On

International Commercial Arbitration

Edited by Emmanuel Gaillard and John Savage
949. — More importantly still, the date of their acceptance also marks the start of the period within which they are required to make their award. While French international arbitration law, unlike domestic law, 332 does not fix the duration of the proceedings or specify the means of extending it, 333 the French courts have confirmed — although there was little doubt on this point — that the deadline for making the award (fixed by the arbitration agreement or by the arbitration rules, for example) begins to run as soon as the arbitrators have accepted their brief. 334 It was held that if arbitrators appointed by the ICC have not accepted their functions, then the various time periods set forth in the arbitration agreement and in the ICC Rules will not have started to elapse, and as a result there will be no grounds for extending them. Similarly, where an ad hoc arbitration agreement gave the arbitrators six months to make their award and an extension was requested, the court held that:

since the defendants have failed to supply sufficient proof to establish that the third arbitrator gave his personal and definitive acceptance before November 10, 1989, the deadline for delivery of the award has not expired. 335

The request for an extension was therefore granted.

950. — It has also been held that the arbitrators’ acceptance of their brief has a further consequence as regards the extent of the courts’ jurisdiction in the presence of an arbitration agreement. Some provisions governing the jurisdiction of the courts to decide certain types of provisional measures require that the arbitral tribunal be not yet constituted and therefore unable to hear the dispute. 336 Those measures are thus no longer available once all the arbitrators have accepted their brief. 337

SECTION II
INTERNATIONAL PRACTICE

951. — Even if a number of awards made under the ICC Rules have addressed the issue of the constitution of the arbitral tribunal, 338 international practice on this question does not result primarily from arbitral awards because, in theory, by the time an award is made, difficulties concerning the constitution of the arbitral tribunal will already have been

333 See infra paras. 1246 et seq. and 1379 et seq.
337 On this issue, generally, see infra paras. 1302 et seq.
954. — The International Chamber of Commerce, with seventy-six years of experience of international commercial arbitration, is perhaps the most widely-imitated model in institutional arbitration. Its success in practice has grown with the expansion of its geopolitical base. The System of Conciliation, Arbitration and Expertise developed by the Euro-Arab Chambers of Commerce was strongly influenced by the ICC. Many other nationally-based arbitral institutions, such as the London Court of International Arbitration or the AAA, based themselves on the ICC model, particularly with regard to the appointment and removal of arbitrators. In 1985 the LCIA changed its name from the London Court of Arbitration, and adopted new rules. The AAA also has a distinct set of rules for international arbitration.

955. — However, the success (or at least the greater public awareness) of institutional arbitration should not be allowed to distort the picture. Although by definition it is more discreet, or even totally confidential, ad hoc arbitration plays and will always play a significant role, even in international disputes.

We shall therefore now provide an overview, discussing in turn the constitution of the arbitral tribunal in ad hoc arbitration (§ 1) and in institutional arbitration (§ 2).

As both forms of arbitration are based on the discretion of the parties and arbitral institutions, the mechanisms devised for constituting the arbitral tribunal are quite varied in nature. Nevertheless, they have features in common, as can be seen from the applicable arbitration rules.

§ 1. - Ad hoc Arbitration

956. — The main characteristics of ad hoc arbitration can be seen particularly clearly in the process of constituting the arbitral tribunal (A). Those characteristics are at the same time the strengths and weaknesses of ad hoc arbitration as compared to institutional arbitration. Because of their popularity internationally, the UNCITRAL Rules (B) provide an important illustration of the attempts to reconcile flexibility and efficiency in the constitution of an ad hoc arbitral tribunal.

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346 [continued]

347 On ICC arbitration in general, see supra paras. 349 et seq.
348 These Rules became effective on January 10, 1983.
349 The 1985 Rules were subsequently replaced by a new set of Rules effective as of January 1, 1998.
350 Since 1982, the AAA Supplementary Procedures for International Commercial Arbitration, amended on February 1, 1986 and, since 1991, the AAA International Arbitration Rules, last amended in 1997, see supra para. 344.

A. - COMMON METHODS OF APPOINTING AD HOC ARBITRATORS

957. — In ad hoc arbitration, the constitution of the arbitral tribunal is the exclusive domain of the parties. They are entirely free to determine its composition and to decide on the number of arbitrators, the qualifications required of them and the method for appointing them. That freedom, which is widely recognized in national legal systems, promotes flexibility by enabling the parties to adapt the constitution of the arbitral tribunal to suit the particular nature of each dispute. Furthermore, because the arbitrators are usually appointed directly by the parties, the constitution process is, in theory at least, faster and less costly than in institutional arbitration. Finally and most importantly, the direct choice of the arbitrators by the parties is undoubtedly the method of appointment most in keeping with the spirit of arbitration: it implies a personal relationship of trust between each of the parties and the private judge it appoints, and that trust provides the best guarantee that the proceedings will run smoothly and the award will be enforced voluntarily.

958. — On the other hand, there is a risk that, precisely when it is being set up, an ad hoc arbitration may prove to be more vulnerable to various obstacles than an arbitration which has the benefit of an intermediary in the shape of an arbitral institution. In that respect, the efficiency of the arbitration depends heavily on the drafting of the arbitration agreement. A "blank" arbitration clause, which merely provides for disputes to be resolved by arbitration, will require the intervention of the courts to be effective, unless the parties agree upon the choice of arbitrators. The courts will also be asked to intervene if the arbitration clause contains various criteria for appointing the arbitrators, but does not specify how to deal with obstacles resulting from disagreements or default. Although many legal systems now allow the courts, at the request of a party, to resolve difficulties with the constitution of the arbitral tribunal, the efficiency of international arbitration should not be dependent on court intervention.

