Chapter 4, Part II: Commentary on the ICC Rules, Article 14 [Challenge of arbitrators]

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(1) **A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.**

(2) **For a challenge to be admissible, it must be submitted by a party 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.**

(3) **The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.**

I. Purpose of the Provision

Once the arbitrators have been appointed or confirmed pursuant to Art. 13 of the ICC Rules, the parties may wish to challenge a member of their arbitral tribunal. Art. 14 of the ICC Rules sets out the requirements of admissibility as well as the grounds and procedure to be followed when submitting a challenge.

The powers granted to the ICC Court under Art. 14 of the ICC Rules may have important consequences for the parties. If successful, a challenge would severely disrupt the arbitration proceedings, particularly if it occurs at an advanced stage. If unsuccessful, the party that brought the challenge may feel that it has jeopardized its chances of obtaining a fair award.(1)

Article 14 is almost identical to the provision contained in Art. 11 of the previous 1998 Rules. However, the standard for justified grounds of a challenge has been expressly extended to “lack of impartiality”. The revised language, which is rather a specification than a modification, will not affect any change in the practice of the ICC Court: the lack of impartiality was already a ground of challenge under the 1998 Rules, which provided in Art. 15 that each arbitrator “shall act fairly and impartially” and allowed the challenge for “lack of independence or *otherwise*” (Art. 11(1) 1998 ICC Rules, emphasis added).(2)

II. Admissibility of the Challenge (Article 14(2))

The ICC Court considers the admissibility of a challenge before examining its merits.

Pursuant to Art. 14(2) of the ICC Rules, a challenge is admissible if submitted 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”. In cases where the date is unclear, the ICC Court will assess the surrounding circumstances to decide when the challenging party ought to have known certain facts or circumstances.(3)

Derains and Schwartz note that the relatively strict time limit contained in Art. 14(2) of the ICC Rules is intended to reduce the number of challenges that are submitted by the parties for purely dilatory page "742" purposes at an advanced stage of the arbitration.(4) The 30-day time period also provides the parties with the opportunity to properly consider whether a challenge is necessary.(5)

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- International Court of Arbitration of the International Chamber of Commerce

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A party that has failed to object to the confirmation of an arbitrator under Art. 11(2) of the ICC Rules or has been unsuccessful in its objection to an arbitrator's confirmation is free under Art. 14 of the ICC Rules to reformulate its objection as a challenge, provided the time limit is respected.(6)

Article 15(1) of the ICC Rules, which deals with the replacement (not challenge) of arbitrators, is relevant to Art. 14 of the ICC Rules. Not only does a successful challenge trigger Art. 15, but "upon the request of *all* the parties" (emphasis added), the ICC Court must decide on the acceptance of this (joint) challenge and confirm the replacement of the arbitrator in question.(7)

III. Grounds for Challenge (Article 14(1))

Procedurally speaking, Art. 14(1) of the ICC Rules requires a challenge to be made by submission to the Secretariat of a "written statement specifying the facts and circumstance on which the challenge is based". Attachments such as supporting evidence or witness statements may be included with the challenge submission, if useful.(8) Under this provision, a challenge may be brought on the basis of alleged lack of impartiality or independence, or on circumstances falling within the meaning of "otherwise".(9)

Although most challenge applications are based on the manner in which the arbitration proceedings were conducted, few of such types of challenges are accepted by the ICC Court. Instead, the largest number of challenges that have been accepted by the ICC Court were based on grounds of independence and impartiality.(10)

This section thus focuses on independence and impartiality (other qualifications agreed between the parties are dealt with under Art. 13 of the ICC Rules). As noted above, the notion of impartiality was not explicitly mentioned in Art. 11 of the 1998 ICC Rules, but it was in fact provided for in Art. 11(1) 1998 page "743" ICC Rules (a challenge can be brought for "an alleged lack of independence or otherwise") and Art. 15(2) 1998 ICC Rules ("in all cases, the Arbitral Tribunal shall act fairly and impartially […]") of the ICC Rules.(11) The same is true in Switzerland. Although Art. 180(1)(c) PILS only mentions "independence", according to Berger and Kellerhals, in practice, it includes the concept of impartiality because the Swiss Supreme Court continues to refer to its old case law, which required an impartial tribunal.(12)

A. Lack of Independence and Impartiality

Any close links with the parties to the arbitral proceedings compromise an arbitrator's independence and impartiality.(13)

1. Prior Relationship with a Party's Counsel

A long-standing professional relationship between an arbitrator and counsel of one of the parties is the most common ground for challenges based on independence. For instance, in 2008, it was the only reason for the one challenge (out of seven) that was accepted that year.(14)

