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What Makes Challenges Challenging?

Marnix A. Leijten and Matthias L. Kuschner¹

Of the many varied functions performed by the ICC International Court of Arbitration (the 'ICC Court') in the arbitral process, its role in resolving challenges to an arbitrator based on a lack of independence or impartiality pursuant to Article 14 of the Rules of Arbitration of the International Chamber of Commerce (the 'ICC Rules') is one of the most critical. Only a rigorous and principled enforcement of fundamental ethical standards can safeguard adequately the legitimacy of arbitration as a mode of dispute resolution and, of more immediate concern to disputing parties, preserve the integrity of any arbitral award that is ultimately rendered. The process of resolving challenges is also perceived, not least by the ICC Court and its Secretariat, as an especially taxing one.

During his tenure of over six years at the helm of the ICC Court, John Beechey has presided over countless debates in the monthly plenary sessions of the ICC Court regarding challenges, including a sizeable number of especially thorny cases in which starkly opposing views were being voiced within the ICC Court. Arguably, John was at his very best during these debates. Combining a wealth of practical experience, a characteristically thorough and detailed preparation, the highest ethical standards and eminent pragmatism, he skilfully and safely navigated the ocean liner that is the ICC Court between the rocks and the hard places posed by such challenges. John never imposed his views on others, but more often than not convinced many members of the ICC Court – most of whom are not known for being easily persuaded to change their minds. Only rarely, but then graciously, did John have to accept the majority view of others. Perhaps more than anyone present at these plenary sessions of the ICC Court, John would consistently and meticulously emphasise the all-important detailed

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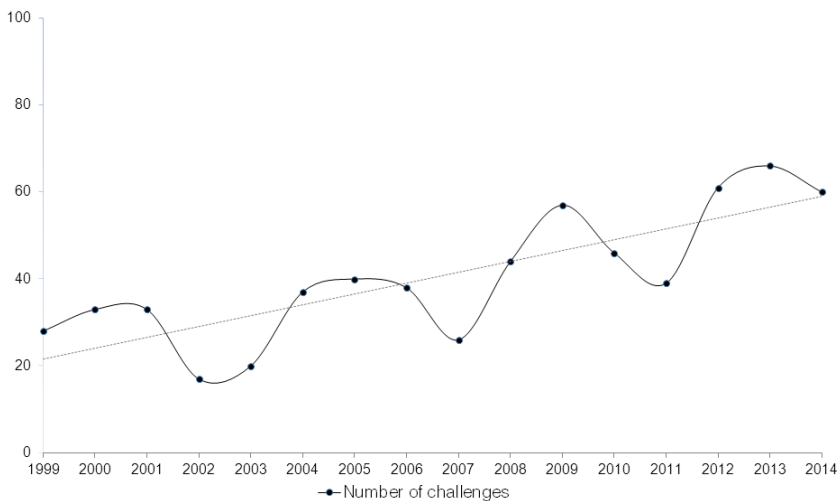
factual circumstances and nuances that often do make a world of difference. Both authors consider it a special honour and privilege to have been part of such Beechey-led debates.

The present chapter endeavours to explain the basis for the perception that challenges are both one of the most critical and one of the most taxing functions of the ICC Court. First, we examine one truth that is widely held to be self-evident, namely that challenges in international arbitration are a growth industry (1). We proceed to consider two challenges in a topical area that appear superficially similar, but may lead to diametrically opposed decisions from the ICC Court, to illustrate the tensions inherent in an intensely fact-driven process (2). Staying within the same topical area, we finally evaluate the potential impact the ICC Court can have outside the narrow confines of deciding a specific challenge to shape policy and stimulate self-regulation in response to legitimate concerns of users of international arbitration (3).

1. A growth industry?

The customary starting point of the chapter or section dealing with challenges of arbitrators in the standard arbitration textbooks still appears to be the claim that challenges have become (much) more frequent in recent years.² A quick glance at the statistics published by the ICC Court on an annual basis appears to lend credence to this view.³

Figure 1



2 See e.g. G.B. Born, *International Commercial Arbitration*, 2d ed. (Kluwer, 2014) at 1913; J.D.M. Lew et al., *Comparative International Commercial Arbitration* (Kluwer, 2003), § 13-7.