959. — Practitioners have gradually become familiar with the main difficulties which can arise when constituting an ad hoc arbitral tribunal. As a result, although arbitration agreements are obviously not all drafted identically, there are a number of constants or dominant trends. These are also found in the numerous drafting guidelines produced by arbitration experts.
960. — It is exceptional for the arbitrators to be appointed in the arbitration agreement. At that stage it is not known whether a dispute will ever arise during the performance of the contract and, if it does, when it will arise and what it will concern. The appointment of an arbitrator at that stage is therefore likely to be premature, and could prove to be very awkward if a dispute does occur. For example, the arbitrators appointed in the agreement might be totally unsuited to the nature of the dispute, or might die before the dispute arises.

961. — The most common form of arbitration agreement will stipulate that any dispute which may arise in the course of the contract shall be resolved by a three-member arbitral tribunal, with each party appointing one arbitrator and the third appointed by mutual agreement between the first two arbitrators. This system owes its success to the fact that parties value their freedom to appoint one of the arbitrators. Admittedly, the status of party-appointed arbitrators raises delicate issues concerning their independence and their relations with the party appointing them, and neither international arbitral practice nor national legal systems are unanimous as to how those issues are best resolved. Nonetheless, practitioners remain undaunted by such difficulties. They generally attach considerable importance to the personal relationship of trust between each party and the arbitrator it appoints. The role of the third arbitrator—who is a party-appointed arbitrator whose contribution in such circumstances will often be decisive—will, in practice, be made easier by the relationship of trust on which his or her appointment by the other two arbitrators was based. In addition, it is easier for two arbitrators, rather than the parties themselves, to agree upon the identity of the third arbitrator. As a result, the choice of a sole arbitrator, although less costly, is usually only optional. At any rate, the continental tradition is that the parties generally retain their right to opt for a tribunal of three arbitrators.

962. — There are no other major areas of convergence on this subject in the drafting of arbitration agreements. In particular, arbitration agreements do not systematically identify the third party responsible for appointing the necessary arbitrator or arbitrators in the event of disagreement between the parties. That omission is unfortunate, as it compromises the efficiency of ad hoc arbitration. However, in such cases, most legal systems allow the tribunal to be constituted with the help of the courts, as we have seen.

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On this question, and on the notion of the "non neutral" arbitrator, see infra paras. 1041 et seq.

Similarly, there is no dominant trend in international arbitral practice as to the choice of third party responsible for appointing the third arbitrator. Alternatives include presidents of chambers of commerce or of arbitral institutions, individuals representing the legal professions (the president of a bar or the dean of a university law faculty) or the sector in question, politicians, diplomats, representatives of the international community and presidents of national courts. The spectrum is thus very broad. This can lead to difficulties if the third party has no experience in the exercise of such functions or of international commercial arbitration in general, or if the third party refuses to act when requested to do so.

B. — THE CONSTITUTION OF THE ARBITRAL TRIBUNAL UNDER THE UNCITRAL ARBITRATION RULES

963. — The UNCITRAL Arbitration Rules were published in 1976 and were intended for use in international commerce by parties who found it difficult to agree upon a choice of arbitral institution. By offering a universally acceptable ad hoc arbitration system, formulated by a wide range of experts with different backgrounds, UNCITRAL met a significant need. Its Arbitration Rules have been well-received by practitioners. A number of arbitral institutions have even adopted them, referred to them in their own rules, or at least drawn inspiration from them.

964. — As with any ad hoc arbitration, the constitution of the arbitral tribunal under the UNCITRAL Rules is above all a matter for the parties. However, the resulting flexibility carries with it a risk of inefficiency which is liable to materialize if the parties disagree, once the dispute has arisen, as to the appointment of the arbitrators. For that reason, the Rules provide for the intervention of a pre-designated third party, thus creating a "semi-organized" arbitration.

965. — All of the provisions of the Rules are optional, in that when adopting them the parties are free to depart from them by written agreement. In addition, in the event of a conflict between a provision of the Rules and a mandatory rule of law applicable to the arbitration, the Rules specify that the latter shall prevail (Arts. 1(1) and 1(2)).

966. — The seat of the arbitration is determined by the parties or, failing that, by the arbitrators (Art. 16). The number of arbitrators is also determined by the parties, but their choice is restricted to either one or three. If they fail to make such a choice, three arbitrators will be appointed (Art. 5).

_555_ On these rules, see supra paras. 200 et seq., and Annex X, especially Section II: Composition of the arbitral tribunal, Arts. 5–14.

1. The Appointment of the Arbitrators

967. — In principle, the parties are responsible for appointing the arbitrators. A sole arbitrator is appointed by mutual agreement between the parties. If three arbitrators are to be appointed, each party appoints one arbitrator, with the third appointed by mutual agreement between the first two. The main concern of the Rules is, however, to address the situation where the parties cannot agree on the appointment of an arbitrator, or where a party refuses to make such an appointment.357

968. — The parties are therefore invited to choose an “appointing authority” responsible for appointing the missing arbitrator or arbitrators. Where a party (usually the defendant) fails to appoint an arbitrator, the appointing authority will make that appointment directly. In contrast, for the appointment of a sole arbitrator or a third arbitrator the appointing authority resorts to a fairly complex list procedure. It supplies the parties with a list of at least three candidates. Each party must strike out the candidates to which it objects, and must number the remaining candidates in order of preference. The appointing authority will then appoint the sole or third arbitrator according to the parties’ preferences.

The same list system is used by the AAA and by the Netherlands Arbitration Institute, and the American and Dutch practitioners involved in drafting the UNCITRAL Rules pushed for the adoption of that system. Its advantage lies in the fact that the parties are involved in choosing the arbitrator, without there being any risk of obstructing the system. In that respect, the system reconciles efficiency with the need to maintain a relationship of trust between the arbitrator and the parties. However, because it is fairly complex, the list procedure is of subsidiary application. The parties can agree to exclude it, and it can also be excluded by the appointing authority, if it considers that the system “is not appropriate for the case.”

