate and decision-making should be accelerated. The process of deliberation, which may necessitate exchanges and debate between members of the arbitral tribunal in order to reach a consensus, is avoided. However, opting for a sole arbitrator means that the outcome of the arbitration will be determined by one person only. This may increase the risk of misunderstandings or errors. Furthermore, the combined knowledge, skills, expertise, cultural awareness and, perhaps, even languages of three arbitrators may prove beneficial. One of the most compelling reasons for preferring three arbitrators is that each side usually gets to nominate one member of the arbitral tribunal.

21. ICC statistics show that when the parties decide on the number of arbitrators, they usually agree to have three. In 2008, a three-member tribunal was appointed in 61% of ICC cases. In 93.5% of those cases, the decision to opt for three arbitrators was made by the parties themselves rather than by the Court. The situation is different when it comes to sole arbitrators. In only 69.4% of the cases heard by sole arbitrators was the decision to opt for a sole arbitrator made by the parties. In the remaining 30.6% of such cases, the decision was made by the Court.

Parties should be careful to record clearly and unequivocally any agreement they may reach on the number of arbitrators. The Court is often confronted with agreements containing apparent inconsistencies—for example, use of the plural 'arbitrators' interchangeably with the singular 'arbitrator'.

1.3 Statement of Acceptance, Availability and Independence

22. Article 7(1) is an important, overriding provision of the Rules. It states: 'Every arbitrator must be and remain independent of the parties involved in the arbitration.' This is complemented by Article 7(2), which requires all prospective arbitrators to 'sign a statement of independence and disclose in writing to the Secretariat 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'.

23. The Court distributes to prospective arbitrators a form entitled 'Statement of Acceptance, Availability and Independence'. The form, which has recently been revised,[9] requires arbitrators to disclose information, not only about their independence, but also about their availability to arbitrate a particular case, and to confirm that they are cognizant of the time limits in the Rules and will respect those time limits. The form provides some guidance on what should be disclosed, which is expanded upon below.

9 The form is reproduced above in the chapter entitled 'ICC Arbitration News'. See also the discussion at paras 31–32 below.

1.4 Disclosures regarding independence

24. Recent experience suggests that full and frank disclosure, resolving any reasonable doubt in favour of transparency, is the Court's preference. Yet, it appears that when some arbitrators are faced with the Statement of Acceptance, Availability and Independence, a state of disclosure paranoia and/or stubbornness sets in. The arbitrator fears that the disclosure will lead to non-confirmation and/or refuses to disclose 'as a matter of principle', or because the information is 'already known to the parties' or 'in the public domain'.

25. Potential arbitrators should not be nervous about full disclosure. They should have confidence in the Court's decision on whether the disclosed fact is significant. Disclosure is likely to avoid the potential embarrassment and delays that could result if facts that have not been disclosed are subsequently uncovered. Moreover, proper disclosure protects an arbitrator by flushing out any challenges at the outset of a case. Undisclosed information may be used by a party at a later stage, when it has a different, covert reason for wanting to get rid of the arbitrator or simply cause a delay. Had the information been disclosed at the outset, the parties would only have 30 days after the appointment or confirmation to file the challenge.

26. The Secretariat spot-checks its electronic database to ascertain whether arbitrators have made proper disclosure about prior or pending ICC arbitrations. The Secretariat has access to all information about an arbitrator's prior roles in ICC arbitrations, whether as counsel or arbitrator, including how the arbitrator was appointed. There have been several recent instances where undisclosed information was discovered by the Secretariat through this process. The Secretariat then requests the arbitrator to amend his or her Statement of Acceptance, Availability and Independence and, if necessary, to make disclosures in any other ongoing proceedings.

1.5 Disclosures regarding availability

27. The rapidity of arbitral proceedings is usually important to the parties. To a large extent, speed is in the hands of the parties and their legal advisors. They can agree to, or take steps towards ensuring, a very fast arbitration if they wish. Arbitrators also play an important role in determining rapidity. First, they can assist the parties in fixing procedures that are rapid and appropriate to the case. Second, arbitrators should ensure that they do not cause delays in the arbitration themselves.

28. There are two principal ways in which arbitrators can delay arbitrations. The first concerns availability for hearings and meetings. It can happen that a busy arbitrator simply does not have a sufficient number of free days available for an oral hearing until far into the future. In the case of a three-member arbitral tribunal, the problem becomes worse because it is necessary to find a time when all three arbitrators (not to mention the parties and their lawyers) are available at the same time. The second way in which arbitrators can delay arbitrations is at the stage of drafting the award. If the arbitrator has too many commitments after the closing of proceedings, he or she may be delayed in finalizing the award.

29. The Court and Secretariat are conscious that these problems arise from time to time and have been taking a number of steps to overcome them. When it comes to the drafting of awards, pressure is placed on slow arbitrators by way of a letter or telephone call from the Secretary General, the Deputy Secretary General or, in extreme cases, the Chairman of the Court. Arbitrators usually react positively to such exhortations, especially bearing in mind that their reputations may be harmed by the delay. The Secretariat and Court members rarely forget the names of tardy arbitrators. Such

arbitrators may also have their fees reduced and, as discussed further below, in extreme cases may be removed by the Court under Article 12(2) of the Rules.

30. Ensuring availability for hearings is less straightforward, both for arbitrators and for the Court. For arbitrators, it can be difficult, if not impossible, to predict the course of an arbitration. Arbitrations can be delayed, suspended, withdrawn, or require acceleration in certain circumstances. When an arbitrator is approached in connection with a new arbitration, he or she is unlikely to have any idea when hearings and meetings will be necessary. Depending on the stage the case has reached when the arbitrator is approached, it could be a matter of weeks, months or even years before a substantial time-commitment is required of him or her. The party approaching the arbitrator may not be in a better position to answer these questions, either.

