Chapter 4, Part II: Commentary on the ICC Rules, Article 13 [Appointment and confirmation of the arbitrators]

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(★)

(1) **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 the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).**

(2) **The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.**

(3) **Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.**

(4) **The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:**

(a) **one or more of the parties is a state or claims to be a state entity; or**

(b) **the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or**

(c) **the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.**

(5) **The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.**

I. Purpose of the Provision

The selection of arbitrators is a key step in arbitral proceedings; the arbitration is only as good as its tribunal. When appointing members of a tribunal, the ICC Court can guarantee a certain standard regarding the arbitrator's qualifications and neutrality. However, the ICC Court has little influence on the selection of arbitrators nominated by the parties or co-arbitrators. Some level of control on the selection process of arbitrators is exercised through the ICC Court's confirmation of each arbitrator by the Secretary General or the Court itself prior to the examination of a nominees' Statement of Independence. Art. 13 of the ICC Rules establishes the requirements for and procedure of confirmation and appointment by the ICC Court or Secretary General.

Article 13 maintains the key components of Art. 9 of the 1998 Rules regarding the appointment process of the tribunal, but enlarges the Court's possibility to make appointments without reference to

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national committees.[1]

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Contrary to Art. 9 of the 1998 ICC Rules, Art. 13(2) does not differentiate between the appointment processes by the Court, depending on whether a sole arbitrator, president or co-arbitrator is to be appointed.

Article 9(4) of the 1998 ICC Rules on direct appointment is now included in Art. 13(4)(b) (with a minor modification) as one of several scenarios in which a direct appointment by the Court is possible.

The provision of Art. 9(6) of the 1998 Rules (appointment by the Court of a co-arbitrator for a failing party) is no longer a stand-alone provision as it is now covered by Art. 13(2) ICC Rules.

Article 13(4) not only refers to National Committees that can be called upon by the Court for making proposals for prospective arbitrators, but introduces the notion *Group of the ICC* in order to take into account the special situation of territories where no National Committee could be established, such as in the case of Hong Kong, Macao, Chinese Taipei and Palestine.[2]

II. Appointment and Confirmation of the Arbitrators: General Rule (Article 13(1))

A. "Appointment" and "Confirmation"

Although the parties are free to nominate arbitrators, the ICC Court imposes certain conditions regarding the constitution of the tribunal. First, every nominee must be confirmed or appointed by the Secretary General or the ICC Court. This allows the ICC Court to guarantee the required independence, neutrality, impartiality, ability and availability of the tribunal. This procedure maintains a minimum and consistent standard in ICC arbitral tribunals.

The ICC Court "appoints" an arbitrator if the selection of the nominee is effected by the Institution under Art. 13(3) and (4) of the ICC Rules. All other prospective arbitrators (i.e., those nominated by the parties, co-arbitrators or third parties) must be "confirmed" by the Secretary General or the ICC Court (see Art. 13(2) ICC Rules).[3] Pursuant to Art. 11(4), the decision of the Court as to the appointment and confirmation is final. This also applies to the decision of the Secretary General. The only remedy for a party that is not satisfied with the decision of the ICC is to file a challenge pursuant to Art. 14. If unsuccessful, in the case of arbitrations seated in Switzerland, a request for annulment of the subsequent award can be made provided the party establishes that the arbitral tribunal was not "properly constituted" pursuant to Art. 190(2)a PILS.[4]

With the confirmation and appointment of the arbitrator, the contractual relationship between the arbitrator and the parties on one side and the arbitrator and institution on the other is concluded. In Switzerland, failing a choice of law by the parties, the law applicable to the contract between the arbitrator and the parties is the law at the seat of arbitration.[5]

In the year 2010, the ICC Court confirmed or appointed a total of 1'331 arbitrators. Out of this number, 226 acted as sole arbitrators, 738 as co-arbitrators and 367 as president of arbitral tribunals with three members.[6] With regard to the nationality of the arbitrators, in 2010, Swiss arbitrators continued to uphold their traditional leadership position: 13,52% of all 1'331 arbitrators confirmed or appointed page "735" by the ICC Court (i.e., 180 in total) came from Switzerland. More specifically, 26 sole arbitrators, 72 co-arbitrators and 82 chairpersons.[7]