969. — Finally, a difficulty can arise in any ad hoc arbitration where the parties fail to agree on the choice of an appointing authority. In that case, the UNCITRAL Rules provide for the appointing authority to be designated by the Secretary-General of the Permanent Court of Arbitration at The Hague. Although that venerable institution has been semidormant for several decades and might therefore seem an odd choice, it does at least have the merit of having received the approval of representatives of a great number of countries in the negotiations of the UNCITRAL Rules. The role of the Secretary-General is modest, but sufficient to overcome delaying tactics (and hence to deter the parties from engaging in them). The Secretary-General is not of course the “appointing authority,” and does not actually appoint the arbitrators, but instead designates the appointing authority, which then goes on to compile the list of arbitrators from which the parties are to choose.358

970. — The system is rather cumbersome, because it involves a number of different stages (there were twelve in one particularly complex case). Although the deadline imposed

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357 See Arts. 8 and 9 of the Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund (EDF), in force since June 1, 1991 (Annex V to the Decision No. 3/60 of the ACP-EEC Council of Ministers of 29 March 1990 adopting the general regulation, general conditions, and procedural rules on conciliation and arbitration for works, supply and service contracts financed by the European Development Fund (EDF) and concerning their application), 1990 O.J. (L 132) 98; XVII Y.B. COM. ARB. 323 (1992).

358 AAA, Procedures for Cases under the UNCITRAL Arbitration Rules.

359 LCIA, Services for Arbitrations under the UNCITRAL Arbitration Rules.


361 See ICC as Appointing Authority under the UNCITRAL Arbitration Rules (ICC Publication No. 409, 1983); see also INTERNATIONAL COURT OF ARBITRATION 18 (ICC Publication No. 800, 1998).

2° The Challenge and Replacement of an Arbitrator

972. — The primary aim of the UNCITRAL Rules with respect to the challenge and replacement of arbitrators is to provide a degree of transparency: under Article 9, an arbitrator approached in connection with a possible appointment must disclose “any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.” It is circumstances of this kind that can lead to an arbitrator being challenged (Art. 10). A party making a challenge must give written notice of the challenge to the challenged arbitrator, the other members of the arbitral tribunal and the other party, informing them of the reasons for the challenge (Art. 11). If the other party does not agree to the challenge and the challenged arbitrator does not withdraw from office, the decision will be taken by the appointing authority, irrespective of whether it originally appointed the arbitrator in question, and regardless of whether the appointing authority has already been designated (Art. 12).

973. — An arbitrator can be replaced in the event of a successful challenge, death or resignation, as well as “in the event that [he] fails to act or in the event of the de jure or de facto impossibility of his performing his functions” (Art. 13(2)). Such a failure or impossibility is established using a procedure similar to that used for challenges. Whatever the cause of the replacement, the substitute arbitrator is appointed or chosen pursuant to the procedure which governed the appointment or choice of the arbitrator being replaced (Arts. 12(2) and 13).65

Finally, the Rules specify that if a sole or presiding arbitrator is replaced, any hearings held previously must be repeated, whereas if any other arbitrator is replaced, the arbitral tribunal decides whether or not to repeat them (Art. 14). That provision is very useful in practice, since it allows the tribunal to minimize the delay caused by the untimely resignation of an arbitrator.

§ 2. — Institutional Arbitration

974. — The characteristic features of institutional arbitration, and hence its advantages and disadvantages, are in direct contrast to those of ad hoc arbitration. The involvement of an institution and the application of its rules undoubtedly help in constituting the arbitral tribunal, because although the parties retain a role in that process everything is geared to ensure that they cannot obstruct it. However, the greater efficiency of this form of arbitration is gained at the expense of a certain weakening of the relationship of trust which the parties and the arbitrators are supposed to share. It may also entail a more laborious process for setting up the arbitral tribunal, and yet it does not always provide the parties with the procedural guarantees that they expect from the courts. That may be the case, in particular, with some of the newer organizations, the founders of which do not necessarily have extensive experience of international business and arbitration.66

975. — The proliferation of international arbitral institutions67 makes it impossible to give an exhaustive account of the procedures for constituting an arbitral tribunal adopted in the rules of each of them. The diversity of institutional rules has increased with the publication, over the past ten years or so, of fast-track arbitration rules.68 We will therefore examine first the ICC Rules (A), which are typical of the institutional approach to constituting the arbitral tribunal and have inspired many other institutional rules. We will then discuss the procedures adopted in a small number of other major arbitral institutions (B). As a result of the influence of the ICC and the generality of the needs and constraints of international institutional arbitration, the rules of these various institutions are sufficiently similar to provide a true reflection of international practice in the constitution of the arbitral tribunal.

A. — THE RULES OF ARBITRATION OF THE INTERNATIONAL COURT OF ARBITRATION OF THE ICC

976. — In the latest version of the ICC Rules,69 which entered into force on January 1, 1998, the arbitral tribunal is the subject of Articles 7 to 12 (replacing Article 2 of the previous Rules, which contained 13 paragraphs). Its essential provisions concern the appointment (2°), the challenge and the replacement (3°) of the arbitrators, while Article 14 deals with the seat of the arbitration (4°). First, however, Article 1 states that the

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65 See for example, in France, the report of the January 19, 1990 symposium of the Comité français de l’arbitrage on arbitral institutions, 1990 REV. ARB. 227.
66 For a general description, see supra paras. 323 et seq.
68 For a general description of the ICC, see supra paras. 349 et seq., and the references cited therein; as the applicable provisions have not been substantially modified, commentary on the previous Rules remains pertinent; see especially Alan Pourier, La gestion des arbitrages commerciaux internationaux: l’exemple de la Cour d’arbitrage de la CCI, 115 J.D. 663 (1987); W. Laurence Craig, William W. Park, Jan Paulsson, International Chamber of Commerce Arbitration 203 et seq. (1990); Christophe Lahouss, The ICC Arbitral Procedure – Part I: Constituting the Arbitral Tribunal, ICC BULLETIN, Vol. 2, No. 2, at 3 (1991). For commentary on the new Rules, see the references at para. 391 above, note 579.
International Court of Arbitration is the permanent organ of the ICC which is to provide for the settlement by arbitration of disputes submitted to it (19).