31. In the eyes of the Secretariat, the Court and ICC arbitration users, there is a need for greater transparency over an arbitrator's current professional commitments from the outset of an arbitration. It was in response to this need that the new Statement of Acceptance, Availability and Independence referred to above was introduced by the Court on 17 August 2009. This form includes a section in which arbitrators are asked to provide limited information about their professional engagements. They are free, and encouraged, to provide any additional information that may help to clarify the statements they make (e.g. the status of any ongoing cases, or an assessment of the hearing time the arbitrator expects to have available in the coming year or so). The Court has been eager to point out that, whilst genuine concerns over availability may cause it not to confirm or appoint an arbitrator, it will endeavour to respect the parties' choices of arbitrators and will not entertain frivolous or unmeritorious objections raised on the basis of information provided on the form. It has also stressed that there is no threshold of pending cases above which an arbitrator would be ineligible to serve.

32. Initial usage of the new form has been revealing. On several occasions, arbitrators have gone beyond the form's minimal requirements by stating the number of days during which they would be available (or unavailable) over the ensuing months. The form has also been welcomed by corporate users and strongly endorsed by the Corporate Counsels International Arbitration Group (CCIAG). Reservations over privacy and confidentiality that were expressed when the form was first introduced have been addressed by a clear indication that any information provided will be treated confidentially and stored in compliance with French data protection law and used only for the purpose of the case for which the arbitrator has been nominated. The Court has indicated that the new form will be kept under review during the coming months to ensure that it fits its intended purpose of encouraging proper reflection by prospective arbitrators and greater transparency for all involved—parties, arbitrators and the institution.

1.6 Disclosure guidelines

33. A number of guidelines exist to assist arbitrators in making appropriate disclosures. Those to which parties most commonly refer in ICC arbitrations are the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines').

34. When briefing the Court on challenges and contested confirmations of arbitrators, the Secretariat usually mentions any article of the IBA Guidelines which somehow contemplates the factual situation alleged. Sometimes the Secretariat states that it does not believe any article of the IBA Guidelines contemplates the situation.

35. These references to the IBA Guidelines in no way bind the Court. When it comes to deciding challenges and contested confirmations, the IBA Guidelines are not particularly

relevant because they relate principally to disclosure. The Secretariat's references to the IBA Guidelines are for information only and to help establish statistics that may be useful to the IBA when revising and monitoring its guidelines.[10]

36. An appendix to this article,[11] prepared by Simon Greenberg and José Ricardo Feris, presents the results of research conducted into references to the IBA Guidelines in ICC cases in which the Court was required to decide on a challenge or a contested confirmation between 1 July 2004 and 1 August 2009. This document shows the frequency with which the various situations set out in the IBA Guidelines have been referred to and reveals situations not covered by those Guidelines.

37. Indeed, guidelines will never be fully comprehensive and those of the IBA are no exception. This is acknowledged by the Guidelines themselves[12] and has been observed by the Court in the course of its decisions on challenges.

38. Another risk resulting from the use of guidelines for the purpose of disclosure is that there is no universal standard of independence. In ICC proceedings, the standard is that required by the Rules as applied by the Court. Additionally, the independence standard has a subjective element, as it depends on the parties' perspective in a particular case.[13]

39. As a related matter, some guidelines are too burdensome and will result in over-disclosure. This is undesirable as it complicates and undermines the efficiency of arbitration and may give rise to unfounded objections. For example, the Court and Secretariat viewed certain aspects of the American Bar Association's draft document entitled 'Disclosure for Arbitrators in Commercial Disputes: A Checklist'[14] as going too far, requiring the disclosure of trivial, distant connections, to the potential detriment of international arbitration. It seems that others shared this view because a sub-committee of the American Bar Association decided in April 2009 that this disclosure checklist would not be adopted or endorsed by the American Bar Association.

2. Confirming and appointing arbitrators

40. In 2008, the Court appointed or confirmed 1,156 arbitrators. Of these, 168 prospective arbitrators made a disclosure in their Statement of Independence. It is relatively unusual for the Court to decide not to confirm a nominated arbitrator. In 2008, this happened on only 24 occasions. A disclosure had been made in the Statement of Independence on 20 of these occasions but not on the remaining four occasions.[15]

2.1 Deciding whether to confirm an arbitrator

41. The procedure for confirming an arbitrator depends on whether he or she has disclosed any facts or circumstances in accordance with Article 7(2) of the Rules. If so,

10 For more about references to the IBA Guidelines, see A.M. Whitesell, *supra* note 4 at 36.

11 See p. 33 below.

12 IBA Guidelines, p 5.

13 Article 7(2) of the Rules provides that a prospective arbitrator must disclose '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'.

14 American Bar Association, 'Draft Disclosures for Arbitrators in Commercial Disputes: A Checklist', available at <www.abanet.org>.

15 In a study covering the period 1998–2006, it was found that 2,424 arbitrators were appointed and a further 5,661 arbitrators were confirmed. Over the same period, 1,055 arbitrators made a disclosure on their Statement of Independence and 925 of these were confirmed despite the disclosure. A further 39 arbitrators were not confirmed over this period, meaning that the total number of arbitrators not confirmed was only 169, whereas 8,085 were appointed or confirmed. See A.M. Whitesell, *supra* note 4 at 12–14.

Article 7(2) provides that: 'The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.'

42. If no party objects to the confirmation, or there is no disclosure, then the arbitrator can be confirmed by the Secretary General, Deputy Secretary General or General Counsel.[16] Where a party objects to the confirmation, or the Secretary General or his delegate considers that the arbitrator should not be confirmed, the Court decides the matter.

43. Article 9(1) of the Rules provides that: 'In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with these Rules.' When deciding whether to confirm an arbitrator, the Court may be faced with the tension between a party's right to nominate whomever it chooses and the interests of ensuring the appointment of a diligent, qualified and independent arbitral tribunal.

44. The Court is sometimes even faced with the tension between party autonomy (i.e. agreement of both parties) and the requirement in Article 7(1) that '[e]very arbitrator must be and remain independent of the parties involved in the arbitration'. In one recent case the respondent, which was a State, nominated an officer of that State as a co-arbitrator. When the claimant questioned the nomination, the State party replied that its nominee held the appropriate office for appointment as an arbitrator by the State. The claimant, which was represented by experienced arbitration counsel, decided not to object to confirmation of the arbitrator, and expressly indicated in writing that it had no objection. Taking into account the claimant's position, the Court decided to confirm the arbitrator.