B. Requirements for the "Appointment" or "Confirmation"

The ICC Court's competence to verify the "availability and ability to conduct the arbitration" applies to all nominees. The verification of the "availability" and the "ability" is of course difficult to ensure. The ICC Court bases its decision on the statement of acceptance, availability, impartiality and independence without making any further inquiries. The Court occasionally decides not to confirm an arbitrator when, although no party has objected, it has important information about the arbitrator's poor performance in previous or ongoing proceedings.[8] When the appointment is made by the ICC Court, it must also take into account the arbitrator's nationality and country of residence. A major requirement is of course the arbitrator's independence and impartiality.[9]

1. Ability to Conduct the Proceedings under the Rules

Complaints of parties regarding the arbitrators' “ability” to conduct the proceedings may relate to the arbitrator's legal training or capacity to conduct the proceedings in the language of the arbitration.

If the language of the arbitration has been agreed in the arbitration clause, the ability test is straightforward. However, in many cases, at the appointment and confirmation stage, the required language skills may not yet be established because the arbitration clause does not specify the language of the proceedings and several languages are used in the contractual relationship. In one case, the ICC Court refused the confirmation of a party-nominated co-arbitrator who only had passive knowledge of the language that the opposing party requested as the language of the proceedings.(10)

When taking the decision on whether or not to confirm a nominee, the ICC Court must not prejudge the decision on the language of the arbitration because it lies within the competence of the arbitral tribunal (Art. 20 of the ICC Rules).(11) In cases where the parties have not agreed on the language of the arbitration and, theoretically, several languages could be applied, the ICC Court should not *per se* refuse the confirmation of a nomination on the basis of language skills, particularly if none of the parties raised this as an objection to the confirmation. The parties might agree on a third language or on the appointment of a translator.(12) Furthermore, each party always has the ability to challenge an arbitrator within 30 days from receipt of the notification of the appointment or confirmation (Art. 14(2) ICC Rules). Therefore, there is no need for a premature decision by the ICC Court that endangers the parties' right to participate in the constitution of the arbitral tribunal.

The ability test of course should not provide the possibility of delaying proceedings with abusive arguments. Unless an express agreement by the parties exists, there is no basis whatsoever to refuse the confirmation of an arbitrator on the basis that s/he does not speak the language of the country of the applicable law or does not have legal training in this law.(13)

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2. Availability of the Arbitrator

Since August 2009, prospective arbitrators must not confirm their acceptance and independence, but also their availability.(14) In that regard, the prospective arbitrators must indicate the number of cases in which they are currently involved as sole arbitrator, president, co-arbitrator or counsel before arbitral tribunals and/or state Courts. This should give the parties the possibility to object to those nominees who do not dispose of sufficient time.(15) In the authors' opinion, the ICC Court should not refuse the confirmation of a nominee simply because s/he is involved in a significant number of cases, particularly where the parties jointly appoint the nominee as co-arbitrator or president.(16) However, this information may be used by the Court when considering a request for replacement of an arbitrator by both parties under Art. 15(1) ICC Rules, based on the argument that the arbitrator lacks availability, even though the parties may have been aware of this fact at the time of his or her confirmation or appointment.

3. Arbitrator's Residence and Nationality

With regard to the residence and nationality of arbitrators, see the below commentary on Art. 13(5) ICC Rules. This provision, however, does not apply to co-arbitrators or to arbitrators confirmed by the Court.

III. Confirmation of Arbitrators by the Secretary General or the Court (Article 13(2))

The ICC Court holds its session once a week. In order to avoid unnecessary delay in constituting the tribunal, the Secretary General confirms co-arbitrators who have been nominated by the parties or all other arbitrators jointly nominated by the parties, co-arbitrators or third persons (pursuant to the parties' agreement in that regard). The confirmation by the Secretary General can only be made under the condition that the nominees have not disclosed any facts or circumstances that might call into question the arbitrator's independence in the eyes of the parties or any (objective) circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality pursuant to Art. 11(2) of the ICC Rules. If

such circumstances were disclosed, but neither party objected to the confirmation (and the Secretary General is convinced of the arbitrator's independence and impartiality), the Secretary General can exceptionally proceed with the confirmation process. Otherwise, the (non)confirmation must be made by the ICC Court pursuant to Art. 13(3) of the ICC Rules.