1° Nature and Purpose of the International Court of Arbitration

977. — The ICC International Court of Arbitration is a body which, in principle, meets once a month. It comprises a Chairman (who is empowered to take urgent decisions on behalf of the Court), 8 vice-chairmen and 56 members representing a total of 56 different nationalities. The Court is backed up by a substantial Secretariat, which forms the real working machinery of the institution. Finally, as the ICC is an international organization comprising a large number of National Committees, the Court often seeks the views of those Committees when appointing an arbitrator.

978. — Article 1(2) of the ICC Rules states that the Court "does not itself settle disputes." This provision, contained in Article 2(1) of the previous Rules, has two important consequences.

979. — First, because the Court is not the arbitral tribunal, when it decides that an arbitration is to take place and rules on the composition of the arbitral tribunal, its decision is "administrative in nature." As this is therefore not a judicial decision, it is not capable of appeal, and the Court need not state the grounds on which it is based (Art. 7(4), replacing Art. 2(13) of the previous Rules). Second, when the Court decides to accept a request for arbitration, determines which parties are involved and declares that the arbitration shall take place, it takes organizational steps which do not bind the arbitrators. In particular, where the Court considers that "it is prima facie satisfied that an arbitration agreement under the Rules may exist," despite the default of the defendant or the challenge by one party of the existence, validity or scope of the arbitration agreement (Art. 6(2)), it requires the arbitrators to rule on their own jurisdiction. In so doing, the Court takes a further administrative decision.

The French courts, like their Swiss counterparts, have endorsed that characterization, and it has been confirmed in numerous ICC awards. For instance, in a 1979 award the arbitrator referred to Article 8, paragraph 3 and held that:

the fact that the Court accepted the present arbitration does not imply, by any means, a decision on its admissibility; this matter is submitted expressly to the judgment of the appointed arbitrator.

Likewise, the arbitrators are solely responsible for ruling on the interpretation of an ambiguous or pathological arbitration agreement, and for determining which parties are actually bound by the arbitration.

980. — However, in matters regarding the appointment of the arbitrators, the Court exercises a jurisdiction of its own. Thus, one arbitrator rightly observed that:

390 For the composition of the Court from April 8, 1997 to December 31, 1999, see ICC BULLETIN, Vol. 8, No. 1, at 13 (1997).


392 The previous Rules (Arts. 7 and 8(3), and Art. 12 of the Internal Rules) stated that the Court's decisions were of an administrative nature. The authors of the revised 1998 Rules rightly believed that it was not for the ICC to characterize its own decisions. However, commentators consider, correctly in our view, that the ICC's 1988 characterization remains accurate: see Herman Verbit and Christophe Imboulo, The New 1998 ICC Rules of Arbitration/Le nouveau Règlement d'arbitrage de la Chambre de Commerce Internationale de 1998, 1998 Rev. 25, 25.
[x]though the parties ... [had] agreed upon a method of appointing the sole arbitrator, ... when this method later proved to be ineffective because of the refusal of the [authority empowered] to appoint an arbitrator ... then the arbitrator shall be appointed by the Court.577

Similarly, another arbitrator stated that "[t]he Court of Arbitration has exclusive jurisdiction to decide whether one or three arbitrators are to sit and this decision is in itself not to be challenged before the arbitrator or before the Geneva courts."578

The French courts also consider that they should not "substitute themselves for the pre-designated arbitral institution in organizing and implementing the arbitral proceedings in accordance with its rules, unless that institution is proved to have failed to do so," and that "decisions of the Court [of Arbitration] concerning the appointment of the arbitrators are not open to appeal."579

981. — Article 9, paragraph 1 of the ICC Rules (Art. 2(1) of the previous Rules) stipulates that in appointing or confirming the appointment of 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." This allows the Court to ensure the respect of the general principle that every arbitrator must be and remain independent of the parties (Art. 7(1)). Subject to this restriction, the parties are entitled to depart from the provisions governing the constitution of the arbitral tribunal (Art. 7(6), replacing Art. 2(1) of the previous Rules). The French Cour de cassation therefore upheld a decision to set aside an award on the grounds that the arbitral tribunal was unlawfully constituted because the ICC Court of Arbitration had set up the arbitral tribunal without taking into account various derogations from its Rules provided for in the arbitration agreement.380

2° The Appointment of the Arbitrators

982. — The arbitral tribunal comprises one or three arbitrators (Art. 8(1), replacing Art. 2(2) of the previous Rules). The number of arbitrators is determined by the parties,

either in their arbitration agreement581 or by means of a later agreement.582 Failing that, the number is decided by the Court.583 The Court will, in principle, opt for a sole arbitrator,584 unless it considers that the scale or nature of the dispute warrants a tribunal of three arbitrators (Art. 8(2), replacing Art. 2(5) of the previous Rules). The practice of the Court is public and has been the subject of a number of studies.585 In 1998, 47.4% of cases submitted to the ICC were heard by three arbitrators.586 In most cases, the parties made that choice,587 indicating that they still favor having three arbitrators and thereby enabling each party to nominate one of the arbitrators.

983. — Sole arbitrators are nominated by mutual agreement between the parties, which is then confirmed by the Court. In the absence of an agreement between the parties, the Court appoints the arbitrator directly (Art. 8(3), replacing Art. 2(3) of the previous Rules). Where three arbitrators are to be appointed, each party nominates an independent arbitrator, and the appointment is confirmed by the Court. Where a party fails to make its appointment, the Court makes the appointment directly, in place of the party in default. The third arbitrator, the Chairman of the arbitral tribunal,588 is nominated by agreement between the two party-appointed arbitrators, and that nomination is confirmed by the Court. If the party-appointed arbitrators fail to make an appointment in due time, the Court will appoint the third arbitrator (Art. 8(4), replacing Art. 2(4) of the previous Rules).

In order to accelerate the constitution of the arbitral tribunal, the 1998 Rules now allow the Secretary-General of the Court alone to confirm the appointment of arbitrators where the declaration of independence is not qualified or, if it is qualified, does not give rise to objections. In such a case, the confirmation is reported to the Court at its next session (Art. 9(2)).589


579 "Cf Paris, réf., Jan. 18, 1991, Société chêvrésienne des pétroles, supra note 177, where a party challenged the appointment of the chairman of the arbitral tribunal by the ICC Court. On the recognition of the powers of arbitral institutions in this area, see supra paras. 806 et seq.


