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Securing a Regime for Effective International Arbitrations
International Chamber of Commerce International Court of Arbitration

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Moderators: Lorraine Brennan (ICC International Court of Arbitration, New York); Alex Blumrosen (Bernard-Hertz-Béjot, Paris)

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I. INTRODUCTION

The Delegation's first meeting in Paris was convened at the International Chamber of Commerce. The panels included a group of the world's most accomplished international arbitrators. They reviewed current developments in international commercial arbitration.

II. FIRST PANEL – MULTIPARTY ARBITRATIONS

A. Introductions and opening remarks

1. **Ms. Deborah Enix-Ross** introduced the first panel. Ms. Lorraine M. Brennan moderated. Ms. Anne-Marie Whitesell, Mr. Robert Briner, Mr. Emmanuel Gaillard, and Mr. Hilmar Raeschke-Kessler participated in the panel discussion.

2. **Ms. Brennan** noted that the ICC was created in 1923 and grew out of the Peace Conference at Versailles as part of the wider post war effort to design international dispute resolution mechanisms intended to secure a lasting peace. The ICC initially met in New Jersey, but the ICC showed its early wisdom by settling in Paris.

3. **Mr. Briner**, the current Chairman of the ICC International Court of Arbitration, opened the session with an overview of the development of international arbitration. Mr. Briner previously served on the United Nations Compensation Commission (UNCC) to process claims and pay compensation for damage resulting from Iraq's

invasion and occupation of Kuwait, and served as a member of the Claims Resolution Tribunal (CRT) for dormant Swiss bank accounts from the Nazi era.

Mr. Briner observed that the growth of the ICC workload reflects both an increased in the amount of trade between nations and the increase of the number of disputes in international commerce. The role of the U.S. has also grown and it has a unique contribution to the law of arbitration, particularly with the adoption of the 1925 U.S. Arbitration Act, the 1958 New York Convention on Arbitration, the 1990 Inter-American Convention on International Commercial Arbitration, the UNCITRAL Model Law on International Arbitration by several states, and the U.S. Supreme Court's long established pro-arbitration stance. Also, the U.S. Supreme Court will soon decide whether 62/64 of the ICC rules permits parties to constrict or expand arbitration beyond the scope of the Arbitration Act. U.S. law has had and will continue to have a substantial influence on the law of international dispute resolution.

The ICC has been a prime force in the development and acceptance of arbitration in the world. The ICC first met in New Jersey with the French Minister of Commerce as its first president. The ICC has promulgated rules of arbitration and issued guidelines for national and international arbitration bodies. Its first rules addressed both arbitration and *conciliation* of disputes, but arbitration has been the traditional focus of the ICC.

Since its first arbitration (a dispute over a shipment of wood and fluctuation in currencies), the ICC has conducted over 13,6000 arbitrations. There are approximately 103 American arbitrators associated with the ICC. The name "Court of Arbitrators" is a bit of a misnomer, since the Court of Arbitrators does not sit to hear individuals' cases, but rather serves to enforce the rules of the ICC. The ICC has its offices in Paris, but it conducts arbitrations throughout the world. Its procedure is highly flexible, since the arbitrations are held in so many and varied places around the world. Indeed, the only rule of procedure is that the proceeding be a fair hearing of the dispute. The ICC also has had a role in the development of commercial law through its awards, which are appropriately redacted and published by the ICC.

In the past year, the ICC received 580 requests for arbitration. Those requests concerns 1,584 parties from 123 different countries and independent territories. In 115 of the cases, at least one of the parties was a state or other public entity. The place of arbitration was located in 47 different countries and the arbitrators of 69 different nationalities were appointed or confirmed under the ICC Rules. In 55.3% of the cases, the amount in dispute exceeded $1 million U.S. dollars, and 369 awards were rendered.

B. Challenges to the Appointment of an Arbitrator. The first panel addressed the raising objections to an arbitrator and the constitution of an arbitral panel.

There are two stages to raise objection: (1) at the time of the appointment of the arbitral panel, and (2) after the appointment of the panel, which can be raised during the arbitration or at the time of enforcing the award.