Although not expressly provided in the ICC Rules, if one of the parties files any other objections that do not relate to the arbitrator's independence or impartiality such as the lack of ability or required qualifications, the Secretary General will also submit the confirmation to the ICC Court.(17) The Secretary page "737" General will also submit the case to the Court if neither of the parties files any objections to a candidate jointly nominated by the co-arbitrators but the Secretary General has doubts regarding the candidate's qualifications.(18) However, this case must remain exceptional.

As opposed to the practice under the 1998 Rules, the Secretary General would likely confirm arbitrators under this provision even if one of the parties files jurisdictional objections under Art. 6(3) of the ICC Rules, unless the Secretary General refers the matter to the Court for its decision pursuant to Art. 6(4). In such instance, the confirmation will be made by the ICC Court, after having decided whether the arbitration shall proceed. The same is true if, in a multi-party arbitration or in the case of a joinder, the appointment must follow the rules contained in Art. 12(8).

The ICC Rules are silent as to what should happen in the event that the ICC Court refuses the confirmation of a nominee. In practice, the ICC Court (or the Secretariat upon invitation by the Court) usually grants the nominating party a time limit (usually not more than fifteen days) to nominate another candidate.(19)

IV. Appointment of Arbitrators by the ICC Court upon Proposal by an ICC National Committee (Article 13(3))

The ICC Court will be called upon to appoint the arbitrators under Art. 13(3) if the parties cannot agree on a sole arbitrator or if the parties (or the co-arbitrators or any third person agreed upon by the parties) do not reach an agreement regarding the selection of the president. Further, this provision applies if one party fails to nominate a co-arbitrator or, in a multi-party scenario and in the case of a joinder, the parties cannot agree on a joint nomination and are unable to agree on a method for the constitution of the tribunal (see Art. 12(2)-(8)).

As a general rule, the ICC Rules provide that the ICC Court must rely on one of its National Committees or Groups of the ICC to make a proposal for the appointment. Therefore, appointment by the ICC Court is generally a two-step process: the ICC Court first decides on the National Committee (or Group) that it considers “appropriate” and then the Secretariat contacts the selected National Committee or Group to submit the proposed nominee to a second Court session for appointment. Usually, the Secretariat requests the National Committees or Group to propose at least three names. The ICC Rules, subject to the provision of Art. 13(5), do not provide that the proposed prospective arbitrators should have the nationality of the country in which the National Committee is located, although this is the rule in practice.(20) The National Committee makes a pre-selection and is typically requested to propose only those candidates that submit an unqualified declaration of independence and impartiality.(21) The Secretariat will then select the most appropriate nominee and submit the nominee for appointment by the ICC Court. The parties to the arbitration are not informed of the choice of the National Committee or Group until the Court has appointed the sole arbitrator or president.(22) However the Court's practice in that regard has slightly changed in the past years. It was a long-standing practice of the Court not to appoint candidates proposed by a National Committee who filed a qualified statement of independence. According to the new practice, if the candidate makes a minor disclosure, the candidate's CV and statement of independence is sent to the parties for comment prior to the appointment by the Court.(23)

In exceptional circumstances, the Secretariat contacts several National Committees for proposals before the ICC Court takes the final decision as to which Committee should be invited to make a formal proposal.

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When deciding on the “appropriate” National Committee or Group, the ICC Court takes into account the nationality of the parties, the

language of the proceedings and the applicable law. Contrary to Art. 9(6) of the 1998 ICC Rules, the revised Art. 13(3) no longer states that in the event of an appointment of a co-arbitrator, the Court must seek a proposal from the National Committee of the country of the failing party's nationality, although in most cases, this should be, in the authors' view, the "appropriate National Committee". For the choice of the National Committee when appointing a sole arbitrator or the president, see in detail Art. 13(5).