581 The number of arbitrators was determined in the arbitration agreement in 41% of the cases submitted to the Court in 1998, see 1998 Statistical Report, ICC BULLETIN, Vol. 10, No. 1 (1999).

582 The number of arbitrators was determined in a later agreement in 32% of the cases submitted to the Court in 1998, id.

583 The Court determined the number of arbitrators in 27% of the cases submitted to the Court in 1998, id.

584 A sole arbitrator was appointed in 23.1% of the cases (76 cases) and three arbitrators were appointed in 3.9% of the cases (13 cases), id.

585 Other than the references given above, note 320, see Hascher, supra note 339.

586 This figure is gradually decreasing over the years; see the statistics in the JOURNAL DU DROIT INTERNATIONAL annual review or in the ICC BULLETIN.

587 In 1998, the parties chose three arbitrators in 143 cases, and a sole arbitrator in 97 cases (see 1998 Statistical Report, supra note 381).

588 The ICC Rules give the Chairman an important prerogative: the ability to reach a decision alone if there is no majority decision (Art. 25, replacing Art. 19 of the previous Rules); in practice, the Chairman directs the conduct of the proceedings and this is reflected in fees that are slightly higher than those of the co-arbitrators.

984. — Where the Court is required to make an appointment, such appointment will be "upon a proposal from a National Committee" of the ICC. 390 The relevant National Committee will be that of the country where the party which failed to make the appointment is based, if such a Committee exists. For sole or third arbitrators, the relevant Committee will be that of a third country which the Court considers to be appropriate. The latter rule is not absolute: under certain conditions the Court itself can choose the sole or third arbitrator from a country having no National Committee. Further, unless a party objects, the sole or third arbitrator can be chosen from a country of which one of the parties is a national (Art. 9(3) to (6), replacing Art. 2(6) of the previous Rules). 391

985. — Although it is relatively flexible, this system sometimes gives rise to difficulties, particularly where the dispute involves more than two parties with different interests at stake. If the parties have stipulated that the dispute is to be decided by three arbitrators, two or more co-defendants may refuse—and in practice the Secretariat of the Court invites them to do so—to make a joint appointment of one arbitrator (the second arbitrator). Such a refusal has been held to be legitimate by the French Cour de cassation in the Dutco case, 392 on the basis of the "principle of equality between the parties in the appointment of the arbitrators."

The Dutco decision gave rise to some concern among practitioners. 393 They had been trying for many years, particularly within the ICC, to put forward a model clause and special rules for multi-party arbitration, but had met with little success because of the diversity of the situations described using the adjective "multipart." 394 Nevertheless the main difficulty stems from the privy of the arbitration agreement which means, in principle, that third parties to the contract containing the arbitration agreement cannot be required (or allowed) to participate in arbitral proceedings based on such agreement. 395

986. — The most usual scenario—and that encountered in the Dutco case—is less complicated. It concerns only one contract involving more than two parties, one arbitration agreement, and one dispute arising out of the contract. The principle of equality between the parties seldom led to unsurmountable difficulties in such a situation, even under the 1988 Rules. Problems were only likely to arise where the following circumstances co-existed:
— the parties had not adopted the standard ICC arbitration clause (which provides for "one or more arbitrators"), but had expressly stipulated that there were to be three arbitrators;
— in its request for arbitration the claimant sued more than one defendant;
— the co-defendants did not belong to the same group and had different interests at stake;
— the co-defendants refused, on grounds of equality, to appoint an arbitrator jointly.

Even in such a case, which was in practice fairly rare, the Court was not entirely powerless. In order to uphold the principle of equality, it could still order the claimant either to split its action and bring claims against each defendant separately, or to waive its right to appoint an arbitrator so that the Court alone appointed either one or three arbitrators. To justify either of those measures, the Court needed only refer to Article 26 of the Rules (Art. 35 of the 1998 Rules), which required it to make every effort "to make sure that the award is enforceable at law."

987. — That was certainly the spirit of a 1993 memorandum from the Secretariat of the Court, 396 which read as follows:

The judgment of the Cour de Cassation leaves parties wishing to institute proceedings against multiple defendants with a number of different options in order to avoid violating the principle of equality upon which the Dutco decision is founded. One would be to seek to reach an agreement with the defendants concerning the constitution of the tribunal. This would not offend the principles upon which the Cour de Cassation's judgment is based, provided, however, that the dispute has arisen. In the event that agreement with the defendants were no longer possible, or that the defendants cannot agree on the joint nomination of a co-arbitrator or do not accept that an appointment be made on their behalf by the ICC Court, the claimant might then consider requesting the ICC to appoint an arbitrator on its behalf. In such a case, the defendants could not claim to be disadvantaged if a joint appointment were made by or for them. Nor would any such argument be available to them if a sole arbitrator were appointed by the ICC in accordance with Article 2, paragraph 5 of its Rules. Of course, it may also be possible for the claimant to introduce separate arbitration proceedings against the different defendant parties concerned.

988. — The 1998 ICC Rules seek to resolve the problem more directly, by introducing at Article 10 a special provision for arbitration where there is more than one claimant or defendant. Article 10 thus reflects the common intention of parties who agree to have their disputes settled by ICC arbitration.

The principle remains that if the arbitration clause provides for three arbitrators, the multiple claimants jointly, and/or the multiple defendants jointly, nominate one arbitrator.

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390 This wording used in the 1998 Rules allows the Secretariat of the Court to itself ask for a proposal from a National Committee, and thus to appoint an arbitrator in place of the Court. On the benefits and dangers of this development, see Reiner, supra note 372, at 33.