Axel Baum, of Hughes Hubbard & Reed LLP in Paris, observed that the frequency of objections to arbitrators is resurgent in the practice, in part to protect the fairness of the process and some fear in part to abusive tactics. Mr. Baum observed also that objections are more successful at an early stage, and more difficult at later stages. As the parties spend time and resources in arbitration, the grounds supporting the objection must, as a practical matter, be more substantial to succeed on the objection to a party appointed arbitrator. However, the chairman of the panel must be "whiter than white" to assure the independence and the impartiality of the panel.

Article 7 of the ICC Rules speaks only to independence from the parties involved, and not impartiality. Before appointment the arbitrator must sign a statement of independence and disclose any facts to the secretariat that may raise a question of independence. Mr. Baum explained that a lack of independence is an objective matter and impartiality is subjective. A challenge to the independence of an arbitrator is considered by the International Court of Arbitration, by way of a report with a recommendation to the court in plenary session. The court may reject the recommendation, but it is usually accepted. The challenge, of course, takes time, which raises a dilemma in maintaining independence and impartiality but also wanting to avoid delay in the process.

Emmanuel Gaillard, of Shearman & Sterling LLP in Paris, addressed the grounds for challenge to the arbitrator and the grounds for disclosure. The UN Commission on International Trade Law Arbitration Rules set out similar standards for when an arbitrator should disclose information and for when a party may challenge an arbitrator. Article 9 of the UNCITRAL provides that: A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

Article 10 of the UNCITRAL rules provides the standard for asserting a challenge, which is that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The ICC rules take a different approach. Article 7 of the ICC Rules requires an arbitrator to "…disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties." There is a subjective element to this standard. A challenge to an arbitrator under Article 11 of the ICC rules may be made for an alleged lack of independence or impartiality, which is an objective allegation as to the qualities of the arbitrator and is narrower than the grounds for disclosure under Article 7.

Under the UNCITRAL rules, information is disclosed only if there is a justifiable doubt. If a party objects based on this information disclosed by the arbitrator, it is difficult for the arbitrator to assert that it is not a problem, since he disclosed the information because he determined that it presents a justifiable doubt.

Mr. Gaillard pointed out two views on an arbitrator's failure to disclose information that should have been disclosed. First, if the arbitrator does not disclose information that should have been disclosed, the failure to disclose should be grounds to vacate the award or otherwise object to the arbitrator. The second view is that the failure to disclose is grounds to vacate the award only if the party seeking to set aside the award shows that the non-disclosed information caused the award to be rendered as it was.

Mr. Hilmar Raeschke-Kessler addressed the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration. The IBA guidelines have the general standard that every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceedings until the final award has been rendered. The IBA guidelines view impartiality as being free of bias and independence as being free from external forces.

The IBA guidelines set of color-coded lists: red, orange, and green lists. The red list has a non-waivable list and a waivable list. The non-waivable red list is a list of specific situations that give rise to justifiable doubts as to the arbitrator's impartiality and independence. In these circumstances an objective conflict of interest exists from the point of view of a reasonable third person. The non-waivable red list derives from the principle that no person can be his own judge, and therefore, disclosure of such a situation cannot cure the conflict.

The waivable red list includes situations that are serious, but not as severe as the non-waivable list. However, because of their seriousness these situations should be considered waivable only when the parties are aware of the interest and expressly state their willingness to have such the person act as arbitrator. If a party challenging the award shows a conflict that appears on the red list, the challenge ought to be successful and the award be set aside.

The orange list is a list of situations that give rise to justifiable doubts about the arbitrator's impartiality or independence based on the specifics of the case and that the arbitrator must disclose to the parties. A party may object, but if a party does not object, than the party will have accepted the arbitrator.

The green list contains situations that pose no appearance or actual conflict of interest, so the arbitrator has no duty to disclose the information.

Mr. Baum noted that there has been an increase in the number of challenges to arbitrators in the ICC arbitrations. There were 13 challenges in 1995, 33 in 2000, 17 in 2001, 20 in 2003, and 37 (of which 2 were accepted) in 2004. On average 10% of the challenges are accepted. In 2004, there were 24 instances out of 940 nominations where the arbitrator was not confirmed.

Objections on impartiality are not often sustained because impartiality is a state of mind that manifests itself in the conduct of the arbitrator. Only infrequently is there conduct that shows impartiality of the nominated arbitrator. In any event, the ICC

Court does not give reasons when it rules on a challenge to the appointment of an arbitrator.