In Switzerland, the proposals are made by the ICC Swiss Commission of Arbitration, whose Secretariat is run by *economiesuisse* (which in turn runs ICC Switzerland).(24)

The appointment procedure contained in Art. 13 allows the Institution to better choose the ideal candidate for each case. The local National Committee or Group (which exists in almost every country around the world in which arbitration is used as a means of resolving business disputes) can certainly better judge the qualifications (and availabilities) of the prospective arbitrator than the counsel in the Paris head office. However, in the past, this system allowed for some protectionism, which the Paris head office steadily sought to avoid by inviting the National Committees to diversify the names of their candidates and in particular to give young (but experienced) arbitration practitioners the opportunity to act as arbitrators.

The ICC Court rarely rejects the proposal made by a National Committee. Similarly, a National Committee rarely fails to make a proposal. If either situation should happen, under Art. 13(3), "the Court may repeat its request, request a proposal from another National Committee or Group that it considers appropriate, or appoint directly any person whom it regards as suitable". The last option, i.e., the direct appointment by the ICC Court, was only possible when appointing a co-arbitrator under Art. 9(6) of the 1998 ICC Rules or, when appointing a sole arbitrator or president, the Court decided to choose a person from a country where no National Committee existed. The enlarged option of direct appointment under the above-described circumstances falls under the specific situations of possible direct appointments listed under the 2012 ICC Rules, which will be discussed in the following section.

V. Direct Appointment of the Arbitrators by the ICC Court without Recourse to an ICC National Committee (Article 13(3)-(4))

Article 13(3)-(4) lists four specific situations in which the Court may appoint arbitrators without following the general rule of Art. 13(3), which provides for the appointment of arbitrators by the ICC upon proposal of a National Committee or Group of the ICC.(25)

As mentioned above, the Court may "appoint directly any person whom it regards as suitable" if the National Committee that was invited to make a proposal does not come up with a suitable proposal, or fails to make the requested proposal within the time limit fixed by the Court and the Court decides not to repeat its request to that National Committee or to request another Committee to make a proposal (Art. 13(3), last sentence). This provision deals with the occasional problems faced by the Court if the respective National Committee does not come up with an acceptable proposal, whether because of the selection process or criteria applied.(26) Therefore, the Court will be able to appoint a citizen or resident of a country with a National Committee that is not able to put forth suitable names, without relying on the proposals of that National Committee. When it becomes "notorious" that the National Committee is not in a position to make suitable proposals, the Court, upon recommendation of its President, has the option to make a direct appointment without first asking the respective National Committee to make a proposal (see Art. 13(4) c).

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Furthermore, if appropriate, the Court may appoint an arbitrator from a country or territory where there is no National Committee or Group (Art. 13(4)(b)). In light of the increasing number of National Committees or Groups, the relevance of this provision is rather minor. Direct appointment under such circumstances was already possible for the appointment of a sole arbitrator or president of the tribunal under Art. 9(4) 1998 ICC Rules. However, under Art. 9(4) 1998 ICC Rules, the parties had the possibility to object to the direct appointment. Under the 2012 Rules, the parties' objections are limited to a possible challenge pursuant to Art. 14(2) of the ICC Rules.

Third, the Court may also make a direct appointment, "if one or more of the parties is a state or claims to be a state entity" (Art. 13(4)(a)).

This provision is destined to promote investment arbitration under the ICC Rules. In this context, States had expressed concerns that National Committees lacked the required neutrality since their membership is composed of leading companies and business associations in their respective countries.(27)

Finally, as mentioned, the Court can make a direct appointment if "the President [of the ICC Court] certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate" (Art. 13(4)(c), explanation in brackets added). This implies that in such circumstances, the Court may proceed with a direct appointment without first asking a suggestion from a National Committee pursuant to Art. 13(3). The Rules are silent as to when such circumstances exist. Apparently this provision was added in order to allow a direct appointment in cases where it is "notorious that a specific National Committee is not able to make suitable suggestions"(28) or where one of the parties is or claims to be an international organization.(29) The new provision is meant to improve the quality of the arbitrators appointed by the Court and motivate National Committees to make excellent proposals in a short time limit and will thus avoid a negative certification by the President of the Court under Art. 13(4)(c).(30)