Due to increasing globalization of law firms, the occurrence of conflicts and disclosures is particularly prominent in cases where an arbitrator is part of a firm.(15) The circumstances of successful challenges typically involve a current or prior co-counsel relationship between the arbitrator and counsel of the parties.(16)

2. Prior Relationship with a Party

Parties have brought challenges alleging impartiality on the basis of a relationship between an arbitrator and a party. A clear and direct relationship between the arbitrator and the party will usually prevent the arbitrator from accepting the case or at least oblige a disclosure that would most likely result in a rejection by the ICC Court. More ambiguous relations between a party and arbitrator arise where a colleague of the arbitrator is working or worked closely with the party or the arbitrator was interviewed as a prospect, prior to official appointment. Such instances lead to queries about the appropriate level of contact between the arbitrator and the party.(17)

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Challenges on this basis are commonly made, but rarely accepted.(18) Failed challenges involved a party's claim that an arbitrator lacked independence because s/he previously acted as an arbitrator in a matter involving one of the parties.(19) The ICC Court

also rejected challenges based on the fact that an arbitrator had previously acted for a party or an affiliate party when the matter was unrelated to the dispute at hand.[20] In 2008, five challenges were made before the ICC Court on the basis of an arbitrator's relationship with a party, none successfully.[21]

3. Arbitrator's Conduct during Proceedings

The ICC Court rarely upholds 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.[22]

In a recent case rejected by the ICC Court, the respondent challenged the president of the arbitral tribunal for issuing a procedural order, which admitted the claimant's new claims before the respondent had been given the opportunity to submit responsive comments. The respondent also alleged that the president's procedural order breached due process because the amount of time allowed for the respondent to respond to the claimant's request to admit new claims was shorter than that given to the claimant to comment on the respondent's counterclaim. Since the president amended the procedural order to rectify the perceived inequality immediately after being informed, the ICC Court rejected the challenge.[23]

4. Other Grounds Related to Independence

Other challenges have been brought on the basis of:

(a) a conflict concerning a relative of an arbitrator;
(b) an arbitrator's previously expressed views on the issue under dispute;
(c) the activities of the arbitrator's colleagues, employed by the same law firm;
(d) a personal or professional conflict with one of the party's representatives;
(e) membership in the same association as one of the party's counsel, and;
(f) an arbitrator's alleged relationship with a witness

All of these types of challenges have been rejected by the ICC Court.[24]

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In Switzerland, unless the parties provide otherwise, a party generally does not have the right to apply to a State court or a "*juge d'appui*" to decide upon a challenge that has been rejected by the ICC Court.[25]

However, if a party became aware of any irregularity concerning the constitution of the arbitral tribunal after an award was rendered, it may challenge the award itself. The Swiss Supreme Court has held that an arbitral award can be re-examined for its compliance with the requirements of independence and impartiality under Art. 190(2)(a) PILS.[26]

If the circumstance of the arbitrator's alleged lack of independence and impartiality had been known to the party at the time the ICC confirmed the appointment of the arbitrator, then the party cannot successfully bring a challenge of the award in Switzerland.[27] However, the re-examination is permissible if grounds relating to independence and impartiality were known and arose before the arbitral award was issued, but were ruled out by the ICC Court.[28] In this sense, the decision of the ICC Court on a challenge of an arbitrator may be indirectly re-examined in the context of a setting aside proceeding.

B. The Meaning of the Term "Otherwise" as a Ground for Challenge

An arbitrator can be challenged on the basis of "an alleged lack of impartiality or independence, *or otherwise*" (emphasis added). Art. 14 of the ICC Rules does not define the meaning of "otherwise". Generally, this allows a party to challenge an arbitrator upon request for reasons other than an alleged lack of independence or impartiality and allows the ICC Court discretion to remove an arbitrator for any grounds it considers appropriate, in addition to the grounds listed in Art. 14 of the ICC Rules.

