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Commentary

Selecting ICC Arbitrators: What's New Under The Revised Rules?

By
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Although it has lately been argued that arbitration is increasingly becoming "*the new litigation*",[1] arbitration and litigation continue to differ greatly in many aspects. In litigation, parties have little or no influence on who will adjudicate their dispute.[2] In arbitration, they do. The present article examines how arbitrators are selected in ICC arbitral proceedings – and what part the parties play in this respect. It will also address the (few and minor) changes brought about as of 1 January 2012 by the revised ICC Rules of Arbitration (the "New Rules").

The Rules' Default Framework Vs. Party Autonomy

Articles 12 and 13 of the New Rules contain the default framework governing the selection of arbitrators and their confirmation or appointment. It should be noted, though, that, pursuant to Article 11(6) of the New Rules, the parties are free to derogate from these provisions by mutual agreement. Consequently, in the arbitration clause or even after the filing of the request for arbitration, the parties may, *inter alia*, bindingly agree on

- the number of arbitrators;
- any requirements as to the arbitrators' nationalities[3], language, technical or other skills;
- the procedure to be followed for the selection of the arbitrators and for the constitution of the arbitral tribunal as a whole.

Whether, and if so, under what circumstances and to what effect, the parties should make use of the opportunities so afforded to them, will be discussed further below.

Number Of Arbitrators

Before selecting arbitrators, parties need to know how many arbitrators there will be. Consequently, pursuant to Article 4(3)(g) of the New Rules, the claimant must address this issue in its request for arbitration. As to the respondent, it must provide its comments on the number of arbitrators and their choice within 30 days from receipt of such request (Articles 5(1)(e), 5(2) of the New Rules – this time limit is, as a general rule, not subject to extensions).

Two scenarios should be distinguished, depending on whether or not the arbitration clause on which the claimant relies specifies the number of arbitrators.

Scenario 1: The Arbitration Clause Specifies The Number Of Arbitrators

Where the arbitration clause specifies the number of arbitrators, the parties will, in most cases, simply refer to the clause.[4] On occasion, parties may find it warranted to suggest to the adverse party that the clause be modified with regard to the number of arbitrators. Having three arbitrators instead of one basically triples the arbitrators' fees and expenses. Therefore, in cases where the

amount in dispute is moderate, the Secretariat of the ICC Court encourages parties to "downsize" the arbitral tribunal from three arbitrators to one. While this may be the right course of action in certain situations, it should be noted that

- seemingly small disputes may and do quickly grow out of proportion;
- in a three-member arbitral tribunal, each party normally has the opportunity to select one arbitrator without interference from anybody else. A sole arbitrator is either confirmed on the basis of a joint nomination of the parties or appointed following a proposal from one of the ICC's national committees. Especially in cross-cultural disputes, it may be essential for a party to have an arbitrator that shares the party's cultural background. The only way of securing this objective is to insist on a three-member arbitral tribunal.

Scenario 2: The Arbitration Clause Does Not Specify The Number Of Arbitrators

Many arbitration clauses do not specify the number of arbitrators. In such case, the claimant, in its request for arbitration, will suggest a number. If the respondent agrees with the claimant's suggestion, the parties' mutual agreement applies. If the respondent does not agree, the ICC Court will decide on the number of arbitrators, pursuant to Article 12(2) of the New Rules.[5] Article 12(2) of the New Rules contains a presumption in favor of submitting the matter to a sole arbitrator. Examples for specific exceptional circumstances militating for submitting the matter to a three-member arbitral tribunal are:

- The amount in dispute is particularly high;
- The matter exhibits an above-average complexity;
- One of the parties is a state, a state entity or an inter- or supranational organization;
- The matter is related to a matter where a three-member arbitral tribunal has already been constituted, and it is conceivable that the same arbitrators will be confirmed or appointed as in the related matter or that the two matters will be consolidated.