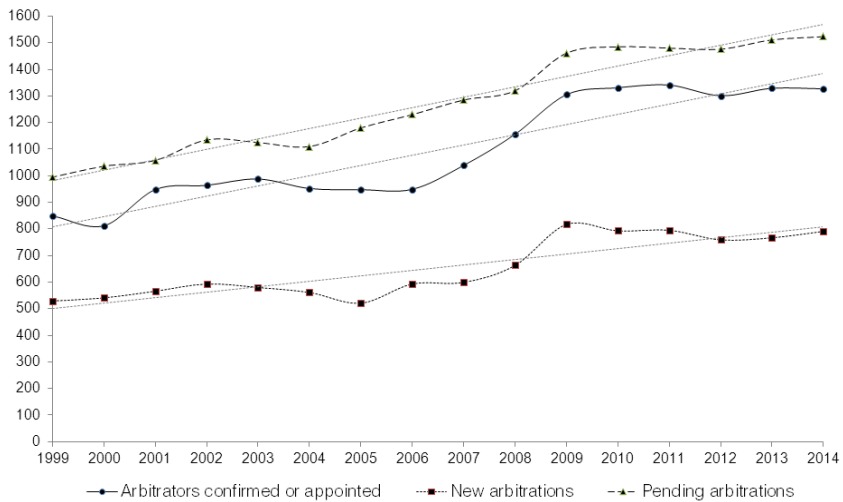
3 For the raw data underlying Figures 1 and 2, see the Statistical Reports published annually by the ICC in the *ICC International Court of Arbitration Bulletin*, which was relaunched in 2015 as the *ICC Dispute Resolution Bulletin*.

As Figure 1 shows, the number challenges has varied to a considerable degree in absolute terms on a year-to-year basis over the sixteen years from 1999 to 2014, with a low of 17 in 2002 and a high of 66 in 2013. In the long term, the absolute number of challenges appears to have grown consistently and appreciably, as the linear trend line in Figure 1 shows. That impression is confirmed by considering the average number of challenges for the four four-year spans within this period, with the ICC Court receiving just under 28 challenges on average in the quadrennial from 1999 to 2002 and just over 56 challenges on average in the quadrennial from 2011 to 2014.

The undeniably sharp increase in the absolute number of challenges is, however, meaningless when viewed in complete isolation. Three phenomena suggest that this prima facie evidence of the buoyant growth in the number of challenges ought to be approached with some caution.

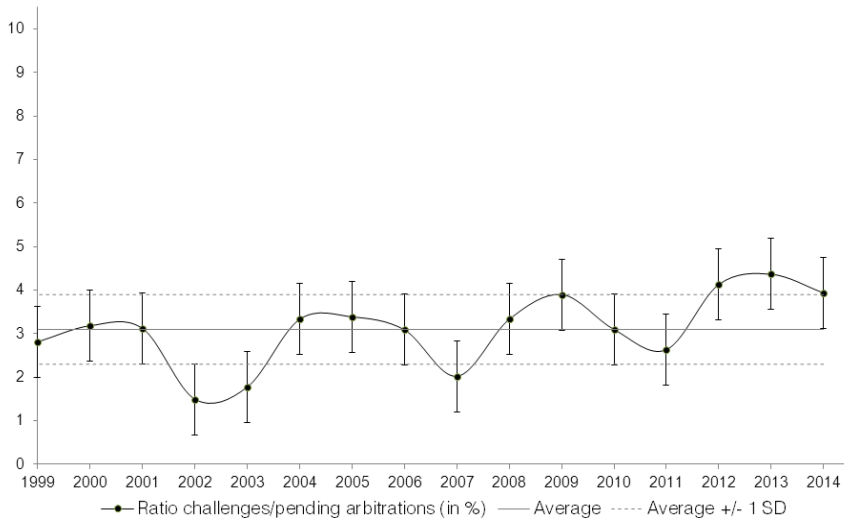
First, it has taken place in the context of a similarly buoyant (if not quite as explosive) growth in the number of arbitrations filed, and thus in the number of pending arbitrations and of arbitrators confirmed or appointed, over the same period, as Figure 2 shows.