Such "other" grounds are unlimited and the ICC Court can decide

challenges on any basis.[29] This would include the applicable arbitration law or the agreement between the parties. Art. 13(2) of the ICC Rules provides that confirmation of a nomination must be in line with the parties' particular agreement, which must also be understood as a reference to the applicable arbitration law. This may be with regards to availability or ability to conduct an arbitration pursuant to Art. 11(5) of the ICC Rules, which states that "by accepting to serve, every arbitrator undertakes to carry out his responsibilities in accordance with these Rules" (discussed above).[30] Challenges based on an arbitrator's lack of required qualifications under the ICC Rules or the parties' specifically agreed qualifications may also be raised.[31]

Since the removal of an arbitrator may be a sanction of the violation of their duties, one can understand that the term "otherwise" mainly refers to these duties. Thus, additional categories that fall under "otherwise" are picked up in Art. 15(2) of the ICC Rules, which relates to the replacement of an arbitrator, as discussed below.[32]

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C. The Likelihood of Success of a Party's Challenge

Statistically, successful challenges are quite rare. Over ten years, from 2001 to 2011 out of 397 challenges, only 30 were accepted or 7.6%.[33] By way of comparison, during this same period, a total of 11'921 arbitrators were appointed or confirmed under the 1998 ICC Rules.[34] These figures must be considered in view of the fact that some challenged arbitrators submit a resignation (which must be accepted by the ICC Court) before the challenge is decided by the ICC Court. In 2011, only three challenges were accepted by the Court.[35]

IV. Procedure for Submitting a Challenge (Article 14(3))

Article 14(3) of the ICC Rules sets out the procedure for submitting a challenge. The ICC Court does not permit oral hearings in respect of challenges.[36] Instead, the arbitrators (including the arbitrator subject to challenge) and non-challenging party (or parties) are given the opportunity to comment upon the challenging in writing "within a suitable period of time"[37] (which is usually ten days).[38] The ICC Court will circulate any of the comments received in respect of a challenge.[39] This mechanism is intended to protect the non-challenging parties' right to be heard.

Article 14 of the ICC Rules does not require any reasoned decision on challenges to arbitrators. According to a former Secretary General of the ICC Court, the rationale for this position is that the preparation of a well-reasoned decision would delay the challenge process (and therefore the arbitration).[40]

Once a challenge has been made, the procedure for replacement is similar to that outlined in Art. 15(4) of the ICC Rules, discussed below.

Regarding the payment of fees, if it is the arbitrator's conduct that caused the challenge, his or her fees may be reduced by the ICC Court to balance out the costs to the parties.[41]

As noted above, if a party's challenge is not admitted by the ICC Court, the Swiss Supreme Court is not bound by the decision of the ICC in that regard.[42] The party could then file an action for annulment against a (preliminary) award (once rendered), based on the irregular composition of the arbitral tribunal under Art. 190(2)(a) PILS.[43] Therefore, if the parties were unsuccessful in their challenge, they may have recourse in Swiss courts pursuant to Art. 190 PILS.

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1 Lew/Mistelis/Kröll, p. 316.
2 Fry/Greenberg/Mazza, para. 3-555.
3 Fry/Greenberg/Mazza, para. 3-581.
4 Derains/Schwartz, p. 188.
5 Reiner/Jahnel, p. 44. In contrast to Swiss law on international arbitration, the advantage of Art. 14(2) is that it provides an exact time period. In Switzerland, unless agreed otherwise, the parties

appear to be given less time to notify the arbitral tribunal and the other party of its request for challenge. Art. 180(2) of the PILS provides that challenges of arbitrators must be asserted either "without delay", but fails to specify a precise time limit. Berger/Kellerhals contend that the provisions of Art. 369(2) and (3) of the Swiss Code of Civil Procedure (ZPO) can be applied by analogy, which provide 30 days for the submission of the challenge to the arbitral tribunal and 30 days to seize the competent authority or State court in the event that the challenge is contested. See Berger/Kellerhals, para. 811. Nevertheless, even in the absence of an express time-limit, the principle of good faith dictates that a party must promptly exercise its right to challenge an arbitrator. BGE 126 III 249 paras. 3c-d; BGer. 4P.188/2001 para. 2b; BGE 129 III 445 para. 3.1 (with respect to the right to challenge an arbitrator, parties are under an obligation to act in good faith). The Swiss Supreme Court has held that parties to an arbitration with its seat in Switzerland should file its request for challenge as soon as it learns of the facts and circumstances in question (BGE 126 III 249 paras. 3c-d; BGer. 4P.188/2001 para. 2b; BGE 129 III 445 para. 3.1), failing which the party risks being treated as having waived its ground for challenge. For instance, in a decision of 20 March 2008, the Swiss Federal Supreme Court considered a challenge of an award rendered by two CAS co-arbitrators based on information learned after the award was rendered as too late because the information had been publicly available (on the Internet) before that time. The Court in this decision held that parties are required to actively verify the independence of arbitrators (see BGer. 4A.506/2007 para. 3.1.2); cf. also Leemann (law clerk at the Swiss Federal Supreme Court), *ASA Bull. 2011*, p. 13, with further references.