VI. Nationalities and Residence of Arbitrators (Article 13(5))

The parties are free to nominate the co-arbitrators, sole arbitrator and president of their choice and are not bound by any rules of nationality in that regard.(31) Therefore, this provision only applies if the ICC Court is called upon to appoint the sole arbitrator or president pursuant to Art. 12 of the ICC Rules, insofar as the parties (or the person(s) in charge for the nomination pursuant to the procedure agreed upon by the parties) cannot agree on the selection of a nominee.

If the ICC Court must appoint a co-arbitrator on behalf of a party that has failed to do so, no express provision regarding nationality exists. Under the 1998 ICC Rules, Art. 9(6) provided that in this case the appointment shall be made "upon a proposal of the National Committee of the country of which that party is national". Although this rule was not maintained under the 2012 Rules, in most cases the National Committee of the country of which the party is a national will be the "appropriate National Committee", as required under Art. 13(3) of the 2012 ICC Rules. However, the fact that the express rule was not maintained gives the Court greater flexibility. If no National Committee exists in the country of which the failing party is a national, the Court is free to appoint a person of its choice (either by reference to a National Committee under Art. 13(3) or by way of direct appointment under Art. 13(4)(b)), whereby the cultural and legal background of the party who failed to make a nomination typically will continue to influence the ICC Court's decision.

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Under Art. 13(5), the sole arbitrators and presidents to be appointed by the ICC Court must have a different nationality than the parties.(32) Art. 13(1) ICC Rules provides in addition that the ICC Court, when appointing an arbitrator, must not only take into account the "nationality" of the prospective arbitrator, but also his or her "residence and other relationships with the countries of which the parties or the other arbitrators are nationals". Therefore, in the past, the ICC Court avoided appointing an arbitrator as president or sole arbitrator who was merely a resident of the country of one of the parties. The ICC Court also avoids appointing arbitrators from the country of one of the parties' mother companies.(33) The place of residence is also taken into consideration for reasons of time and costs. In particular, in smaller cases, the Court will choose arbitrators close to the place of arbitration in order to avoid travel costs.(34)

When deciding on a National Committee, the ICC Court also takes into account other factors such as the applicable law, place of arbitration, amount in dispute and nationalities of the co-arbitrators, which is not expressly mentioned in Art. 13(5) ICC Rules. With regard to the latter, a party who wants to avoid having a national of a certain country be appointed as president could influence the ICC Court's decision by nominating a national of that country as co-arbitrator.(35)

In exceptional circumstances, under Art. 13(5), the ICC Court can appoint a sole arbitrator or president that has the same nationality as one of the parties. Such circumstances exist if all parties share the same nationality or the parties have nominated co-arbitrators from one of the parties' countries.(36) This might be an indication that, mainly for cost reasons, the parties want to have the president

come from the same country, particularly if the place of arbitration corresponds to this country and the applicable law of this country applies to the merits of the case.(37) Pursuant to Art. 13(5), the parties do not have to give their "agreement", but must be invited to provide any objections within a certain time period fixed by the ICC Court. The Rules do not say whether the parties must be invited to comment before or after the appointment is made. Practically speaking, the ICC Court usually appoints the arbitrators under the condition that the parties would not provide any objections within five days upon receipt of the notification of the appointment.(38)

The ICC Court also avoids appointing a president with the same nationality as one of the co-arbitrators.(39) However, for cost reasons, an exception to this rule may be justifiable. Although the ICC Rules do not provide any formal possibility to object to the appointment in such case, the ICC Court could apply Art. 13(5) by analogy. In any event, the challenge provisions of Art. 14(2) apply.

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1 This was the case under Art. 9(6) 1998 ICC Rules when the Court had to appoint a co-arbitrator on behalf of a party and the Court did not accept the proposal made by the National Committee of the country of which the failing party was a national, or if that country had no National Committee. Also, the Court had the possibility, under Art. 9(4) 1998 Rules, to choose the sole arbitrator or the president from a country where there is no National Committee.