Figure 2



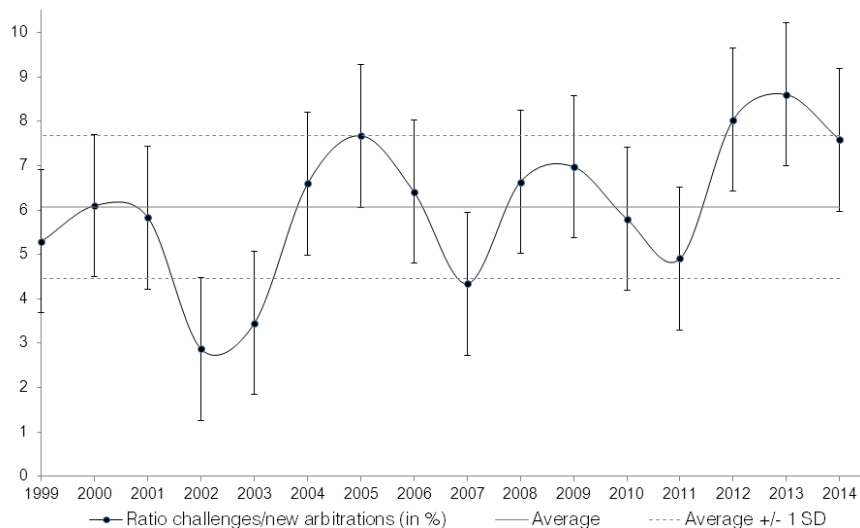
Merging these data series permits a more meaningful appreciation of the growing number of challenges relative to the rising number of arbitrations handled and arbitrators appointed or confirmed by the ICC. As Figure 3 demonstrates, the ratio of pending arbitrations and challenges has oscillated over the years around an average of 3.1%, with a standard deviation of 0.81. A few extreme outliers in 2002, 2003 and 2013 aside, the ratios for most years are scattered relatively snugly around the average and fall well within the corridor of one standard deviation. Notably, the ratios for 2004 and 2005 (3.3% and 3.4%, respectively) are not of a wholly different order of magnitude than the ratios for 2009 or at the end of the period in 2014 (3.9%).

Figure 3



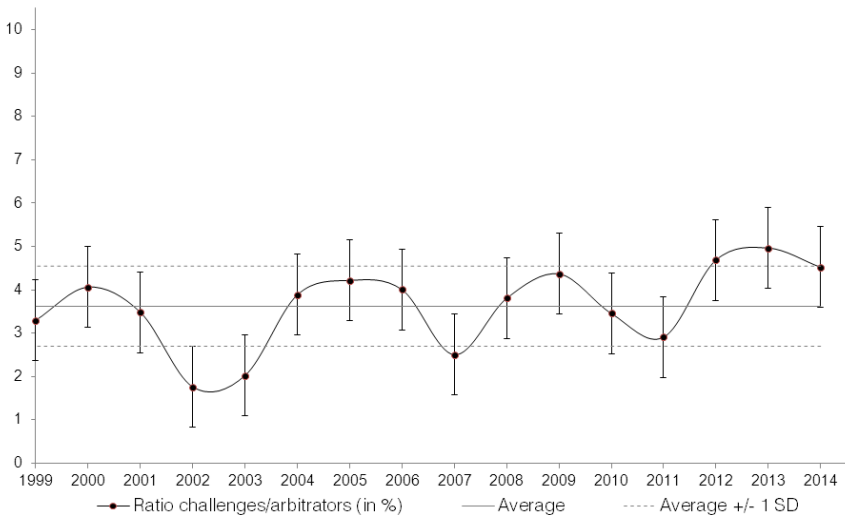
A similar result obtains when the number of newly filed (rather than pending) arbitrations is chosen as comparator, which confirms that no substantial or systematic corrections are required to account for the time lag usually observed between the commencement of an arbitration and the filing of a challenge. Figure 4 confirms the outlier status of 2002, 2003 and 2013, with the annual ratios of the number of challenges to the number of new arbitrations falling within one standard deviation (of 1.6) around the long-term average (of 6.1%). Again, the ratios observed in 2004 and 2005 (6.6% and 7.7%, respectively) are in a similar quantitative sphere as those for 2009 (7.0%) and 2014 (7.6%).