[6] See also (in the context of Art. 11 of the 1998 ICC Rules) Schäfer/Verbist/Imhoos, p. 64.

[7] See Art. 15(1) 2012 ICC Rules. Contrary to Art. 12(1) of the 1998 ICC Rules, which merely provided for the replacement upon joint request be the parties, the revised provision requires that the Court must *accept* a joint request by the parties to replace an arbitrator.

[8] Fry/Greenberg/Mazza, para. 3-560.

[9] In Switzerland, the grounds for challenge of an arbitrator under Art. 180(1) PILS are essentially the same as Art. 14(1) of the ICC Rules: (a) s/he does not meet the qualifications agreed by the parties, (b) grounds for challenge exist under the parties' chosen rules of arbitration, or (c) "circumstances exist that permit legitimate doubt about [the arbitrator's] independence". See also the above commentary on Art. 11 ICC Rules, paras. 10-13.

[10] Whitesell, *ICC Arb. Bull. Special Supplement 2007*, p. 27.

[11] A former Secretary General, Deputy Secretary General and General Counsel of the ICC confirmed the view that the ICC's test of independence under the 1998 ICC Rules was broad enough to include the concept of impartiality. See Whitesell, *ICC Arb. Bull. Special Supplement 2007*, footnote 8. See also Hascher, *ICC Arb. Bull. 1995/2*, p. 6. Note that Hascher also uses the term "neutrality" alongside "impartiality", which often encompasses both independence and impartiality. See generally Lew/Mistelis/Kröll, p. 261 ("[i]n legal systems where either impartiality or independence is the relevant criterion the interpretation adopted incorporates most elements of both concepts"); Redfern/Hunter/Blackaby/Partasides, paras. 472-479.

[12] See BGE 135 I 14 para. 2; BGE 119 II 271 para. 3b; BGE 118 II 359 para. 3c; BGE 115 Ia 40 para. 2; BGE 92 Ia 271 para. 4 (arbitrators are subject to the same criteria that applies to state court judges) as cited in Berger/Kellerhals, para. 735. In a more recent decision of 29 October 2010, the Swiss Federal Supreme Court expressly decided that impartiality (and independence) is required under Swiss law, even if Art. 180(1)(c) only refers to independence (BGE 136 IIII 605 para. 3.3.1). Art. 367(1)(c) of the Swiss Code of Civil Procedure (ZPO) refers to both independence and impartiality. See also Poudret/Besson, para. 415. See also the commentary above on Art. 11 ICC Rules, para. 10.

[13] Many aspects related to the standard of independence and impartiality under Swiss law have been discussed (with references) under Art. 11 ICC Rules above and thus will not be repeated in this section.

[14] A similar challenge was accepted by the ICC Court in 2009 wherein the president of the arbitral tribunal had previously acted as co-counsel with counsel to one of the parties. See Fry/Greenberg, *ICC. Arb. Bull. 2009/2*, p. 24. The ICC usually does not publish the grounds on which challenges are based. The annual statistical reports merely list the total number of challenges. In 2011, 39 challenges were introduced. Only three of the challenges were accepted by the Court ("ICC 2011 Statistical Report", *ICC Arb. Bull. 2012/1*, p. 11).

[15] Whitesell, ICC Arb. Bull. Special Supplement 2007, p. 8.

[16] Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 24.

[17] Whitesell, *ICC Arb. Bull. Special Supplement 2007*, p. 7.