Selecting the Members Of A Three-Member Arbitral Tribunal

General Requirements For ICC Arbitrators

Article 11 of the New Rules sets forth certain general requirements for arbitrators that the parties may not waive, namely that they be and remain

- independent;
- impartial; and
- available to carry out their duties as arbitrators.

The independence requirement needs no explanation. It was already spelled out in the 1998 Rules. Although the ICC Court is not bound by the IBA Guidelines on Conflicts of Interests in International Arbitration, it usually looks at these guidelines when deciding whether to confirm or appoint arbitrators whose independence is called into question.

The 1998 Rules mention neither impartiality nor availability. Yet it has long been common ground that ICC arbitrators must be and remain impartial, and the ICC Court may be obliged to refuse to confirm or appoint a candidate who lacks impartiality.

It is important to note that the standards for impartiality and independence are the same for both party-nominated and court-appointed arbitrators. The role of a party-nominated arbitrator is not to defend the interests of the party or parties which has or have nominated him or her, but to contribute to a fair and equitable resolution of the dispute.

As to arbitrators' availability, ICC users are increasingly concerned about arbitrators who take on so many cases that they lack the time to deal with them in a speedy and efficient manner. Consequently, in 2009, the ICC Court introduced a new practice, requiring prospective arbitrators to indicate their availability, in particular, by listing in how many cases they are already sitting as arbitrator.[6] By expressly listing availability as a general arbitrator requirement, the New Rules codify this existing practice.

Selecting The Co-Arbitrators

Where the dispute is to be decided by a three-member arbitral tribunal, the regular procedure under Article 11 and 12(4)-12(8) of the New Rules is as follows:

- Each party nominates one co-arbitrator.[7] The nomination must normally be made in the request for arbitration (by the claimant(s)) and within 30 days from its receipt (by the respondent(s)), unless the number of arbitrators was not specified in the arbitration clause. In the latter case, the nomination must be made within 15 days from the day when the parties are notified that the number issue was resolved – be it through mutual agreement of all parties or, as the case may be, a decision of the ICC Court.

- The Secretariat of the ICC Court provides each nominee with information on the case, in particular the parties, their counsel and any related entities mentioned in the request for arbitration and the subsequent briefs of the parties. On the basis of this information, the nominee is invited to provide a detailed statement of acceptance, availability, impartiality and independence. In particular, the nominee must disclose in writing 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, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.

- Once this statement is received, the secretariat forwards it to the other party or parties for comments (Article 11(2) of the New Rules).

- Upon receipt of such comments or upon the expiry of the time limit set for comments to be submitted, the ICC examines whether to confirm the arbitrator.[8] Normally, the court will only decide not to confirm him or her where there are serious concerns with regard to the nominee's availability, impartiality and independence. In such a case, the nominating party will be invited to make a new nomination.

Where a party fails to make a nomination, the court will appoint an arbitrator for that party, normally upon the proposal of a national committee. The procedure is essentially identical to the one to be followed for the selection of the president of a three-member arbitral tribunal, which is outlined below.[9]

Selecting The President Of The Arbitral Tribunal: The Default Rules

Once the co-arbitrators are confirmed or appointed, the only remaining step to be taken towards the constitution of the arbitral tribunal is the selection of the third arbitrator, now gender-neutrally referred to as president (rather than chairman) of the arbitral tribunal. Under Article 13(3) of the New Rules – *i.e.* unless the parties have agreed otherwise – the procedure to be observed in this regard is as follows:

- The ICC Court invites a specific national committee[10] to propose a person to act as president of the arbitral tribunal. In selecting the national committee to be invited to make a proposal, the court may take into consideration various factors, including *inter alia*

  - the place of the arbitration,

  - the nationalities and locations of the parties and their counsel as well as of the co-arbitrators;

  - the language of the arbitration; and

  - the applicable law.