45. It is relatively rare for the Secretary General, when requested to confirm an arbitrator under Article 9(2) of the Rules, to consider that the arbitrator should not be confirmed, causing the matter to be transferred to the Court. An example occurred in 2009 in relation to a chairman nominated jointly by the co-arbitrators. Neither party objected to confirmation of the chairman when the Secretariat forwarded his curriculum vitae and completed acceptance forms to the parties. However, the Secretary General or his delegate felt uncomfortable confirming the chairman based on his performance in a previous arbitration that was considerably delayed. After being briefed on the individual's prior performance, the Court decided not to confirm him despite the absence of an objection from a party.

46. There are numerous grounds upon which the Court can decide not to confirm an arbitrator, some of which are categorized below.

2.1.1 Lack of independence

47. The most common reason for not confirming an arbitrator is that he or she does not satisfy the independence requirement laid down in Article 7 of the Rules. In 2008, the Court decided not to confirm an arbitrator on 24 occasions, 21 of which were due to an objection raised by a party over the independence of the prospective arbitrator. Some examples are provided below.

16 Article 9(2) of the Rules and Article 5(1) of Appendix II to the Rules.

2.1.2 Large law firms

48. On four instances in 2008, the Court refused to confirm a prospective arbitrator because a partner in the arbitrator's law firm was in some way connected with the dispute or with a party to the dispute. For example, in a recent arbitration, the Court decided not to confirm a co-arbitrator nominated by the respondents, in light of the fact that a different office of the arbitrator's law firm was representing affiliates of the respondents in an unrelated dispute.

2.1.3 Repeat arbitrators

49. In 2008, confirmation was withheld in a case where the prospective arbitrator had acted as an arbitrator in five previous cases in which the claimant had been a party. In three of the previous cases the arbitrator had been nominated by the claimant and in the remaining two he had been nominated as chairman of the tribunal by the co-arbitrators. The Court took account of factors such as the existence of only a small pool of experienced arbitrators in the claimant's country but also the fact that the arbitrator was sitting as arbitrator in a pending dispute involving the claimant.

2.1.4 Prior or existing professional relationship with a party

50. In 2008, there were nine instances of confirmation being refused by the Court where the arbitrator had a prior or existing relationship with the nominating party (other than having been nominated in previous arbitrations, as dealt with above). One example was a case in which the co-arbitrator nominated by the respondent was simultaneously representing the respondent as counsel in a different dispute involving the same parties.

2.1.5 Professional and personal relationships with a party's counsel

51. In 2008, there were three instances in which an arbitrator's professional relationship with a counsel caused the Court to withhold confirmation. The most common scenario here is where the arbitrator is acting as co-counsel with one of the counsel in another matter.[17]

52. Prospective arbitrators are occasionally not confirmed due to a personal relationship with a counsel. In 2008, there were two such instances. In one case, the prospective co-arbitrator was a close friend of the respondent's counsel. In another case, the co-arbitrator nominated by the respondent was the wife of one of the partners in the law firm acting for the respondent in the arbitration.

2.1.6 Prior involvement in the dispute

53. In 2008, there was one instance of an arbitrator who had previously been involved in the dispute not being confirmed. The co-arbitrator nominated by the respondent had previously been engaged to represent it in relation to the same dispute. The respondent subsequently changed law firms for the purpose of representation and nominated its former counsel as a co-arbitrator.

2.1.7 Lack of skills / qualifications

54. Confirmation is sometimes withheld for this reason when the parties' arbitration agreement requires the arbitrator to have specific skills or qualifications. In a recent case, the co-arbitrator nominated by the claimant was not confirmed when the respondent objected that she lacked the language skills and experience required by the arbitration

17 As noted in the Appendix, this situation is a notable omission from the IBA Guidelines.

agreement. The arbitration agreement required the arbitrators to have specific experience and to be fluent in English as well as a specified Asian language.

2.1.8 Language issues

55. In 2008, around 75% of ICC arbitrations were conducted in English, 7% in French, 5% in Spanish, 4% in German, and 2% in Portuguese.[18] It seems trite to observe that all arbitrators should be fluent in the language(s) of the arbitration. Difficulties arise, however, when the language has yet to be determined when the arbitral tribunal is constituted. Ideally, all prospective arbitrators should speak all of the potential languages in which the arbitration might be conducted. But this is not always practicable or possible. For example, the mere fact that a party argues in favour of a particular language as the (or a) language of the arbitration should not be sufficient to require all arbitrators to be fluent in that language, particularly if it is not a widely spoken language. When considering objections based on language skills, the Court considers all elements in the file pointing towards the language in question (e.g. contract, documentation, correspondence).

56. It occasionally happens that the co-arbitrators nominated by the parties do not speak a common language. For example, in one case where language remained undetermined, the claimant contended that the language should be English and nominated an arbitrator who spoke only German and English. The respondent alleged that the language should be French and nominated an arbitrator who spoke only French and Arabic. The dispute involved documents in English, French and German. The Court decided to confirm both co-arbitrators and appointed a chairperson fluent in English, French and German. After the tribunal had been constituted, the proceedings were conducted simultaneously in English and French. However, the two co-arbitrators were not able to communicate with each other directly as they did not speak a common language.

57. In another case, the Court decided not to confirm an arbitrator who was not fluent in English, which the parties had already chosen as the language of the arbitration. The nominating party was not prepared to cover the costs of an interpreter and translator, which the prospective arbitrator would have required in order to fulfil his mandate properly.

2.2 Appointing arbitrators

58. As noted above, a distinction is made in the ICC system between the *confirmation* and the *appointment* of an arbitrator. This section covers appointments and hence situations in which the prospective arbitrator has been found by the Court or an ICC National Committee as opposed to having been nominated by one or more parties or by the co-arbitrators.