[18] Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 25.
[19] Fry/Greenberg/Mazza, para. 3-563; Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 25.
[20] Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 25.
[21] Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 25. In Switzerland, past relationships only raise justifiable doubts as to an arbitrator's independence and impartiality if economic ties remain. See BGE 126 III 249 paras. 3c-d; BGer. 4P.188/2001 para. 2b. Procedural defects or decisions that are materially wrong are insufficient to give rise to justifiable doubts about the arbitrator's independence except in cases of serious or repeated errors that amount to a manifest violation of his or her duties. BGer. 4A_348/2009 para. 3.3.3, *ASA Bull. 2010*, p. 776; BGer. 4A_539/2008 para. 3.3.2, *ASA Bull. 2009*, pp. 809-810, referring to BGE 115 Ia 400. The justifiable doubts standard found in Swiss law regarding the arbitrator's independence or impartiality is generally accepted internationally. It is an objective test that assesses whether the presence of specific facts or circumstances "provok[e] suspicions as to the independence of the arbitrator". See, e.g., BGE 118 II 359 para. 3c. With regard to the duties of an arbitrator, the Swiss Federal Supreme Court has held that the same standards apply as for judges, taking into account, however, the specificities of international arbitration. See Swiss Federal Supreme Court, BGer. 4A_539/2008 para. 3, *ASA Bull. 2009*, pp. 806-810, referring to BGE 129 III 445. For the required standard of independence and impartiality in Switzerland, see above, discussion on Art. 11, paras. 4-13.
[22] Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 25.
[23] Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 25.
[24] Fry/Greenberg, *ICC Arb. Bull. 2009/2*, p. 26.
[25] Art. 180(3) of the PILS. See also above, commentary on Art. 11 ICC Rules, paras. 26-27.
[26] BGer. 4A.539/2008 para. 3.1, *ASA Bull. 2009*, p. 806 (The Swiss Federal Supreme Court recalled that it was not bound by the decision of the ICC Court and could freely examine whether the arbitrators were partial). The number of ICC awards challenged before the Swiss Federal Supreme Court has been decreasing significantly over time. See Dasser, *ASA Bull. 2007*, p. 451. This may also be linked to the fact that the Swiss Federal Supreme Court applies a restrictive standard when examining a request for setting aside an award for lack of independence and impartiality. See Leemann, *ASA Bull. 2011*, p. 16; see also Beffa, *ASA Bull. 2011*, pp. 598-606. See also the above commentary on Art. 11 ICC Rules, para. 28.
[27] BGer. 4A_256/2009 para. 4.2.2, *ASA Bull. 2010*, p. 552; BGer. 4A_258/2009, para. 3.1.2, *ASA Bull. 2010*, pp. 544- 546. In the latter case, the claimant lost its right to rely on the circumstance that allegedly gave rise to doubts regarding the arbitrator's independence because these circumstance had been known to the claimant at the time the ICC Court confirmed the appointment of the arbitrator.
[28] Art. 190(2)(a) PILS; BGE 118 II 359 para. 3b; BGE 122 I 370 para. 2b. Note that a motion to set aside an award on the basis of Art. 190(2)(a) PILS cannot be filed on the basis of non-compliance with the parties' arbitral agreement (see Girsberger/Voser. p. 158); for a commentary on Art. 190(2)(a) PILS, see Arroyo on Art. 190 PILS above.
[29] Whitesell, *ICC Arb. Bull. Special Supplement 2007*, p. 27.
[30] Calvo, *J.Int.Arb. 1998*, p. 63.
[31] Fry/Greenberg/Mazza, para. 3-567.
[32] In this regard, under Swiss law, the obligation to act in good faith may be seen as serving a purpose analogous to the term "otherwise" in Art. 14(1). For instance, good faith requires that every arbitrator disclose on his or her own initiative any circumstances that may give rise to justifiable doubts as to his or her independence or impartiality, failure of which may lead to his or her removal. See Berger/Kellerhals para. 814.
[33] Fry/Greenberg/Mazza, para. 3-573 (Table 20).
[34] Fry/Greenberg/Mazza, para. 3-573 (Table 20).
[35] Fry/Greenberg/Mazza, para. 3-573 (Table 20). In 2010, challenges in 34 cases against a total of 46 arbitrators were introduced (see ICC 2010 Statistical Report, *ICC Arb. Bull. 2011/1*, p. 11.
[36] Fry/Greenberg/Mazza, para. 3-561.
[37] Art. 14(3) of the ICC Rules.
[38] Fry/Greenberg/Mazza, para. 3-587.
[39] Derains/Schwartz, p. 190.
[40] Whitesell, *ICC Arb. Bull. Special Supplement 2007*, p. 26; Born, p. 1558.
[41] Art. 37(2) ICC Rules; see Art. 31(2) of the 1998 ICC Rules.
[42] See also the discussion under Art. 11 ICC Rules above, para. 24.

[43] The Swiss Federal Supreme Court has held that when examining a request for setting aside pursuant to Art. 190(2) (a) PILS (irregular composition of the Arbitral Tribunal), it is not bound by the ICC's decision regarding a challenge and can examine freely whether the Arbitral Tribunal had been properly constituted (BGer. 4A_210/200 para. 4.1, referring to BGE 128 III 330, *ASA Bull. 2009*, pp. 309-324). For a recent decision in which the Swiss Federal Supreme Court had to examine a request to set aside an arbitral award in an ICC proceedings for lack of impartiality after the ICC had rejected the challenge (see Swiss Federal Supreme Court decision of 6 January 2010, BGer. 4A_348/2009 para. 3.1); see also Berger/Kellerhals, para. 836, with further references. See also the above discussion under Art. 11 ICC Rules, para. 28.