Figure 4



Finally, and perhaps most relevantly, a comparison of the total number of challenges to the total number of arbitrators confirmed or appointed by the ICC Court yields a similar result, as depicted in Figure 5. The long-term average ratio is 3.6%, with a standard deviation of 0.9, and it is once more only in 2002, 2003 and 2013 that the observed ratios differ clearly by more than one standard deviation from the average.

Figure 5



Accordingly, when viewing these developments in context across the entire 16-year period, it is apparent that the increase in the (absolute) number of challenges can be explained, at least to a significant degree, by the increase in the (absolute) number of pending arbitrations, new arbitrations and arbitrators confirmed or appointed by the ICC Court. Contrary to popular belief, then, the ICC has not witnessed a truly disproportionate or unnaturally steep increase in the number of challenges filed.

Second, the (still) relatively small number of challenges filed in any given year is prone to yield erratic and deceptive results that may also distort the long-term perspective and insinuate growth where there is none. To give but one example, in 2009, 23 of the 57 challenges were filed in a single (!) case (and were largely repetitive challenges filed by the same party against the same arbitrators), which more than explains the superficially sharp increase in the overall number of challenges from 2008 to 2009.⁴

⁴ See S. Greenberg, 'Tackling Guerrilla Challenges Against Arbitrators: Institutional Perspective' (2010) 7:2 *Transnational Dispute Management Journal*.

Third, the ICC Court and its Secretariat have undergone transformative institutional change in the last decade and a half, not least in response to their ever-expanding caseload and the increasingly complex and demanding nature of the work. Thus, while towards the beginning of the period the ICC Court counted a Chairman, 10 Vice-Chairmen and some 120 members,⁵ the ICC Court has grown to 17 Vice-Presidents (as they are now called) and over 130 members by 2015. Similarly, while some 30 lawyers in seven case management teams of the Secretariat in Paris (representing some 20 nationalities and speaking some 20 languages) handled the 20 challenges filed in 2003,⁶ almost 40 lawyers in nine case management teams of the Secretariat based in Paris, Hong Kong and New York (speaking more than 25 languages) assisted the ICC Court with the 60 challenges submitted in 2014.

2. Spot the difference

Consider two (not entirely hypothetical) arbitrations.

In the first one (Case A), a challenge was filed when the members of the arbitral tribunal had just been confirmed and were in the process of establishing the Terms of Reference together with the parties. The challenge was triggered by certain pleadings filed in court proceedings ancillary to the arbitration, from which it appeared that, in those proceedings, the claimant had retained a junior barrister who was a member of the same barristers' chambers as the senior barrister nominated and confirmed as co-arbitrator by the claimant. In subsequent correspondence instigated by the respondent, the claimant confirmed that it had also retained the junior barrister as one of its counsel in the arbitration. The respondent challenged the co-arbitrator in question on that basis.

In the second one (Case B), the parties had filed several rounds of written submissions and made submissions during a hearing with the arbitral tribunal. Subsequently, the claimant determined from a procedural application relating to the further conduct of the merits phase of the arbitration filed by the respondent that the latter had in the meantime retained additional counsel, namely a senior barrister who was a member of the same barristers' chambers as the senior barrister nominated and confirmed as co-arbitrator by the respondent. The claimant immediately challenged the co-arbitrator in question.