2 Fry/Greenberg/Mazza, para. 3-521; Voser, *ASA Bull. 2011*, p. 801.

3 With regard to the 1998 ICC Rules, see Fry/Greenberg, *ICC Arb. Bull. 2009/2*, pp. 20-22.

4 In Switzerland, no recourse to a judicial authority is available against the ICC's decision on confirmation or appointment. Only subsequent awards rendered by a tribunal which were not properly constituted can be set aside. See in detail the commentary under Art. 11(5) above.

5 See Peter/Besson, para. 56 at Art 179; Bühler, *Swiss Rules*, para. 21 at Art. 5. Upon conclusion of the agreement between the arbitrator and the party, the arbitrator's right to resign is limited (see Art. 15(1) ICC Rules). Regarding the arbitrators' right to resign under Swiss law, see BGE 117 Ia 166 para. 6c; and Berger, *ASA Bull. 2002*, pp. 5-25 and Bucher, *ASA Bull. 2002*, pp. 413-426.

6 Cf. ICC 2010 Statistical Report, *ICC Arb. Bull. 2011/1*, p. 11.

7 Cf. ICC 2010 Statistical Report, *ICC Arb. Bull. 2011/1*, p 12.

8 Fry/Greenberg/Mazza, para. 3-492.

9 See in detail the commentary on Art. 11 above. The list of factors in Article 13(1) is not exhaustive and the Court may take into account any other factors it considers relevant (see Fry/Greenberg/Mazza, para. 3-494).

10 ICC Case No. 11241 (filed in 2001, unpublished). In this case, a party from Cuba brought an action against a party from ex-Yugoslavia. The contract, which did not provide for the language of the arbitration, was drafted in Spanish. During the on-going contractual relationship the parties communicated both in Spanish and in English. The party who nominated the arbitrator requested English as the language of the proceedings, the other party who was opposed to the confirmation of the nominee requested Spanish. See also Fry/Greenberg/Mazza (para. 3-509) who remind that the "Court will not usually confirm an arbitrator who does not speak the agreed language of the arbitration".

11 Art. 16 of the 1998 ICC Rules.

12 Bühler/Webster, para. 16-29; Castineira/Petsche *ICC Arb. Bull. 2006/1*, p. 33.

13 See the case described by Derains/Schwartz, p. 160. In this case the ICC decided to confirm a co-arbitrator despite the objections of one of the parties who had complained that the nominee held no degree in the applicable German law. Under Swiss law, the parties may at any time, whether in advance or after the dispute has arisen, directly agree on certain qualifications for the arbitrators, such as language skills and legal training (Peter/Besson, para. 7 at Art. 180). If an arbitrator does not satisfy one criterion, s/he may be challenged on the grounds referred to in Art. 180(1)(a) of PILS. If the parties have expressly agreed on these qualifications and the ICC does not accept the challenge on these grounds pursuant to Art. 14(1) ICC Rules, the award could be set aside pursuant to Art. 190(2)(a) PILS.

14 The ICC-form used until December 2011 was entitled "ICC

Arbitrator Statement of Acceptance, Availability & Independence". On 1 January 2012, a new version of the form was released. It now incorporates the term impartiality and includes some small changes relating to the disclosure of an arbitrator's availability (see Fry/Greenberg/Mazza, para. 3-378).

15 When the requirement for availability was introduced it was not clear to what extent the Court would take into account the declaration on availability when deciding on the nominee's confirmation. See Fry/Simon, *ICC Arb. Bull. 2009/2*, pp. 18-22. However, the Court apparently may decide not to confirm or appoint an arbitrator where there are "genuine concerns over availability". Between mid-2009, when the new Statement form was first introduced, and the end of 2011, the Court decided not to confirm three arbitrators on the basis of information relating to availability provided in their Statement (see Fry/Greenberg/Mazza, para. 3-382).