59. Under Article 9(3) of the Rules, when the Court is required to appoint a sole arbitrator or the chair of an arbitral tribunal, it ordinarily does so upon the proposal of an ICC National Committee. ICC has some ninety National Committees around the globe. In addition to their many other activities as an essential part of the world business organisation, National Committees can provide an invaluable service to the Court in identifying new and appropriately qualified arbitrators.

18 This is based on the language of the awards notified in 2008. Awards were also issued in Italian, Polish, Turkish, Russian, Greek, Arabic, Czech, Serbian and Hungarian. Two awards were bilingual: one drafted in English and Italian and the other in English and Chinese (Mandarin). The English/Chinese award was contained in a single document, with each paragraph appearing first in English and then in Mandarin.

60. For each appointment, Article 9(3) requires the Court to select the National Committee 'it considers to be appropriate'. The Secretariat usually makes a recommendation to the Court about which National Committee might be appropriate based on the circumstances of the case. The most common factors the Court considers are the nationalities of the parties, their counsel and the other arbitrators, the applicable law, the nature and complexity of the dispute, the languages involved and the location of the place of arbitration. The peculiarities of individual National Committees are also considered. Experience shows that some National Committees are better placed than others to act quickly and/or to propose arbitrators with certain desired qualities or capabilities. There are certain National Committees whose performance the Court has found to be unsatisfactory for various reasons, including the transparency of their internal selection process, the quality and appropriateness of the candidates proposed, and the speed with which proposals are made.

61. It can happen that, due to the circumstances of or the qualifications required in, a case, the Court will have a certain person in mind when it decides to seek a proposal from a given National Committee. The Secretariat will suggest that person to the National Committee when informing it of the Court's decision to invite that National Committee to make a proposal. However, National Committees are independent and remain free to propose whomever they wish. It will then be up to the Court to decide whether or not to accept the proposal.

62. A National Committee will sometimes propose a candidate whom the Court considers as unsuitable. In this case, the candidate will be rejected. The Court may request another proposal or alternatively ask a different National Committee to propose a candidate.[19]

63. Under the Rules as they presently stand, the Court is not at liberty to select arbitrators directly when appointing sole arbitrators and tribunal chairs. Article 9(3) requires the appointment of a sole arbitrator or a chair to be made upon proposal of a National Committee. The only exception is that provided in Article 9(4), which allows the Court to 'choose the sole arbitrator or the chairman of the arbitral tribunal from a country where there is no National Committee, provided that neither of the parties objects within the time limit fixed by the Court'.

64. The situation is slightly different when the Court is appointing a co-arbitrator on behalf of a party that has failed to nominate one. If the Court does not accept a National Committee's proposal, or if the National Committee fails to make a proposal within the time limit fixed by the Court, the Court is free to appoint directly any arbitrator it considers appropriate.[20]

65. Under the revision of the Rules currently in progress, it is likely—and certainly desirable—that Article 9(3) will be modified so as to provide the Court with greater flexibility to make direct appointments whilst retaining the strengths and benefits provided by the National Committee system.

66. When deciding whether to appoint an arbitrator, the Court must have regard to Article 9(1) of the Rules, set out above.[21] The considerations taken into account by the Court when deciding whether to confirm arbitrators are also applicable in deciding whether to appoint arbitrators. The Court considers, in particular, the arbitrator's experience, qualifications, language abilities, and overall suitability for the case.

19 Article 9(3) of the Rules.

20 Article 9(6) of the Rules.

21 See para. 43 above.

67. If an arbitrator under consideration for appointment has not made a disclosure in his or her Statement of Independence, the arbitrator's identity is not revealed to the parties prior to the appointment. If, however, the arbitrator has made a disclosure, the relevant facts will be sent to the parties for comments. The Court applies a much stricter standard of independence when appointing an arbitrator itself than when confirming an arbitrator nominated by one or more parties or by the co-arbitrators. However, arbitrators who make a minor disclosure are nonetheless appointed and therefore not prevented from being proposed by a National Committee on account of such disclosure.[22]

3. Challenge, removal and replacement of arbitrators

68. Article 11 of the Rules deals with challenges to arbitrators. It outlines the grounds on which a challenge may be made and the process of submitting a challenge. Article 12 is concerned with the removal and replacement of arbitrators. Each is addressed in turn.

3.1 Challenging an arbitrator

69. Article 11(1) provides that a party may challenge an arbitrator 'whether for an alleged lack of independence or otherwise'. In 2008, 44 challenges were submitted to the Court. Only one was accepted.[23]

70. Article 11(1) requires a challenge to 'be made by the submission to the Secretariat of a written statement specifying the facts and circumstance on which the challenge is based'. First and foremost, the challenging party needs to be clear that it is submitting a challenge. Occasionally, a party complains to the Secretariat about an arbitrator without making it clear that the complaint is intended to be a challenge. When this occurs, the Secretariat asks the party to clarify in writing whether it is making a challenge.

71. Upon receiving a challenge, the Secretariat requests comments from the arbitrator concerned, the other parties and the other members of the arbitral tribunal. They are invited to comment 'within a suitable period of time',[24] which is usually around ten days, although this will depend on the circumstances. The comments will be circulated to all parties and arbitrators and additional comments may be called for.

72. After receiving comments, the Secretariat drafts a written memorandum (internally called an 'agenda') to brief the Court at its next monthly Plenary Session. The agenda outlines the challenge submission and the comments that have been received. All relevant correspondence will be attached for the Court's information. The Secretariat does not make recommendations regarding the outcome of challenges, but rather summarizes the facts, the parties' arguments, and the reasons for and against accepting or rejecting the challenge. It may also trawl its database of previous decisions to inform the Court about similar challenges decided by the Court in the past. A member of the

22 The Court's practice has in this sense evolved slightly since the comment by A.M. Whitesell, *supra* note 4 at 12 and footnote 14, that '[t]he Court will not normally accept a qualified Statement of Independence from an arbitrator proposed by a National Committee' save in 'exceptional circumstances where rare and specific expertise was required'.