Normally, the court will invite a national committee from a country other than those of the parties. This is because under Article 13(5) of the New Rules, the court is, as a general rule, barred from appointing a person as president of the arbitral tribunal (or, for that matter, sole arbitrator) whose nationality is identical to the nationality or nationalities of the parties[11].[12] Sometimes, however, the parties expressly agree on a certain nationality. The court then invites the relevant national committee to make a proposal.

- The Secretariat of the ICC Court provides the national committee with information on the case that allows the national committee to reach out for potential candidates and to have them carry out a conflict check. The Rules do not prescribe a specific internal procedure to be

followed within the national committees for the selection of suitable candidates, but the tasks of the national committees are clear:

- Based on the information available, in particular on the subject-matter of the dispute as well as on the place of the arbitration, the national committee is to identify one or several suitable candidates for the office of president of the arbitral tribunal.

- In a second step, the national committee will liaise with the prospective arbitrator(s) and verify their availability, impartiality and independence. The ICC Court's practice is not to appoint national committee candidates whose statement of impartiality and independence is qualified. Even a so-called *de minimis* disclosure will normally not result in appointment.

- Unlike other arbitral institutions, neither national committees nor ICC itself operates with lists of arbitrators. Instead, national committees are expected to permanently monitor the market for arbitral services in their jurisdiction and to propose any person that may be suitable.

- Once the national committee has identified a candidate it considers suitable, it notifies the Secretariat of the ICC Court of its proposal and ensures that the Secretariat is provided with the candidate's statement of acceptance, availability, impartiality and independence.

- Upon receipt of the national committee's proposal, the ICC Court examines whether to appoint the candidate proposed.

  - If the court is satisfied that the candidate is suitable, it appoints him or her. Immediately thereafter, the Secretariat transfers the file to the arbitral tribunal (Article 16 of the Rules).

  - While the vast majority of the national committees operate "*comme il faut*", a few fail to live up to ICC's standards. Examples of non-compliance are a tendency to propose the same (often very senior) people over and over again and/or sheer non-responsiveness to the Secretariat's queries. It is mainly in such cases that the court will make use of its powers under Article 13(3)(2) of the New Rules to repeat its request, request a proposal from another national committee or appoint directly any person which it may consider suitable.

- In certain situations, the court has the power to circumvent the national committee system from the outset and to directly appoint any individual whom the court considers suitable at an early stage:[13]

  - where one of the parties is a state or claims to be a state entity (Article 13(4)(a) of the New Rules); or,

  - where the court wishes to appoint an arbitrator from a country or territory where there simply is no ICC national committee or group (Article 13(4)(b) of the New Rules); or,

  - where the President of the ICC Court certifies to the latter that circumstances exist which, in the president's opinion, make a direct appointment necessary and appropriate (Article 13(4)(c) of the New Rules); it is expected that the president will restrain the use of this instrument to exceptional cases, *e.g.*, where the national committee that the court would normally invite to make a proposal is not operational, for example, as a result of armed conflict or natural disaster.

Selecting the President of the Arbitral Tribunal: Alternative Selection Mechanisms

For various reasons, a party may find it unsatisfactory to rely on the ICC's national committee system. The national committee system does not allow parties to take part in the selection mechanism for the president of the arbitral tribunal – in fact, the parties are not even provided with the name of the person proposed by the national committee until after he or she has been appointed by the ICC Court. It is widely – though by no means unanimously[14] – held that the parties' interests are better served when they (or at least the party-nominated co-arbitrators) are in some way involved in the selection mechanism. The ICC Rules

are not hostile to such alternative selection mechanisms, but parties must expressly agree on them. In roughly 60% of the ICC cases submitted to three-member arbitral tribunals, they do.[15]

What is required is an express agreement of the parties (either to be found in the arbitration agreement or to be concluded at a later stage, even if subsequent to the commencement of the arbitration). By far the most popular choice is to agree that the president of the arbitral tribunal will be jointly nominated by the party-nominated co-arbitrators, sometimes subject to the parties' approval. Rarer, though not uncommon, are clauses which confer the task of jointly nominating the president of the arbitral tribunal directly upon the parties.[16]