Both challenges thus revolved around the problems associated with an arbitrator's membership of the same barristers' chambers as counsel to one of the parties. At the time these two challenges were brought, the ICC Court had never removed an arbitrator on that specific basis, and there was one (indirectly reported) recent case in which the ICC Court had rejected a challenge where one party had retained a barrister

5 See (2001) 12:1 *ICC International Court of Arbitration Bulletin* 14.

6 See (2004) 15:1 *ICC International Court of Arbitration Bulletin* 7.

from the same set of chambers as its party-nominated co-arbitrator to represent it at the hearing.⁷ The London Court of Arbitration had reportedly taken a similar stance on such challenges.⁸

Previous and not necessarily conclusive institutional practice aside, the decision of Rix J. (as he then was) in *Laker Airways Inc. v. FLS Aerospace Ltd et al.*⁹ is generally considered an especially instructive exposition of the current position under English law. Speaking strictly *obiter* and without having had the benefit of proper adversarial argument,¹⁰ Rix J. focused squarely on the core structural and institutional features of the English Bar:

It is the essence of practice at the bar ... that ... barristers are all self-employed. This is not a mere matter of form. On the contrary, practising barristers are prohibited by the rules of their profession from entering partnerships or accepting employment precisely in order to maintain the position where they can appear against or in front of one another. If it were otherwise, public access to the bar would be severely limited: each time a member of a set of chambers accepted instructions, he would debar any other member of those chambers, although independently practising self-employed barristers, from accepting instructions from any other party with a different interest in the dispute; nor would he be able to appear before a recorder, deputy judge or arbitrator in the same proceedings. This would be a severe limitation on the administration of justice in this country. Especially in the context of specialist legal services, where it may be that only a handful of chambers practise within a particular specialty, it would mean that public choice of counsel would be drastically cut. Of course, this would be by the way if the rule were that the doctrine of conflict of interest prevented barristers at the same chambers from appearing against one another. But such a rule has never been recognised, and the contrary practice is an everyday occurrence in the courts ...

In reaching his conclusion, Rix J. indicated that he had been 'particularly impressed' by the decision of the Paris Court of Appeal to the same effect in *Kuwait Foreign Trading Contracting and Investment v. Ikori Estero*,¹¹ not least 'since the presence in Paris of the International Chamber of Commerce (ICC) makes Paris one of the world centres of international arbitration'. Moreover, Rix J. was alive to the need of approaching the matter from the perspective of a non-English party (as *Laker Airways Inc.* was American) and to:

7 See e.g. Y. Derains & E.A. Schwartz, *Guide to the ICC Rules of Arbitration*, 2d ed. (Kluwer, 2005) at 128, note 41; M. Hwang, 'Arbitrators and Barristers in the Same Chambers - an Unsuccessful Challenge' (2005) 6 *Business Law International* 235.

8 LCIA Reference UN97/X11, 5 June 1997, (2011) 27 *Arbitration International* 320.

9 [2000] 1 W.L.R. 113.

10 *Laker Airways Inc.*, having made an application for an arbitrator to be removed pursuant to s. 24 of the Arbitration Act 1996, did not appear in support of its own application, which Rix J. treated as being tantamount to its withdrawal. He expressed his views on the merits of the application only because of the important issues raised by it.

11 *Revue de l'arbitrage* 1992.568.

resist the temptation, to which a person, such as I, who has spent many years growing familiar with the English legal system may be prone, to assume that what is so familiar to me would be clear to foreign parties, or to overlook or underestimate concerns which such foreign parties may have.

Against this background, the outcome of the challenges in Cases A and B may have been said to be a foregone conclusion. Applying the (perceived) institutional and judicial orthodoxy, both would appear unlikely to succeed. However, while the challenge in Case A was indeed rejected, the challenge in Case B was upheld.

Given the ICC Court's distinctly non-doctrinaire and intensely fact-specific approach to challenges, the following factors may, to varying degrees, explain these divergent outcomes:

- The place of the arbitration. Plainly, if the place of the arbitration is located in England and Wales, the ICC Court could derive a certain amount of comfort from *Laker Airways Inc. v. FLS Aerospace Ltd et al.*¹² The position might be different if the place of the arbitration is elsewhere and there are submissions or evidence to the effect that the local courts would likely view the issue with scepticism and potentially remove the arbitrator if seised of the matter.
- The nationality, background and experience of the parties. As acknowledged by Rix J. in *Laker Airways Inc. v. FLS Aerospace Ltd et al.*¹³, a non-English party may find the other party's ability to retain a barrister from the same set of chambers as an arbitrator somewhat disconcerting. However, if a non-English party is itself instructing both solicitors and barristers, it may be more difficult for that party to maintain that it is unfamiliar with and genuinely disturbed by the structure and operations of the English legal profession
- The timing and extent of disclosure (if any). Ever since the issuance of the IBA Guidelines on Conflicts of Interest in International Arbitration on 22 May 2004, it is abundantly clear that the following fact requires disclosure and may (in case of an objection) lead to disqualification:¹⁴

The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers

As such, prompt and full disclosure could and should be expected from an arbitrator as soon as he or she learns of the involvement of another member of his or her chambers in the same arbitration. Any delay or equivocation would call for an explanation.

- Above all, specific facts and circumstances of the professional relationship between the barrister and the challenged arbitrator. At the one end of the spectrum, there may be cases in which both

¹² [2000] 1 W.L.R. 113.

¹³ [2000] 1 W.L.R. 113.

¹⁴ *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004), § 3.3.2. The provision survives unamended to the present day.

barristers can truly be said barely to know each other, to lead entirely separate professional lives, and to be interacting extremely infrequently (if at all). The other extreme could be two barristers who have forged a close professional relationship – for example, if one was the pupil-master of the other, or if both have frequently worked together or shared an office in the past.

- A final component of this matrix of specific facts and circumstances that may need to be considered with special care in any given case is the manner in which and the intensity with which the set of barristers' chambers in question is being branded and marketed (especially perhaps in the field of international arbitration), such that the structural autonomy and strict independence of individual members of that set may have become far less readily apparent to the reasonable and neutral observer.¹⁵ Rix J. foreshadowed this point when he observed in *Laker Airways Inc. v. FLS Aerospace Ltd et al.*¹⁶ that:

Although it may be true that ... there has been a greater tendency for sets of chambers to promote themselves as a whole, it remains the case in my view that chambers are made up of their individual barristers with their separate reputations, each working on their own papers for their own clients, and sharing neither career nor remuneration.

Only six years later, the Court of Appeal of England and Wales sounded a more explicitly cautionary note in *Peter Smith v. Kvaerner Cementation Foundations Ltd*,¹⁷ which, even though it was concerned with the appointment of a recorder (a part-time judge), has obvious relevance in the present context:¹⁸

Judges in this jurisdiction ... frequently have present or past close professional connections with those who appear before them and it has long been recognised that this, of itself, creates no risk of bias nor, to those with experience of our system, any appearance of bias. ... At the same time we can see the force of [the] submission that changes in the way that some chambers fund their expenses ... mean that, in some cases at least, there may be grounds for arguing that a Recorder should not sit in a case in which one or more of the advocates are members of his chambers.

Accordingly, careful consideration may have to be given to the impact of a set of barristers' chambers' promotional, marketing, branding and funding arrangements on the perceived independence and impartiality of its members.

15 See e.g. W.W. Park, 'Arbitrator Integrity' in M. Waibel, A. Kaushal et al., eds., *The Backlash against Investment Arbitration* (Kluwer, 2010) 189 at 236.

16 [2000] 1 W.L.R. 113.

17 [2006] EWCA Civ. 242.

18 Ibid. at [17].

3. A different kind of dialogue

The ICC Court's practice under Article 14 of the ICC Rules (and its predecessors) remains one shrouded in mystery. Textbook accounts and commentaries on ICC arbitration are almost invariably limited to a purely procedural exposition of the regulatory mechanics that determine how challenges are brought, processed and resolved by the ICC Court. Little, if anything, is said about the substantive dimension of the finely balanced deliberative process that takes place within the ICC Court, supported by its Secretariat, when it is considering a challenge. Similarly, the overviews of the ICC Court's decisions on challenges published with a certain degree of regularity¹⁹ are, by their nature, abstract and anonymised mosaics of highly condensed and neutered summaries of the factual circumstances that gave rise to a challenge in a certain case. They do not, and they do not purport to, shed any direct light on the specific factors that moved the ICC Court to accept or reject that challenge.