Questions for the floor:
Arbitration is only as good as the arbitrator. Impartiality is a question of the mind, and independence is a question of external influences. Should we address first whether the arbitrator is independent and if so, only then inquire about partiality? How should we address a situation where the arbitrator is unbiased at the time of appointment, but becomes biased afterwards? Can an orange list factor become a red list factor or a green list factor?

Response from Mr. Briner:
A party cannot show bias until the arbitrator acts. Article 11 of the ICC Rules is open to an objection on the grounds of a lack of independence and is open to objection on other grounds.

Question from John Townsend:
For arbitration in the U.S., which set of rule provides the greater grounds for disclosure: IBA or ICC, or perhaps AAA code of ethics of the new ABA rule on disclosures?

Response:
International arbitration rules are not intended to be connected to the seat of the arbitration. In New York, for example, the international standard ought to be selected as the governing rules. The international standard, not a local standard, is the one best suited for international conflict resolution.

Comment and Question from Ken Reisenfeld:
AAA and ABA have a new standard for disclosure that has raised the standard in favor of disclosure by the arbitrator. The ABA goal was not to articulate a new local standard, but to make the ABA rule comport with the international standards. The ABA rule is intended to be a subjective standard linked to the context of the arbitration, and to protect the integrity of the award. The ABA drafters considered that an objective standard would give a party the opportunity to unsettle an award. A subjective standard preserves the integrity of the award and removed the possibility of a "time bomb" being placed in the proceeding by an objective standard that will explode when the arbitration is complete.

Additional Comment by Mr. Briner:
The standard applied is the same for party appointed and chamber appointed arbitrations. There is no distinction and Article 7 of the ICC rules requires disclosure of facts that would give rise to doubt.

III. SECOND PANEL – MULTI-CONTRACT ISSUES AND CLASS ACTIONS

The panel was composed of Eric Schwartz of Freshfields Bruckhaus Deringer of Paris; Yves Derains from the Secretary General's Office of the ICC in Paris; Anne-Marie

Whitesell of the ICC International Court of Arbitration in Paris; with introductions by Lorraine Brennan of the ICC in New York.

Mr. Schwartz began with the topic of Complex Arbitration

Multi-party contracts have been around for a long time, but they are still complex and still the topic of debate. The goal of arbitration is an effective and cost effective process with respect to the consent of the parties. The rules are drafted with the two poles in mind. Yet, even carefully crafted arbitration agreements can still leave room for dispute (for example Euro-Disney's carefully worded 4-page arbitration clause still gave rise to a dispute and was left to ICC's notions of equality).

If parties draft a clause to address problems with multiple parties, it does not always eliminate problems but often gives rise to similar problems in greater numbers. There have been recent efforts in legislatures in several countries to enact legislation to have related arbitrations consolidated in the same proceeding. An effort in the Netherlands, for example, in 1986 lost momentum and resulted in nothing.

The broad point to observe is that contracting parties may have many contracts with arbitration clauses, but may elect only one arbitration on one contract, and that one is instituted as a gate keeper for all others.

Article 6.2 of the ICC rules provides that if the respondent does not file an answer or challenges the validity or scope of the arbitration agreement, the ICC court may decide that the arbitration shall proceed if it is satisfied that an arbitration agreement may exist. In such a case, any decision as to the jurisdiction of the arbitral tribunal shall be taken by the tribunal itself. If the Court is not satisfied that an arbitration agreement may exist, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

When the ICC process is set in motion, the ICC sends the issues to the arbitrator to decide. The arbitrator's role is to decide the issue; this may conflict with the role of courts on this issue. Where a party has consented to multiparty arbitration the question is whether and who makes the decision as to the scope of the arbitration – the arbitrators or the courts. In Europe, the answer is traditionally the court is the ultimate judge of the scope of the arbitration agreement.

Anne-Marie Whitesell notes that in 1995, 20% of all ICC arbitrations were multiparty. In 2004, one-third of ICC arbitrations were multiparty. In 2004, there were cases with 34 plaintiffs and one defendant; one plaintiff and 47 defendants; and another with one plaintiff and 81 defendants. There are also increases in the number of cases with multiple contracts. The 1998 rule revision regarding multiparty arbitrations is that if a party does not answer or object, then the ICC Article 6.2 process may be applied under the ICC rules. "May" being the operative term.