23 Over the ten years 1999–2008 there were 316 challenges, only 21 of which were accepted. Over that same period a total of 9,605 arbitrators were appointed or confirmed. It is important to recall that *challenges* must be distinguished from *non-confirmation of newly nominated arbitrators*. The latter, which undoubtedly serves to reduce the number of accepted challenges in ICC arbitration, was dealt with above. Finally, the number of challenges may be affected by the fact that some challenged arbitrators resign before the challenge is decided by the Court.

24 Article 11(3) of the Rules.

Court is assigned to drafting a report, which will contain a recommendation as to the outcome.

73. The Court examines the admissibility of a challenge before assessing its merits.

3.1.1 Admissibility

74. A challenge will be admissible if it is sent by a party to the Secretariat either 'within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator', or 'within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification'.[25]

75. In 2008, of the 44 challenges submitted to the Court, 38 were admissible, four were partially admissible[26] and two were inadmissible. The two inadmissible challenges were filed outside the time limit set in Article 11(2).

76. The admissibility of a challenge is usually quite straightforward, but on rare occasions there may be a dispute over the moment at which the challenging party became aware of the relevant facts supporting its challenge. The Rules do not specify who bears the burden of proving the admissibility (or non-admissibility) of a challenge. If there is serious doubt over admissibility, the Court might well decide to deal with the merits of the challenge.

77. A challenge may be grounded on an alleged 'lack of independence' or on circumstances falling within the expression 'or otherwise' in Article 11(1). Examples are provided below.

3.1.2 Lack of independence

78. Challenges are usually submitted for an alleged lack of independence.

(a) Relationship with a party's counsel

79. In 2008, the relationship between the arbitrator and the counsel of one of the parties was the most common ground for challenges based on independence. It was the basis for seven challenges during 2008 and the reason for the only challenge that was accepted during that year.

80. The circumstances of the challenge that was accepted were as follows. The respondent retained new counsel in the early stages of the proceedings. The claimant requested the co-arbitrator nominated by the respondent to disclose his professional relationship with the respondent's new counsel. The co-arbitrator disclosed that he was acting as co-counsel with the new counsel in an unrelated dispute. The co-arbitrator remained formally listed as an authorized counsel in the other dispute even though he did not have an active role in it. The claimant making the challenge also alleged that the arbitrator had participated in two earlier arbitrations with the new counsel, which had not been disclosed. It contended that this proved there was a long-standing professional association and that the arbitrator's failure to disclose the full extent of the relationship increased its suspicion. The Court accepted the challenge.

25 Article 11(2) of the Rules.

26 A challenge is partially admissible where it is made on grounds, at least one of which is admissible and one inadmissible.

81. A similar challenge was accepted in early 2009. The challenge was made against the chairman of the arbitral tribunal, who had been appointed by the Court. The chairman did not disclose anything in his Statement of Independence, but soon after his appointment the counsel to one of the parties revealed that he had acted as co-counsel with the chairman in an unrelated arbitration. Although that other arbitration had recently settled, the file was not yet closed, so it was conceivable that the two individuals could have further work to do together in that case. When the chairman was challenged by the opposing party, the Court decided to accept the challenge.

(b) Relationship with a party

82. In 2008, the relationship between an arbitrator and a party was another frequent reason for making a challenge based on independence. This reason was alleged in five challenges. Three concerned an arbitrator who had previously acted as an arbitrator in a related or unrelated dispute involving one of the parties. The other two concerned an arbitrator who had previously acted for a party, or an affiliate of a party, in an unrelated matter. None of these challenges was accepted by the Court.

(c) Arbitrator's conduct or directions

83. In 2008, 21 challenges were made on the basis of the arbitrator's alleged improper or unfair conduct of the proceedings. Such an allegation is usually made in support of a contention that the arbitrator (usually the chairman or a sole arbitrator) is not independent.

84. In a recent case, the respondent challenged the chairman of the arbitral tribunal for issuing a procedural order prematurely, in which it was decided that the claimant's new claims would be admitted before the respondent had submitted its comments on the claimant's request to introduce new claims. The respondent contended that by deciding to admit the claimant's new claims, the chairman had created a more favourable situation for the claimant, thus evidencing his lack of independence. Additionally, the respondent alleged that the chairman's procedural order breached due process, as the time allowed for the respondent to comment on the claimant's new claims was shorter than that given to the claimant to comment on the respondent's counterclaim. After being informed of the challenge, the chairman of the arbitral tribunal amended the procedural directions to rectify the perceived inequality in the treatment of the parties. The Court rejected the challenge.

85. In another challenge recently rejected by the Court, the respondents challenged the entire arbitral tribunal because it had requested the claimants' counsel to book accommodation for the arbitral tribunal. The accommodation was to be at the same venue as where the hearing was to be held and the claimants' counsel were to stay.

86. The Court has rarely upheld challenges based on procedural decisions or directions issued by arbitrators, except where the arbitrator's conduct was so manifestly improper as to raise concerns over due process.

(d) Racism

87. In 2008, two challenges were based on allegations that the arbitrator was racist. In one of these, the respondent's allegation was directed at the chairman on the basis of his conduct as a lawyer in an unrelated dispute some twenty years earlier. The chairman was at that time the State attorney in his country and acted exclusively for his government in important matters before the courts. He defended his government in litigation commenced by indigenous citizens alleging that newly introduced legislation restricted the operation of the State's cultural heritage laws. The respondent based its challenge

on a verbal exchange between the chairman and a judge, during which, according to the respondent, the chairman argued that the State's constitution did not prevent it from enacting laws which would affect the rights of a certain race more than others. The respondent alleged that this created a perception of unconscious racism. The Court rejected the challenge.