Wherever the parties wish to derogate from the default national committee system and confer upon their co-arbitrators, themselves or somebody else the power to (jointly) nominate the president of the arbitral tribunal, they should fix a time limit by which such nomination is to be made, failing which the default rules will be reinstated. Under Article 12(5)(2) of the New Rules, the default time limit for a (joint) nomination pursuant to an alternative selection mechanism is 30 days from the confirmation of the co-arbitrators.[17] The court, however, may extend this time limit. Obviously, the parties may mutually agree on a longer or shorter time limit or on an extension or renewal of a time limit which has already expired.

There are no limits to the parties' creativity when it comes to inventing alternative selection mechanisms. Multi-tier selection mechanisms are becoming increasingly frequent, requiring co-arbitrators or even external (*i.e.*, non-ICC) bodies, such as the Secretary-General of the PCA, to establish lists of (sometimes 15 or more) candidates, then have the co-arbitrators rank the names so as to arrive at a joint list in descending order of preference, subject perhaps to consultations with the parties, who may be granted limited or broad veto powers. Although in certain cases such procedures may be justified, parties should be aware that they may delay the proceedings quite significantly.

Upon receipt of a (joint) nomination pursuant to an alternative selection mechanism, the Secretariat of the ICC Court invites the candidate to provide his or her statement of acceptance, availability, impartiality and independence and allows the parties a short time period for any comments they may have. Thereupon, the candidate is normally confirmed by the court or, as the case may be, the Secretary General of the ICC Court[18], pursuant to Article 13(2) of the New Rules.

Selecting a Sole Arbitrator

The rules governing the selection of sole arbitrators are essentially identical to the ones governing the selection of the president of a three-member arbitral tribunal: Where the parties have not agreed on an alternative selection mechanism, the national committee system applies. The only sensible alternative selection mechanism available is joint nomination by the parties. If the parties fail to jointly nominate a person to act as sole arbitrator within the default 30-day time limit – or any other time limit agreed upon by both parties or fixed by the court – the court will appoint the sole arbitrator, upon proposal of such national committee as it thinks fit. The selection of the national committee follows the same considerations as in cases where the president of a three-member arbitral tribunal is to be selected.

Conclusion

The New Rules maintain the ICC's traditional "open" approach to the selection of arbitrators: Parties can essentially have any selection mechanism they want. If they fail to agree on one, the ICC's national committee system applies – which, in most cases, produces acceptable results. Where it does not, the New Rules allow the ICC Court more flexibility in making direct appointments. By combining what has been working well over the last decades with new innovative tools to fix (minor) quality issues, Articles 12 and 13 of the New Rules are instrumental in securing the ICC's position as the leading provider of international dispute resolution.

Endnotes

1. *Thomas J. Stipanowich*: "Arbitration: The 'New Litigation', U. Ill. L.Rev. 2010, 1 *et seq.*"

2. Although parties in litigation have the option to agree on a specific court, and sometimes, on a specialized panel, such as the commercial division of the court, they can normally not agree on the individual judges who will hear the matter.

3. But see note 12 *infra*.

4. Difficulties may arise where a party wishes to rely on various clauses, providing for diverging numbers of arbitrators – if the opposing party or parties raise(s) jurisdictional objections and the secretary general refers the matter to the court, the court may find that the matter shall not proceed (Article 6(4)(ii)(a), (b) of the New Rules).

5. Fixing the number of arbitrators is the first step towards the constitution of the arbitral tribunal. Consequently, the court will only take that decision once a *prima facie* decision on jurisdiction under Article 6(3) and 6(4) has been taken to the effect that the matter shall proceed, or, as the case may be, once it is established that none of the parties raises jurisdictional objections which – upon referral by the secretary general – would require the court to take a *prima facie* decision on jurisdiction.