391 These provisions were applied in ICC Award No. 7001 (1994), ICC BULLETIN, Vol. 8, No. 2, at 62 (1997).

392 Cass. le civ., Jan. 7, 1992, Dutco, supra note 75, where the dispute was between three members of a consortium.

393 See supra para. 792.

394 MULTI-PARTY ARBITRATION—VIEWS FROM INTERNATIONAL ARBITRATION SPECIALISTS (ICC Publication No. 480/1, 1991); see, previously, MULTI-PARTY ARBITRATION (ICC Publication No. 404, 1982); Delvovél, supra note 76. In 1994, the Working Party on multi-party arbitration established by the ICC Commission on International Arbitration, chaired by Jean-Louis Delvoyé, issued a Final Report on Multi-party Arbitration which is very detailed on the various aspects of this question and the available solutions (see ICC BULLETIN, Vol. 6, No. 1, at 26 (1995)).

395 On these problems of multi-party arbitration, see supra paras. 518 et seq.

If the parties fail to make a joint nomination and all parties are unable to agree on a method for the constitution of the arbitral tribunal, the Court may appoint every member of the tribunal and shall designate one of them to act as chairman. The Court has full discretion to appoint any person it regards as suitable to act as arbitrator.

The new system is legally watertight and is welcome in practice. Contrary to the opinion of certain commentators, the Dutco decision did not state that the principle of the equality of the parties gave each party the right to appoint “its” arbitrator. Each party will receive equal treatment wherever all the arbitrators are appointed by third parties. In fact, it is probable that the Court will seldom need to appoint all three arbitrators, as the mere fact that it may do so will either encourage the parties to agree on the method of appointment, or will discourage a claimant from initiating a single arbitration proceeding against multiple defendants or from requesting arbitration together with other claimants. Furthermore, the appointment of all the arbitrators by the Court is only an option: the Court could consider that, because all multiple claimants or multiple defendants have the same interests (as in the case of a parent company and its subsidiary), those parties are required to make a joint nomination of one arbitrator.

989. — By confirming the appointment of an arbitrator, and a fortiori by appointing one directly, the Court is able to verify that the requirement of independence is satisfied, particularly by means of the “statement of independence” which all prospective arbitrators must submit, whether their appointment is proposed by a party, by the other two arbitrators, by a National Committee or by the Court (Art. 7(2), replacing Art. 2(7) of the previous Rules).

3° The Challenge and Replacement of an Arbitrator

990. — The requirement of independence on the part of the arbitrators brings with it the requirement that each party should have the right, exercisable within a limited time-frame, to challenge an arbitrator “for an alleged lack of independence or otherwise” (Art. 11(1), replacing Art. 2(8) of the previous Rules). A party making a challenge must submit a written statement “specifying the facts and circumstances on which the challenge is based.” The Court decides on the admissibility and, if need be, on the merits of the challenge, having first provided “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” (Art. 11(3), replacing Art. 2(9) of the previous Rules).

The 1998 Rules add that such comments are to be communicated to the parties and to the arbitrators (Art. 11(3)).

991. — As with the appointment, confirmation or replacement of an arbitrator, the Court’s decision on a challenge is “final” (Art. 7(4), replacing Art. 2(13) of the previous Rules). This provision must not be misunderstood. First, there is no doubt that it prohibits any form of appeal within the ICC arbitration system. Second, because the ICC Rules are merely contractual, the fact that the Court’s decision is “final” simply means that by agreeing to submit disputes to arbitration under the ICC Rules the parties waive their right to bring any available appeal, to the extent that such a waiver is valid.

Prior to the entry into force of the Swiss Private International Law Statute, the Swiss courts did not consider this waiver to be valid. Relying on the mandatory nature of Article 21 of the Intercantonal Concordat on arbitration, they held that when a decision of the Court of Arbitration was contested, the Swiss courts had exclusive jurisdiction to rule on the challenge. Nowadays, however, Article 7(4) applies, because Article 180, paragraph 3 of the Swiss Private International Law Statute provides that the Swiss courts shall only intervene “to the extent to which the parties have not determined the procedure for the challenge.”

In French law, as we have seen, the courts will only be involved in the challenge of an arbitrator if the parties have not agreed on an alternative procedure. The President of the Paris Tribunal of First Instance will thus refuse to intervene if the dispute has already been, or could have been, submitted to the relevant arbitral institution. Similarly, the Paris Court of Appeals rejected both an appeal against a decision of the International Court of Arbitration upholding a challenge and a secondary action which the same party brought against the International Court of Arbitration. The grounds given by the Court of Appeals were that there was no allegation that the International Court of Arbitration had breached the ICC Rules. In that case, the Paris Tribunal of First Instance had carefully discussed the legal nature of the decision of the International Court of Arbitration on the challenge, considering it to be no more than “a measure of an administrative nature, a decision... remaining outside the exercise of the power to judge and decide a dispute.” The Tribunal nevertheless noted that the arbitrator had been removed after a discussion on the matter and that the absence of grounds for the decision was justified by the common intention of the parties.

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799 On the requirement that arbitrators be independent, which is one aspect of their status, see infra paras. 1021 et seq. On the ICC’s practice of requiring arbitrators to sign a statement of independence, see Hascher, supra note 359.

800 The expiration of this deadline obviously does not affect the admissibility of an action to set aside based on an arbitrator’s lack of independence; see CA Paris, June 1, 1995, Paris Hotel Associates Ltd v. Hotel Gray d’Albion Canners S.A., 1996 Rev. Ann. 528; see also Philippe Foucaud, Le statut de l’arbitre dans la jurisprudence française, id. at 225, especially ¶ 43 at 346-47.

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801 On the procedure and grounds for challenges before the ICC International Court of Arbitration, see Hascher, supra note 339, at 11 et seq.; DERAINS AND SCHWARTZ, supra note 339, at 173 et seq.

802 See LALIVE, FOUDRET, REYNARD, supra note 35, at 119 and 343, and the references cited therein.

803 See supra paras. 871 et seq.

804 CA Paris, May 15, 1985, Juffarines de pétrole d’Hons et de Banjir, supra note 142, and the commentary by Foucaud, supra note 55, at 21 et seq.