(e) Other grounds relating to independence

88. The remaining challenges in 2008 were based on a variety of circumstances. Two challenges were made due to a conflict concerning a relative of an arbitrator or a party. In another challenge, it was contended that the arbitrator had already expressed views on the issue under dispute. Three challenges were based on the activities of the arbitrators' colleagues, employed by the same law firm. In three other challenges it was alleged that the arbitrators had an unrelated personal or professional conflict with one of the parties' representatives. One challenge was based on the arbitrator's membership of the same association as one of the party's counsel. Another challenge was made due to an arbitrator's relationship with a witness. The Court rejected all of these challenges.

3.1.3 'Or otherwise'

89. The expression 'or otherwise' in Article 11(1) allows a party to challenge an arbitrator for reasons other than an alleged lack of independence. Challenges have been made on this basis where the arbitral tribunal was not properly constituted in accordance with the Rules or the parties' arbitration agreement.

90. Article 11(1) has also been used to challenge an arbitrator allegedly unauthorized to act as such under the law of the place of arbitration. In a recent decision, the respondents challenged an arbitrator on slightly different grounds, alleging that the arbitrator was not authorized to act because the arbitration law of the country whose substantive law governed the merits of the dispute required any arbitrator to be registered as a legal practitioner in that country. The arbitrator was not registered as such in that country. The challenge was rejected.

91. A further example is a challenge made in 2008 on the grounds that the Court had appointed the same arbitral tribunal for two closely related, parallel arbitrations, despite an objection from one of the parties. The challenge was rejected. The Court took into account the fact that it had already considered the issue of appointing the same arbitral tribunal at the time when it decided to do so

92. A party recently challenged an arbitrator on several grounds, one of which was that the arbitrator had allegedly usurped a university qualification. The Court rejected the challenge.

93. These cases illustrate the broad application of Article 11(1). It is worth noting that, in recent years, the Court has not accepted any challenges based on grounds other than those related to independence.

3.1.4 Dilatory tactics

94. The procedure for challenging arbitrators under the Rules is sometimes misused by parties in an endeavour to create delays. One might suspect that this was the intention of a respondent that filed 24 challenges in a recent case, 14 against the chairman and 10 against the claimant's nominated co-arbitrator. All were rejected.

95. In cases where the Secretariat, guided by the Secretary General and the Deputy Secretary General, suspects that the grounds for a challenge are frivolous or highly

unlikely to succeed, the challenge may be examined at one of the Court's weekly Committee Sessions rather than waiting for the next monthly Plenary Session, so as to ensure that it is dealt with as swiftly as possible. A Court member attending the Committee Session is asked to report and make a recommendation on the challenge. The Committee Session may decide to reject the challenge or, if it has a doubt, refer the decision to the next monthly Plenary Session.

96. One should not infer from the low success rate of challenge applications that the Court is predisposed to decide in favour of arbitrators. The low success rate reflects rather the fact that many arbitrators will not accept an appointment if they are aware of grounds that could be considered as affecting their independence in the eyes of the parties. The low success rate is also due to the pre-appointment and disclosure provisions in the Rules. These provisions are designed to ensure that objections are flushed out and dealt with early, thereby avoiding subsequent interruptions due to challenges.

97. The Court has to weigh many considerations when it decides on challenges. Cases are rarely clear-cut and invariably contain many shades of grey. Although, when handling challenges, the Secretariat systematically looks at prior cases of a similar kind that the Court may have decided, the peculiarities of each case mean that a precedent-based system is not practicable. The Court remains free to determine where the line should be drawn in each case, and the combined experience of its members and the Secretariat staff ensures that it is strongly positioned to make this decision.

98. Despite the breadth of the Court's experience, there have nonetheless been times when a State court has disagreed with the Court's decision on a challenge. In 2009, the Paris Court of Appeal set aside an ICC award on the ground that the arbitral tribunal had been improperly constituted due to the chairman's lack of independence. During the arbitration, the chairman had been challenged by the claimant due to the relationship between his law firm and the respondent. This challenge was rejected by the Court but formed the basis of the Court of Appeal's subsequent decision to set aside the award.[27] This decision has in its turn been appealed to the French Court of Cassation.

3.2 Removing and replacing arbitrators

99. Article 12 of the Rules sets forth the procedure for replacing an arbitrator. The grounds upon which a replacement may be made are listed, in Article 12(1), as death, agreement between the parties, or the acceptance of a challenge or a resignation. Article 12(2) adds that replacements may also be made by the Court on its own initiative.

3.2.1 Death, party agreement, resignation

100. The death of an arbitrator is not unknown, especially in jurisdictions where parties prefer to appoint elderly arbitrators, presumably due to their experience. In one case in late 2007, both of the co-arbitrators in a case passed away within the space of a few weeks and had to be replaced.

101. One might expect that where all parties agree on the replacement of an arbitrator, that arbitrator would step down. However, this did not happen in one case in 2008. The parties agreed that the co-arbitrator nominated by the claimant should be replaced because he was unable to work in the language of the arbitration without the assistance of translators and interpreters, despite what was stated in his curriculum vitae. The

27 Paris Court of Appeal, 12 February 2009 (07/22164), application for annulment of an award rendered on 10 December 2007 in ICC case no. 12273, *J & P Avax SA* v. *Tecnimont SpA*.

arbitrator, who was from a developed Western European country, refused to recognize the parties' agreement to replace him, arguing that the Secretariat of the Court should provide translations and interpretation. He also argued that if he were removed, he would be entitled to damages covering his fees until the end of the arbitration. Pursuant to Article 12(1), the Court took note of the parties' agreement and replaced the arbitrator with another arbitrator subsequently nominated by the claimant.

102. Resignations occur for various reasons. In 2008, there were 19 resignations, all of which were accepted by the Court. Over the past 10 years, a total of 208 resignations have been tendered, and only six of these have been rejected.