16 See also Reiner/Jahnel, p. 53. Under Swiss law, however, the parties may agree that the availability of an arbitrator may be a necessary qualification under Art. 180(1)(a) PILS, which must be respected by the ICC when appointing a tribunal. It is doubtful whether such agreement would be upheld, since it would be difficult to establish that a tribunal is insufficiently available. The ICC Court has not fixed a maximum number of pending cases in excess of which an arbitrator is automatically considered as being ineligible to serve (see Fry/Greenberg/Mazza, para. 3-382).

17 Fry/Greenberg/Mazza, para. 3-517.

18 See the example mentioned by Fry/Greenberg/Mazza, para. 3-518.

19 Fry/Greenberg/Mazza, para. 3-513.

20 At the launching event of the 2012 ICC Rules, the Chairman of the ICC Court, upon request of the author, confirmed that a National Committee is free to suggest prospective arbitrators who have a different nationality than the country of the National Committee. This was recently confirmed by Fry/Greenberg/Mazza, para. 3-526.

21 In exceptional circumstances, the Court appoints arbitrators who have submitted a qualified Statement of Independence that did not give rise to any justified objections: see above, Art. 11(2).

22 See Fry/Simon, *ICC Arb. Bull. 2009/2*, p. 22-23, referring to the 1998 ICC Rules.

23 Fry/Greenberg/Mazza, para. 3-533.

24 For more information on ICC Switzerland and the ICC Swiss Commission of Arbitration see: www.icc-switzerland.ch.

25 In the event of direct appointments, the suitable candidates will be chosen directly by the Court or suggested by the Secretariat (see Fry/Greenberg/Mazza, para. 3-545).

26 Voser, *ASA Bull. 2011*, pp. 783-796, 800.

27 Voser, *ASA Bull. 2011*, pp. 800-801., with reference to the recommendations issued by the ICC Task Force on "Arbitration Involving States or State Entities", established by the ICC Commission on Arbitration.

28 Voser, *ASA Bull. 2011*, p. 801. See also the examples mentioned by Fry/Greenberg/Mazza, para. 3-543.

29 Fry/Greenberg/Mazza, para. 3-544.

30 Voser, *ASA Bull. 2011*, p. 801.

31 See also Fry/Greenberg/Mazza, para. 3-547.

32 This provision is identical to Art. 9(4) of the 1998 ICC Rules. There is of course no guarantee that an arbitrator who does not have the same nationality (or the same domicile) as one of the parties is impartial and independent. Under Swiss law, the mere fact that all arbitrators have the same nationality and/or the same domicile as one of the parties does not *ipso facto* entitle a party to challenge an award on the grounds of irregular composition of the arbitral tribunal pursuant to Art. 190(2)(a) PILS or incompatibility with public policy (Art. 190(2)(e) PILS) or violation of the principle of equal treatment of the parties. See BGE 84 I 39 para. 6b. See also Berger/Kellerhals, para. 726, with further references. Interestingly, the Swiss Rules do not contain a specific requirement of national neutrality.

33 Bühler/Webster, para. 9-43; Fry/Greenberg/Mazza, para. 3-553.

34 Fry/Greenberg/Mazza, para. 3-498.

35 To the extent possible, the ICC avoids having two nationals of the same country in an arbitration panel.

36 See also Fry/Greenberg/Mazza, paras. 3-549 to 3-550.

37 For example, in a case between a Swiss and a non-Swiss party in which both counsel and co-arbitrators are Swiss nationals, Swiss law is applicable and Switzerland is the place of arbitration, it might be justified to appoint a Swiss president or a person who is resident in Switzerland.

38 Fry/Greenberg/Mazza, para. 3-551. See, in that regard, also the Final award in ICC Case No. 7001, published in *ICC Arb. Bull. 1997/2*, p. 60. In this case, the ICC appointed a French National although one of the parties was from France, the tribunal rejected the respondent's objections mainly on the ground that the respondent had not objected to the Secretariat's information that the

Court would appoint a French National, unless one of the parties would object within 30 days. The authors believe that, in this case, according to the 1998 and 2012 Rules, the challenge pursuant to Art. 11(2) of the 1998 ICC Rules (Art. 14(2) 2012 ICC Rules) must be filed with the ICC Court before requesting a decision by the tribunal.

[39] Fry/Greenberg/Mazza, para. 3-496.