805 TGI Paris, Mar. 28, 1984, Juffarines de pétrole d’Hons et de Banjir, supra note 59.
In a different case, the Cour de cassation in turn made a clear statement as to the status of the International Court of Arbitration’s decision on a challenge. It held that the Court of Appeals rightly observed that the decision, concerning a challenge, taken... by the ICC Court of Arbitration, which was only responsible for organizing the arbitration and which was not exercising a judicial function, cannot be considered to be an arbitral award.\textsuperscript{465}

The Cour de cassation also held it to be perfectly legitimate for the Court not to give grounds for its decision, given that “the Rules upon which the parties had agreed provide... that the grounds of the decision shall not be communicated.”\textsuperscript{466}

992. — A decision of the International Court of Arbitration on the replacement of an arbitrator is also final (Art. 7(4), replacing Art. 2(13) of the previous Rules). An arbitrator will be replaced upon death, upon acceptance by the Court of a challenge, or upon acceptance by the Court of the arbitrator’s resignation (Art. 12(1), replacing Art. 2(10) of the previous Rules). The new Rules add a fourth case: an arbitrator will be replaced at the request of all the parties. This dismissal by mutual agreement is likely to be very rare, occurring only where all the parties have lost all confidence in the arbitrator.\textsuperscript{467} On the other hand, an arbitrator cannot simply resign as he chooses: to avoid an untimely or deliberately obstructive resignation by an arbitrator who is overly sensitive to the interests of the appointing party,\textsuperscript{468} the Court will examine the grounds of such resignation.\textsuperscript{469}

The Court can also replace an arbitrator who is “prevented de jure or de facto from fulfilling his functions,” or who is “not fulfilling his functions in accordance with the or within the prescribed time-limits” (Art. 12(2), replacing Art. 2(11) of the previous Rules). The Court thus has the power to remove negligent arbitrators. However, the Rules do contain procedural safeguards: the arbitrator in question, the remainder of the tribunal and the parties are to be informed, and they are all invited to submit written comments to the Secretariat of the Court. The 1998 Rules specify that these comments are to be communicated to the parties and to the arbitrators (Art. 12(3)).

4° The Seat of the Arbitration

993. — The seat of the International Court of Arbitration in Paris is of course not to be confused with the seat of the arbitration, which the parties are free to determine. The seat of arbitration is chosen by the parties in the great majority of cases.\textsuperscript{471} In the absence of a choice by the parties, the Court will choose the seat (Art. 14(1), replacing Art. 12 of the previous Rules), having regard to the wishes of the parties, the localization of the dispute and the local law on international arbitration.

The Court will also take into account any factor from which an implied choice by the parties can be inferred.\textsuperscript{472} Thus, where the arbitration agreement refers to arbitration under the auspices of the ICC “in Paris” or “of Paris,” the Court considers that the parties have indirectly chosen Paris as the seat of their arbitration. The Court’s view is that there is only one International Chamber of Commerce, and as the words “in Paris” or “of Paris” are therefore unnecessary for the purpose of identifying the arbitral institution, they can be interpreted as providing an indication of the location of the seat of the arbitration. In any event, France remains the country which is most often chosen as the seat of ICC arbitrations.

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\textsuperscript{465} Cass. 2e Civ., Oct. 7, 1987, Oplinte France v. S.A.R.L Diaconex, 1987 REV. ARB. 479, and E. Merger’s note; 1987 Bull. Civ. II, No. 184. The Paris Court of Appeals thus ignored this leading decision of the Cour de cassation when, in order to reject a complaint of defamation brought by one lawyer against another, it held that the International Court of Arbitration was a body of a judicial nature when deciding on the challenge of an arbitrator. See supra para. 979.

\textsuperscript{466} Cass. 2e Civ., Oct. 7, 1987, supra note 405.

\textsuperscript{467} See infra paras. 1138 et seq.

\textsuperscript{468} See Gaillard, supra note 190, at 784 et seq.

\textsuperscript{469} See Jean-Jacques Arnould and Edan Jakubka, "Les amendements apportés au Règlement d’arbitrage de la Chambre de Commerce Internationale (CCI) en vigueur depuis le 1er janvier 1988", 1988 REV. ARB. 67, 81; for statistics on resignations accepted by the ICC, see Hasher, supra note 339; DERAINS AND SCHWARTZ, supra note 339, at 181 et seq.

\textsuperscript{471} It has been applied in less than one per cent of cases, according to CRAIG, PARK, PAULSSON, supra note 369, at 236; DERAINS AND SCHWARTZ, supra note 339, at 184 et seq.

\textsuperscript{472} On this point, see infra paras. 1074 et seq.

\textsuperscript{470} On truncated tribunals, see infra para. 1136. On these issues, see, in particular, DERAINS AND SCHWARTZ, supra note 339, at 188 et seq.

\textsuperscript{471} In 1998, this occurred in 81% of the cases; see 1998 Statistical Report, ICC BULLETIN, Vol. 10, No. 1 (1999).

ahead of Switzerland. Nevertheless, ICC arbitrators sit in a very wide variety of jurisdictions: ICC arbitrations took place in 25 different countries in 1992, and in 35 different countries in 1997. The majority of those cases were in Europe, but a significant percentage also took place in the four other continents, underlining the universal reach of ICC arbitration.

B. - RULES OF OTHER ARBITRAL INSTITUTIONS

994. — Despite their diversity, arbitral institutions often play very similar roles, not only during the initial stage of constituting the arbitral tribunal (1°), but also in resolving subsequent difficulties affecting the composition of the tribunal arising during the course of proceedings (2°).

1° The Initial Constitution of the Arbitral Tribunal

995. — All arbitral institutions will of course provide a mechanism in their rules for appointing the arbitrators, and they all retain a role in the appointment process. However, the various sets of rules do diverge over the respective roles of the parties and the institutions in determining not only who is to choose the arbitrators, but also which arbitrators can be chosen.