6. Although the ICC Court would not normally refuse to confirm an arbitrator solely on the grounds of concerns as to his or her availability, it has already made use of its right not to confirm or appoint an arbitrator for lack of availability on multiple occasions after the introduction of the new form (see *Maria Hauser:* "The New International Chamber of Commerce Statement of Acceptance, Availability and Independence for Arbitrators", 2 Arbitration e-Review (2010), p. 24 *et seq.* (at p. 27)).

7. Where there are multiple claimants or multiple respondents, they must make their nomination jointly, pursuant to Article 12(6) of the New Rules. The New Rules clarify that the same applies to additional parties that were joined to the arbitration, under Article 12(7) of the New Rules. In both cases, failing a joint nomination, the ICC Court has the power to "*appoint each member of the Arbitral Tribunal and shall designate one of them to act as President*" (Article 12(8) of the New Rules). In doing so, the court is free either to invite proposals from a national committee or to make a direct appointment (Article 12(8)(2) of the New Rules).

8. In addition to the ICC Court, the Court's secretary general, its deputy secretary general as well as the general counsel may confirm nominees who have not submitted any qualifications as to their independence and impartiality or whose qualifications have not given rise to objections from any of the other parties to the arbitration. Where a qualified statement has given rise to objections, the power to confirm or not to confirm the nominee lies with the ICC Court exclusively (Article 13(1)(2), Article 5(1) Appendix II to the New Rules).

9. On the procedure to be followed where multiple parties have failed to make a *joint* nomination, *see* supra note 7.

10. An ICC national committees is a permanent national umbrella organization, normally bringing together local chambers of industry and commerce from the respective country, as well as companies and other business stakeholders. In dependent and certain other territories (*e.g.*, Hong Kong), ICC maintains "groups", which, for the purpose of selecting arbitrators, are equivalent to national committees, pursuant to Article 13(3) of the New Rules. In some countries, pursuant to special arrangements, the arbitration-related duties of the national committees are carried out by national arbitration institutions. This was the case for Germany until the end of 2011, and is still so for Belgium.

11. Only in suitable circumstances and where none of the parties objects within a time limit to be fixed by the Court may the Court appoint a person whose nationality matches the nationality or nationalities of the parties (Article 13(5)(2) of the New Rules). In practice, this provision is ordinarily applied where the dispute is essentially domestic in nature.

12. Before the UK Supreme Court judgment in *Jivraj v. Hashwani ([2011] UKSC 40)*, there was uncertainty to some degree as to whether the weight that the ICC and other arbitral institutions place on arbitrators' nationality is actually in line with Council Directive (EC) 2000/78. The Supreme Court having unanimously held that the directive does not apply to arbitrators, this matter appears to have been resolved.

13. Compared to Article 9(4) ICC Rules of Arbitration (1998), the New Rules extend the Court's powers to directly appoint an arbitrator in Article 13(4)(a) and (c). Under Article 9(4) ICC Rules of Arbitration

(1998), the Court could only *"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"*.

14. For a strong and well-reasoned dissent see *Jan Paulsson*, "Moral Hazard in International Dispute Resolution" (Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010, available at: http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf).

15. *Alexis Mourre*, "Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration", in: Liber Amicorum Eric Bergsten, The Hague 2011, *pp.* 380 *et seq.* at *p.* 383.

16. Occasionally, a clause provides for the nomination of the President of the Arbitral Tribunal by another arbitral institution (such as the LCIA or the President or Secretary General of the PCA in The Hague) or by the President or the Secretary General of ICC (rather than the ICC Court). Normally, these clauses only cause unnecessary delay and serve no tangible benefit. Exceptions may be conceivable in investment-treaty arbitration.

17. It is the ICC's practice never to confirm or appoint one co-arbitrator before the other. Therefore, the beginning of the time limit will normally not be in doubt.

18. On the Deputy Secretary General's and the General Counsel's powers in relation to the confirmation of arbitrators, *see* Article 13(1)(2), Article 5(1) Appendix II to the New Rules and supra note 8. ■

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