One new practice that has appeared is noticing arbitration to multiple parties, but withholding notice to one party. That party can join in the arbitration as a third party if

the joining party is a signatory to the agreement and the respondent must have a true claim against the other party. Under Article 10 of the ICC rules, multiple party cases with three arbitrators, the claimants and the respondents nominate arbitrators for confirmation pursuant to Article 9. If the parties cannot agree, the ICC constitutes and appoints a chairman, but typically the parties agree.

The multiple contact arbitrations can be consolidated if the contract is signed by the same parties, involving the same economic transaction, and comparable terms in the arbitration clauses.

When an arbitration is already pending, the ICC can accept the request of a party to include his claim in a pending proceeding. Article 4.6 of the ICC Rules provides that when a party submits a request in connection with an arbitration proceeding between the same parties already pending, the ICC may decide to include the claims contained in the request in the pending proceedings provided that the terms of reference have not been signed or approved by the ICC Court. Once the terms of reference have been signed or approved by the ICC Court, claims may only be included in the pending proceedings subject to the provisions of Article 19. Essentially, the claim can be included if a party requests inclusion of the claims, if the claim is between the same parties, if there is the same legal relationship between the parties (such as the same economic transaction) and the request is made before the terms of reference are made. The same relationship between the parties is not necessarily the same contract, but broadly viewed as the same type of relationship between the parties. The conformation of arbitrators in multi-contact proceedings. There are many questions and new revisions of the rules may be required for the ICC to meet its goal of aiding parties in dispute resolution.

Mr. Yves Derains addressed the topic of Cross Claims.

The working example of a joint venture performed in several nations to construct a power plant in Egypt was used to illustrate the problem: if one joint venturer initiates a proceeding against the French agent on a subcontract, the Italian subcontractor may want to assert claims in that proceeding.

The traditional view was that it is not possible for the Italian subcontractor to assert claims in an arbitration between two other parties on a contract that the Italian party is not involved. The traditional view is very frustrating, especially because in a court proceeding it would be simple to do so. Each joint venture member is jointly responsible for the success of the project, so if A sues D, then a remedy may be against E, since each are jointly and fundamentally involved in the project.

If all have signed on to arbitration with essentially the same terms, why should a party be excluded from a proceeding that affects him? Starting one claim may invoke ICC Article 10.2 for the constitution of a panel. The Article 10 process, once initiated, deprives the parties the right to appoint their own panel – and appoint one's own panel is perceived as one of the great advantages to arbitration. The result is a tension between the right to assert a cross claim and the right to select the arbitrators.

Mr. Briner noted:

Regarding the application of the Article 10.2, before the 1998 rule change, there was a decision of the French high court in a case involved one claim and two respondents. The ICC appointed arbitrators for the two respondents. The French court vacated the award on the grounds that the ICC did not have the power to appoint the panel in the situation, citing the danger of unequal treatment. Mr. Briner added a few examples where European courts would not enforce an arbitration award because the party against whom the award was entered was not a party to the arbitration clause. In actuality, it is the first arbitration in a multiparty situation that determined the competence of the panel.

Ms. Anne-Marie Whitesell commented:

Under Article 6.2, a case initiated under ICC rules has agreed to give the ICC Court the first opportunity to decide.

Mr. Briner added:

The new practice under ICC is to bring in a third party provided the claim is against a party in the proceeding and that the third party singed the arbitration agreement.

IV. THIRD PANEL – ENFORCEMENT AND VACATUR OF FOREIGN ARBITRATION AWARDS

The panel consisted of Mr. Matthieu de Boisseson (Darrois Villey Maillot Brochier of Paris); Guy Lipe (Vinson & Elkins in Houston); and Eric Schwartz (Freshfields Bruckhaus Deringer of Paris); with Alex Blumrosen (Bernard-Hertz-Béjot in Paris) as introducer and moderator.

Enforcement of the Arbitral Award

Mr. Schwartz began by observing that enforcement of an arbitral award is object of the process. Article 1 of the New York Convention provides that the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

Under the New York Convention, there is a distinction between domestic and foreign arbitration awards. The New York Convention is concerned only with the enforcement of international awards and not domestic awards, but what is a domestic award?