This disappointingly anodyne state of the literature has an obvious and compelling reason – as the detailed and narrowly drawn Article 1 of Appendix II to the ICC Rules makes clear, the work and the internal workings of the ICC Court are strictly confidential, and dispensations from this regime for academic purposes are granted only on understandably stringent conditions.

Whilst this may leave the curiosity of the interested student of ICC arbitration somewhat unsatisfied, the well-known dogma enshrined in Article 11(4) of the ICC Rules ('The decisions of the Court as to the ... challenge ... of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.') has frequently been cited as a source of a considerable amount of frustration and confusion on the part of the parties and the arbitral tribunal. It is especially in the most complex (and truly borderline) challenges that the parties and the arbitral tribunal might benefit from being provided with more than a one-sentence decision denying or accepting a challenge. Recognising this reasonable and legitimate need, the ICC Court announced on 8 October 2015 that it would start communicating the reasons for many of the decisions it is called on to take under the ICC Rules with immediate effect, provided all the parties to an arbitration so agree in advance of the decision in respect of which reasons are sought.²⁰ Specifically, the ICC Court will henceforth be prepared to communicate its reasons

19 See e.g. J. Fry & S. Greenberg, 'The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases' (2009) 20:2 *ICC International Court of Arbitration Bulletin* 12; A.M. Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators' in *Independence of Arbitrators*, 2007 Special Supplement, *ICC International Court of Arbitration Bulletin* (ICC, 2008) 7; D. Hascher, 'ICC Practice in relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators' (1995) 6:2 *ICC International Court of Arbitration Bulletin* 4.

20 See ICC, 'ICC Court to communicate reasons as a new service to users' (8 Oct. 2015), <http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users/>.

for the decisions it makes on the challenge of an arbitrator, so as to enhance the transparency and clarity of the ICC arbitration process.²¹ It remains to be seen whether the evolving practice of the ICC Court in this respect will indeed be sufficient to alleviate the frustration and confusion that is sometimes said to be experienced by the parties and the arbitral tribunal.

Those strictures do not diminish, however, the voice of the ICC Court in its dialogue with other relevant institutions in furthering self-regulatory efforts that are designed to respond to legitimate concerns of users of international arbitration as they have been expressed, for example, in the ICC challenge process. One tangible product of this dialogue in the present context is the 'Information Note regarding barristers in international arbitration' (the 'Information Note') that was issued in July 2015 by the Bar Council in response to 'concern ... in relation to cases in which a barrister appears before a barrister from the same chambers'.²² At the outset, the Information Note acknowledges squarely that international arbitration users 'may not be as used to the structure and culture of the English bar'²³ and thus correctly highlights that barristers (as other counsel and arbitrators) must 'remain alive to the varying expectations, backgrounds and cultures of those who utilise arbitration'.²⁴ At the same time, the Information Note reiterates that, as a matter of English law as it presently stands, the mere fact that counsel and arbitrator are members of the same barristers' chambers does not, in and of itself, give rise to justifiable doubts as to the arbitrator's impartiality.²⁵

Turning first to the position of barristers appearing as counsel before barrister arbitrators, the Information Note outlines what ought in any event to be considered 'good practice', namely prompt disclosure.²⁶ Specifically, where a barrister learns of the circumstance that he or she has been instructed in an arbitration in which an arbitrator is a member of the same set of barristers' chambers, the other party should be advised promptly.

In addition, the Information Note stresses that a barrister ought to minimise any potential for an adverse interference with the arbitral process as a result of his or her retention and preferably draw any potential client's attention to the possibility of a challenge if he or she is instructed in the same arbitration in which another member of the same barristers' chambers is sitting as arbitrator.²⁷ These words of caution are amplified with respect to the situation in which a barrister is instructed at a very late stage of an arbitration,²⁸ since, as the

21 *Ibid.*, quoting the current President of the ICC Court.

22 Information Note, § 1. Consultations were conducted with 'many arbitral institutions worldwide' whose comments were taken into account (*ibid.*, note 1).