103. A resignation may be rejected where an arbitrator offers to resign after having been challenged. The arbitrator's wish to resign does not necessarily mean that he or she believes the challenge will be accepted. The arbitrator may simply not want to be the subject of a challenge or may not wish to remain involved in a case where a party files what the arbitrator considers to be a mischievous or aggressive challenge. In two recent examples of this kind, the Court refused to accept the resignation. In the first, it appeared that the sole arbitrator tendered his resignation under pressure caused by the respondent's conduct in the proceedings and the challenge it had filed. In the second, the arbitrator tendered his resignation owing to attacks on his integrity by the claimant. In both instances, the Court considered that resignation would be unhelpful to the subsequent conduct of the case and, by refusing to accept the resignations, reaffirmed its confidence in the arbitrators. When the Secretariat considers that the Court might decide to reject a resignation, it may call the arbitrator to establish whether he or she would remain committed to the case if the Court were indeed to do so.

104. Six of the resignations tendered in 2008 were provoked by conflicts of interest. Most were unfortunately caused by new activities undertaken by the arbitrator's law firm. For example, the chairman of the arbitral tribunal in a recent case resigned after a partner of his law firm based in another office began acting for an entity belonging to the claimant's group of companies.

105. In another case in 2008, the chairman—who was an engineer—resigned because the dispute became more legally complex than at first anticipated, requiring the skills of a lawyer. In another case, the entire arbitral tribunal felt that it was appropriate to resign after its award on jurisdiction was set aside by a court at the place of arbitration. In another case, an entire arbitral tribunal resigned when the case it was hearing was consolidated with another case being heard by a different arbitral tribunal.

106. Finally, again in 2008, a chairman resigned a few days after the Secretariat notified him of the Court's decision to remove him under Article 12(2) of the Rules.

3.2.2 Replacement on the Court's initiative

107. Article 12(2) is an important provision. It provides that an arbitrator will be replaced 'on the Court's own initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits'.[28] This article allows the Court to pursue one of its essential functions—monitoring and policing the conduct of arbitrators. It is important to note that the Court may replace an arbitrator only after the arbitrator concerned, the parties and the other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time.[29]

28 Article 12(2) of the Rules.

29 Article 12(3) of the Rules.

108. The most common reason for initiating replacement proceedings is when the arbitrator is causing unacceptable delays, is not responding to correspondence from the Secretariat and/or the parties, or is not conducting the arbitration in accordance with the Rules.

109. In the past 10 years the Court has removed and replaced 20 arbitrators under Article 12(2), seven of which were in the last three years. In a recent case, the members of the arbitral tribunal were having difficulty operating together due to disagreements between them, which caused serious delays in the completion of a majority award in accordance with the Rules. The Court replaced the chairman of the arbitral tribunal. With a strong, fresh chairman, the case quickly moved back on track.

110. There were two cases in 2008 in which replacement proceedings were commenced against a sole arbitrator, who tendered his resignation before the Court could make its decision under Article 12(2). In one of those cases, the reason for the initiation of replacement proceedings was that the arbitrator was not available for a hearing at any of the times requested by the parties. One of the parties informed the Secretariat of this problem and the Court decided to initiate replacement proceedings. The sole arbitrator immediately resigned. In the other case, the sole arbitrator had little previous experience of acting as an ICC arbitrator. This was reflected in the way he managed—or, rather, failed to manage—the matter. There was doubt over whether he verified that his correspondence reached the intended addressees and whether messages left with his assistant reached him. Furthermore, his statements on jurisdiction in the draft Terms of Reference suggested prejudgment of the issue. The sole arbitrator resigned after the commencement of replacement proceedings. In a recent case, replacement proceedings were commenced against an arbitrator sitting in two unrelated cases because he failed to deliver the award in both cases despite the fact that some 12 months had elapsed since the parties' last submissions and notwithstanding numerous promises to the Secretariat that he would complete the awards.

111. There was also a case where the Court decided to initiate replacement proceedings against the co-arbitrator nominated by the respondent after he twice refused to attend hearings at the last minute, appearing to give priority to his other professional activities. The situation caused delays and additional costs for the parties and other members of the arbitral tribunal. The Court decided to initiate replacement proceedings, whereupon the respondent agreed with the claimant's proposal that the arbitrator be replaced by agreement of the parties pursuant to Article 12(1) of the Rules.

112. The replacement of an arbitrator pursuant to Article 12(2) is a last resort. However, the Court will not hesitate to use this provision where the integrity (including speed) of an ICC arbitration is at risk. Whenever an arbitrator is replaced or removed, the Court takes into account the circumstances of the replacement when fixing the arbitrator's fees.

3.2.3 Replacing an arbitrator who has been removed or has resigned

113. If a vacancy arises in an arbitral tribunal, for whatever reason, the question arises as to how it should be filled. Article 12(4) of the Rules provides: 'When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process.' This means that the Court can appoint the new arbitrator directly, instead of following the procedure in Article 9 or any other procedure under which the arbitrator was nominated or appointed.

114. In practice, the Court usually follows the original nominating process. For example, if the arbitrator who has been removed was initially nominated by the claimant, the claimant would be invited to nominate a replacement. In some cases the Court will

directly appoint the arbitrator. This might occur, for example, where there is some urgency in reconstituting the arbitral tribunal or where the Court considers that the nominating party would nominate an inappropriate arbitrator so as to delay or frustrate the arbitration.

115. Finally, Article 12(5) provides that when an arbitrator has been removed or resigns, and after consulting the remaining arbitrators and the parties, 'the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration'.

4. Should challenge decisions be published?

116. The Court, like most arbitral institutions, neither publishes nor gives reasons for decisions on challenges and non-confirmations. Article 7(4) of the Rules states: 'The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated.'

117. To keep users informed about the Court's practices, ICC periodically publishes general summaries of challenge decisions, such as the present article and others like it.[30] These draw together a number of decisions and discuss grounds for challenges thematically, without giving detailed reasons for individual Court decisions.

118. In recent years there has been some debate in the arbitration community about whether challenge decisions should be published. In May 2006, the London Court of International Arbitration (LCIA) decided to publish abstracts of certain of its challenge decisions, although few, if any, have been published so far. The catalyst for this was a paper presented by Geoff Nicholas and Constantine Partasides, the published version of which is entitled 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish'.[31]

119. There have been suggestions that ICC should also publish the Court's decisions on challenges. These suggestions have been and will continue to be considered seriously. Arbitration practice evolves continuously and it is the responsibility of ICC, as a leading arbitral institution, systematically to assess its practices in the light of this evolution. The trend is undoubtedly towards greater transparency in all aspects of commercial life.