European practitioners view domestic to mean a panel constituted under domestic law. In the U.S. Court of Appeals for the Second Circuit in the Toys R Us case and in the Eleventh Circuit in the Four Seasons case, the courts held that there is no overlap

between the New York Convention and the Federal Arbitration Act. If an arbitration is under the New York Convention, then a party may not seek to vacate the award under the FAA.

Other courts have taken a different approach: finding it contrary to public policy to exclude vacating an award on grounds authorized in the FAA or the New York Convention. Others find that parties are deemed to have waived recourse to other statutes under Article 28.6 of the ICC rules which requires the parties to undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. Different approaches have been taken. Article 54 of the Egyptian arbitration statute provides that its provision cannot be set aside. A French Court of Appeal has held that parties cannot alter the statutory recourse available. A Turkish court held that the ICC is contrary to its public policy, but has since changed its position. Argentinean courts have defined public policy so broadly that the definition may interfere with a party's ability to enforce an award. There is no universal approach.

The principle of Article 5 of the New York Convention is that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party can prove that:

- the parties to the agreement were under some incapacity, or the agreement is not valid under the governing law or the law of the country where the award was made;

- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

- the award deals with a difference outside the terms of the arbitration;

- the composition of the arbitral authority or the procedure was not in accordance with the agreement or the law of the country where the arbitration took place; or

- the award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The enforcement is optional, and a court "may" refuse to enforce against a party if not binding in the country where it was made. This imports the policy public of the country where the award was made because one might assert that the award is not enforceable where it was made because it is contrary to public policy in that country.

Also, Article 7 of the New York Convention makes plain that the provisions of the convention are not affected by any other treaty and will not deprive a party of the right to avail oneself to benefits of the arbitration award. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning

the recognition and enforcement of arbitral awards entered into by the contracting states nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon. The New York Convention is meant to establish minimum conditions for the enforcement of awards.

The example of the Cromoloid arbitration is noteworthy, where the award was enforceable in the U.S. was set aside in Egypt. The defendants sought to avoid enforcement in the U.S. on the grounds that it was set aside in Egypt. The court noted that Article 5 of the New York Convention was discretionary and that Article 7 was not dependant on rights in the absence of the Convention.

Mr. Guy Lipe continued

There are essentially three defenses to the enforcement of an award: (1) lack of personal jurisdiction over the person against whom the award is being enforced; (2) forum non-conveniens; and (3) manifest disregard for the law (this third one being a judicially created defense).

In the Channel Islands v. Masow Aluminum case before the Fourth Circuit, a party sought to enforce a $12 million award. The district court however, refused to confirm the award finding that mere presence in the jurisdiction that was unrelated to the dispute is not sufficient to confer in personam jurisdiction.

On the second defense of forum non-conveniens in the Monderay Manaco Ins. Co. case, a party sought enforcement award against the defendant and the Ukraine government on an agency alter-ego theory. The evidence was all in Ukraine and the forum non-conveniens doctrine was used to force the recognition of an award on a party that had not signed the arbitration clause. There is some concern that this may cause a chill of the business dealings. However, in actuality it means greater certainty in business transactions, which means more trade and less risk.

Vacatur under domestic law is not referred to in the New York Convention. Where the situs of the arbitration is in the U.S. the multi-district litigation rules might be applicable. The multi-district litigation rule does not apply to arbitrations where the situs is outside of the U.S. Article 5.01(e) of the New York Convention would apply outside the U.S. – meaning that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked if that party proves that the award has not yet become binding, has been set aside or suspended in the country where it was rendered. However, the Eleventh Circuit expressly rejected the multi-district rule on the grounds that the rule is not simple or quick.

Lorraine Brennan asked:

How does the Base Metal case from the Fourth Circuit affect the principle in the New York Convention to make award enforceable? An award enforceable in Qatar was denied recognition on forum non-conveniens principles. In France, however, the ICC election would be a waive of an immunity defense. The matter was the enforcement of a foreign

award based on French law not on the New York Convention, with no reference to setting aside under French law.

Glenn Hendrix from Atlanta commented:

The Base Metal case is an anomaly and sees future cases being decided differently.

Mr. Bossieni commented:

Reading from the Qatar case, Article 2.8 of the New York Convention rules might require the dismissal of Qatar's motion on the grounds of waiver of immunity because the party who signed the arbitration clause was the sovereign state of Qatar, so that act waived immunity by voluntarily submitting to the arbitration.