23 *Ibid.*, § 1.

24 *Ibid.*, § 6.

25 *Ibid.*, §§ 12-14.

26 *Ibid.*, § 15(d).

27 *Ibid.*, § 22.

28 *Ibid.*, §§ 24-27.

Information Note highlights, that circumstance ‘will inevitably have a bearing on the perception of the other party’²⁹ and may well give rise to an ‘enhanced possibility that the arbitrator may step down, or that counsel may be required by the tribunal to step down’.³⁰

With respect to the position of barristers acting as arbitrators, the Information Note reiterates the general requirements of independence and impartiality (as reflected in Article 11(1) ICC Rules) and the specific relevance of IBA Guidelines on Conflicts of Interest in International Arbitration.³¹ Considering that the circumstance that an arbitrator and another arbitrator or counsel are members of the same barristers’ chambers forms part of the Orange List, the Information Note again stresses the need to make disclosure as early as possible and to avoid disruption of the proceedings.³² To that end, a number of practical suggestions are made to ensure that an arbitrator is apprised properly and promptly of the precise composition of the parties’ respective teams of legal representatives.³³

In sum, the central message of the Information Note to barristers (whether they be counsel or arbitrator) is that timely and complete disclosure of the involvement of barristers from the same barristers’ chambers in an arbitration is key. Neither the subscription to the notion of sunlight being the best of disinfectants,³⁴ nor the various practical proposals contained in the Information Note are particularly novel or enterprising. Indeed, seeing that the Information Note was in gestation for a very considerable period of time,³⁵ some could be disappointed at its conservative nature and limited reach.

Nevertheless, its publication is a step in the right direction. It formally recognises the very real concerns that have been articulated and (re-) codifies a set of generally accepted behavioural guidelines or good practices relating to such matters as disclosure and confidentiality. It seeks to put these into the institutional and structural context of the Bar of England and Wales, highlighting the interdependence of the independence of barristers and the so-called ‘cab rank’ rule guaranteeing a client’s freedom of choice in selecting a barrister. However, for understandable reasons, the Information Note does

29 Ibid., § 25(b).

30 Ibid., § 25(d).

31 Ibid., §§ 29–32.

32 Ibid., § 33.

33 Ibid., § 34.

34 L.D. Brandeis, *Other People’s Money—And How Bankers Use It* (1914).

35 The work on the Information Note reportedly started in 2012; see e.g. J. Koepf, D. Farah & P. Webster, ‘Arbitration in London: Features of the London Court of International Arbitration’ in G. Cordero-Moss, ed., *International Commercial Arbitration – Different Forms and their Features* (Cambridge, 2013) 230. In the intervening years, the annual publication of a brochure called *Barristers in international arbitration* by the Bar Council continued unabated. The main purpose of that repeatedly re-issued brochure, however, was to explain why barristers could and should be instructed in international arbitrations (not least by ‘[l]awyers and clients from other jurisdictions ... directly’).

not seek to answer the far more fundamental question of the wider international acceptability of the position under English law as reflected in *Laker Airways Inc. v. FLS Aerospace Ltd et al.*³⁶

To find that answer will remain one of the prerogatives of the ICC Court in the arbitrations it administers, and it will no doubt continue to be a challenging task. In carrying it out, the ICC Court will remain vigilant in its fight against the evil gremlin so vividly conjured up by Rusty Park:³⁷

If an evil gremlin sought to bring international arbitration into disrepute, two starkly different routes would present themselves. One course would allow service by biased arbitrators, thus tarnishing the neutrality of the arbitral process. An alternate path to shipwreck would establish unrealistic standards for independence and impartiality, permitting spurious challenges intended to derail proceedings ...

The ICC Court shall have to battle this evil gremlin without having the benefit of John's authority, wisdom and steady hand. But it is in no small part thanks to John's profound contribution as its President for the last six and a half years that the ICC Court is now positioned so robustly to prevail in that battle.

36 [2000] 1 W.L.R. 113.

37 W.W. Park, 'Foreword' in S. Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer, 2009) ix.