120. There are, however, a number of reasons why caution should be exercised before making a radical change to any of the Court's practices. Not the least is the influence that any change would have on arbitral practice generally, because the Court is the world's busiest and best known international arbitral institution. It also has the broadest geographical reach and embraces the widest range of industry sectors. Any significant change to the Court's practice will surely impact upon the practice of international arbitration globally.

121. There are also practical reasons why caution should be exercised before deciding to publish challenge decisions. As noted above, in 2008 alone the Court decided 44 challenges. From 1999 to 2008 the Court decided a total of 316 challenges. These figures should be contrasted with those of the LCIA. In the thirteen years between early 1996 and May 2009, only 24 challenges were referred to the LCIA Court.[32] Therefore, the

30 See e.g. A.M. Whitesell, *supra* note 4; D. Hascher, *supra* note 4; S.R. Bond, *supra* note 4.

31 G. Nicholas & C. Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' (2007) 23:1 *Arbitration International* 1.

32 This figure was kindly provided upon request to the LCIA.

issues and obstacles facing the Court when it comes to publishing decisions are slightly different from those facing the LCIA.

122. Moreover, as also pointed out above, the Court generally considers challenges at a Plenary Session. Each Plenary Session is attended by approximately 35 to 45 of the Court's 125 members from 86 countries. The Secretariat's agenda outlines the relevant facts, the parties' arguments, the arbitrators' comments and any relevant previous decisions of the Court. A Court member prepares a written report on the challenge and recommends a decision to the Court. During the Plenary Session, Court members engage in an open debate in order to decide the challenge. Whilst many points of view may be expressed during the discussion, a consensus is almost always reached on the outcome of the challenge, although not always on the reasons. Occasionally a vote is taken.

123. As explained by former Secretary General Anne Marie Whitesell, this system 'allows a decision to be taken by a highly diverse representation of legal systems and cultures without requiring agreement to be reached on the reasons for that decision'.[33] In other words, while the Court has developed an effective mechanism for obtaining agreement on the decision itself from 35–45 Court members from diverse legal and cultural backgrounds, it would be a very different matter to expect them to agree on the reasons.

124. In order to give reasons, the Court would need to consider delegating the power to decide challenges to a smaller sub-committee, or developing another process to decide challenges. Again, in Anne Marie Whitesell's words: 'Due to the extremely international nature of ICC cases, resorting to a sub-committee would be unfortunate, since limiting the number of persons involved in the decision-making process would not allow the same wealth and breadth of input from all parts of the world, which is fundamental to the international neutrality of the ICC system and a hallmark of the Court.'[34] Thus, while delegating challenge decisions to a sub-committee might be a logical step if the giving of reasons is regarded as a priority, the valuable elements of the decision-making process described by Anne Marie Whitesell might well be sacrificed.

125. Another problem is that of costs. Reasoned decisions are invariably more costly to produce, in terms of both time and the resources of the Court and the Secretariat. The Court would have to consider whether its users are prepared to pay these extra costs. One possibility might be to charge a special fee to the party bringing the challenge. Yet, if the challenging party were to refuse to pay, the other side might have to pay in its stead in order to ensure that the challenge is dealt with quickly and efficiently by the Court and prevent it from being raised in subsequent court proceedings jeopardizing the enforceability of the award. In any event, regardless of who pays initially, there would be a net increase in the overall cost of arbitration that ultimately has to be met by one or more of the parties.

126. A further consideration is time. Preparing reasons would delay the notification of decisions. ICC already has a heavy caseload and must ensure that the conditions under which it operates are conducive to efficiency. In a case that was recently closed, the claimant has raised 24 challenges—14 against the chairman and 10 against the co-arbitrator nominated by the respondent. If the Court had to make reasoned decisions for each challenge, this could cause considerable delays to the proceedings and only increase the dilatory effect of raising a challenge.

127. Furthermore, it is possible that communicating the reasons for decisions on challenges could increase the chances of their being contested in State courts.

33 A.M.Whitesell, *supra* note 4 at 39.

34 *Ibid.*

A dissatisfied party will seek every possible opportunity to attack the reasons themselves. This would result in further delays and jeopardize the enforceability of awards. As far as possible, international arbitration must exist independently of domestic courts.

128. One of the arguments made in favour of publishing reasons is that this would create a body of precedent, instructive to parties, lawyers and arbitrators when assessing the likely success of future challenges. However, it seems to us that the value, in terms of precedent, to be gained from publishing reasons is minimal because each challenge turns upon a very specific set of facts. Geoff Nicholas and Constantine Partasides respond that this is 'surely not a reason not to make challenge guidance available, but rather a caution as to how such guidance should be used once available'.[35] ICC could indeed specify in the Rules that challenge decisions are not to be considered as binding precedents. However, if reasoned decisions are published, lawyers will undoubtedly attempt to rely upon them as a form of precedent. And their very existence would add significantly to the time and cost spent by parties and their lawyers preparing challenges. The Court has already received requests from parties wishing to plead challenges orally.

129. It has also been asked whether publishing challenge decisions would not cause an increase in the number of challenges. The publication of reasons would certainly not reduce the number of challenges made to cause delays and disruption. As for the number of legitimate challenges, this could well increase if more is known about what is an acceptable standard of independence. Whilst an increase in the number of legitimate challenges is not a bad thing in itself if it could strengthen users' confidence in arbitration, any move that might undermine the efficiency of arbitration must be considered very carefully.

130. In sum, the perceived benefits of publishing challenge decisions need to be balanced against the inconvenience, cost and risks involved in doing so. ICC's view so far has been that the benefit identified by various commentators can be achieved in other ways, such as regularly publishing appropriately detailed summaries of decisions on challenges, without having to deal with the risk and practical inconvenience of full publication.

35 G. Nicholas & C. Partasides, *supra* note 31 at 18.