996. — In most cases, the institutions allow the parties to determine the number of arbitrators, but their choice is restricted to one or three. Some rules give the parties the final say, but express a preference for a sole arbitrator, or for three arbitrators. Other rules determine the number of arbitrators according to the size of the dispute.

997. — The method of appointment is generally as follows:
— a sole arbitrator is appointed by mutual agreement;
— where three arbitrators are to be appointed, each party appoints one arbitrator, and the third is appointed by mutual agreement between the first two arbitrators;
— the institution only intervenes where a party has failed to make an appointment, or to appoint the sole or third arbitrator in the event of a disagreement between the parties or the other arbitrators, as the case may be.

That is the minimum role retained by most institutions, and it is one which shows most respect for the parties' freedom to choose the arbitrators. If that were the extent of the institutions' involvement, they would act exactly like any pre-designated appointing authority in an ad hoc arbitration.

998. — It is much rarer for the institution to retain exclusive power to appoint the sole arbitrator, the third arbitrator or even the whole arbitral tribunal directly. However, institutions do so in rules organizing fast-track arbitration.

999. — On the other hand, many institutions do retain the power to refuse the appointment of arbitrators or, rather, to confirm their appointment (or decline to do so). That enables the institution to verify the qualifications and independence of all the arbitrators, and to avoid subsequent difficulties caused by a poorly conducted arbitration or by challenges.

1000–1001. — Finally, many institutional rules follow the example of the ICC in requiring prospective arbitrators to disclose any circumstances which would be liable to cast doubt on their impartiality or independence. The institution will thereby be in a position to monitor the choices made by the parties and to confirm the appointment of the arbitrators in each particular case.

1002–1005. — As to the determination, in general terms, of which arbitrators can be appointed, the different rules have varying standards. They often contain no restrictions, requiring no particular qualifications. That is the approach favored by arbitral institutions which organize a broad range of arbitrations.

Conversely, other rules provide that only individuals named on a list drawn up in advance by the institution can be appointed as arbitrators. This system, which is far more restrictive,
is rarely found in non-specialized institutions.\(^{437}\) It is instead often used in trade institutions, because of the highly technical nature of most of the disputes submitted to them. In such cases, it is considered preferable for the arbitrators to be professionals drawn from the relevant business sector.\(^{438}\) On the other hand, there is a risk that the institution might be overly selective in compiling its lists, as a result of which one of the parties might consider that its choice is unduly limited, or that, not belonging to the organization, it has not been treated on an equal footing.

There are also intermediate systems, where the lists exist but remain optional, with the parties retaining the right to appoint arbitrators not appearing on the list.\(^{439}\)

2° Resolving Subsequent Difficulties

1006. — One of the advantages of institutional arbitration as compared to ad hoc proceedings is that it invariably provides for the resolution of problems that are liable to affect an arbitral tribunal which is already constituted or is on the verge of being constituted.

The death or incapacity of an arbitrator will obviously lead to a process of replacement. The same applies in the case of an arbitrator's resignation, although that can create problems if it is untimely, or where its effect or aim is to stall the proceedings (hence the option, which is still rarely found in institutional rules, of allowing the arbitral tribunal to pursue its functions with only two arbitrators).\(^{440}\) Conversely, institutional rules often allow the institution to remove a negligent or unsuitable arbitrator.\(^{441}\) Incidents of this kind often raise delicate questions as to the status of arbitrators and the nature of their relationship with the institution organizing the arbitration.\(^{442}\)

1007. — The arbitral institution may also have to resolve challenges by the parties of the arbitrators appointed. If the challenged arbitrator does not resign, the matter is submitted to the institution, which rules on the merits of the challenge. That is one of the important functions of arbitral institutions, because the increasing intensity of the arbitral process and the excesses resulting from the unilateral appointment of an arbitrator by each party have led to an escalation in the number of challenges. Some rules stipulate that the institution will not give reasons for its decisions\(^{443}\) and that its decisions are final.\(^{444}\) National laws generally consider such provisions to be legitimate, although they do allow for subsequent review of the award by the courts where a challenge is alleged to have been wrongly rejected.

1008. — Lastly, in almost all cases where arbitrators stop performing their functions, they must be replaced.\(^{445}\) In principle, institutional rules provide for such replacement to occur under the same conditions as those that governed the initial appointment of the arbitrator being replaced. However, in some cases, to save time (or to prevent delay), the institution may retain the power to replace the arbitrator directly, and its rules may provide that the proceedings will not necessarily be repeated.\(^{446}\)

\begin{itemize}
\item \(^{437}\) It is the case of the Indian Council of Arbitration (Rules 9 et seq. and 22).
\item \(^{438}\) See Art. 8 of the Rules of the Chambre arbitrale de l'Association Française pour le Commerce des Cacaos; Art. 34 of the Grain and Feed Trade Association (GAFTA) Rules; Art. 1 of the Federation of Oils, Seeds and Fats Associations Ltd. (FOSFA) Rules.
\item \(^{439}\) See Art. 5 of the 1991 Rules of the Austrian Federal Economic Chamber (the Vienna Rules); Art. VI of the Paris Maritime Arbitration Chamber Rules.
\item \(^{440}\) See infra para. 1136.
\item \(^{441}\) See Art. 10 of the LCIA Arbitration Rules; Rule 26(a) of the Indian Council of Arbitration; Art. 19 of the 1999 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Art. 31 of the CACNIQ Rules; Art. 18(4) of the 1997 CEPANI Rules; Art. 12(2) of the Rules of the Italian Arbitration Association (AIA).
\item \(^{442}\) See infra paras. 1128 et seq.
\item \(^{443}\) See Art. 29.1 of the LCIA Arbitration Rules; Art. 12(1) of the Rules of the Italian Arbitration Association (AIA).
\item \(^{444}\) See Art. 29.1 of the LCIA Arbitration Rules.
\item \(^{445}\) The exception to this rule is if the rules allow the proceedings to continue before a tribunal that is incomplete; see infra para. 1136.
\item \(^{446}\) See Art. 11(2) of the AAA International Arbitration Rules; Art. 33 of the CACNIQ Rules.
\end{itemize}