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The ICC Scrutiny Process and Enhanced Enforceability of Arbitral Awards

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Ever since its introduction in the 1927 ICC Arbitration Rules, scrutiny of awards by the ICC Court has been a cornerstone feature of ICC arbitration. Most players involved in the arbitral process are likely to concede that a certain level of review of arbitral awards is both desirable and beneficial. Indeed, proponents among the users are frequently influenced in their choice of the ICC as the administering arbitral institution, based on their strong conviction that time and money invested in the resolution of a dispute is ultimately only well spent if awards are voluntarily complied with or at least less susceptible to be set aside. By providing a look behind the scenes of the scrutiny process, the article does away with tales of excessive intervention on behalf of the arbitral institution when reviewing and approving awards and demystifies the role played by the ICC Court throughout its close interaction with arbitral tribunals operating under the ICC Rules. The article further argues that the scrutiny process can be a highly efficient tool that helps to increase the quality and enforceability of awards rendered under the aegis of the ICC.

Key Words : Institutional Arbitration, ICC International Court of Arbitration, ICC Secretariat, ICC Award Checklist, Scrutiny, Article 33 ICC Arbitration Rules, New York Convention, Recognition and Enforcement of Arbitral Awards, Judicial Review of Arbitral Awards

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Ⅰ. Introduction

The closely supervised nature of ICC arbitration puts the members of the ICC International Court of Arbitration ("Court") and, in particular, its Secretariat ("Secretariat") in the privileged position of dealing with a wide array of awards rendered in jurisdictions spanning all around the globe. These awards are drafted by some of the most renowned and experienced arbitrators. Yet, one of the most salient and beneficial features of ICC arbitration, by virtue of the scrutiny process conducted under Article 33 of the ICC Arbitration Rules ("Rules"), is the Court's role in approving all awards issued by arbitral tribunals in ICC proceedings.

Article 33 of the Rules provides: "*Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form*".

The wording of this provision makes it abundantly clear that the Court's interaction with the arbitral tribunal during this process is by no means limited to "rubber-stamping" awards. To the contrary, the Rules specify that all awards - be they interim, partial, final or by consent of the parties - rendered under the *aegis* of the ICC are subject to prior approval by the Court. The Rules further clarify that the range of issues that may be raised for the arbitral tribunal's consideration cover points of form as well as points of substance.[1] Given this broad scope of comments the Court may convey to the arbitral tribunal it is important to note from the outset that the weight attributable to formal and substantive comments obviously differs and that the latter leave the arbitrators' liberty of decision unaffected.[2]

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1) By the end of 2013, the Court had received more than 20,000 cases since its establishment in 1923. In 2013, its case load included 767 new requests for arbitration involving 2,120 parties from 138 different countries. Also in 2013, the arbitrations were seated in 63 different countries throughout the world and the Court appointed or confirmed 1,329 arbitrators from 86 different nationalities and approved 471 arbitral awards.

In the Court's experience, it is "*rare that an award will not benefit from some scrutiny and some benefit enormously*".[3] However, this unique review procedure is often still underrated in the author's view: it appears surprising that only 33% of all surveyed respondents in the 2010 Queen Mary/White & Case study mentioned "*scrutiny of the award by institution*" when being asked what attracts them to a particular arbitral institution.[4]

Unlike under any other set of arbitration rules, arbitrators in ICC proceedings profit from the vast experience the Court and its Secretariat have gathered in over 90 years of existence. ICC awards thus carry an *imprimatur* which is widely recognized and reduces the risk of setting aside proceedings.[5] Just as experienced arbitrators develop best practices and standards for drafting awards, the Court and its Secretariat have done so with respect to the multi-facetted review procedure under Article 33 of the Rules.

This article will provide a behind the scenes look at these standards and practices by evaluating the statistical background and recent trends with respect to the scrutiny process (II.), providing an in-depth analysis of the functioning of the scrutiny process (III.) and highlighting the positive effects this interaction between the arbitral tribunal and the Court may have on the recognition and enforcement of ICC awards (IV.).

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2) This important distinction will be developed further in section III.3. below.

3) Jason Fry/Simon Greenberg/Francesca Mazza, *The Secretariat's Guide to ICC Arbitration,* ICC Publication No. 729E, 2012, p. 328, para. 3-1182.

4) Queen Mary University and White & Case 2*010 International Arbitration Survey: Choices in International Arbitration,* pp. 21, 22. In terms of percentages, "*scrutiny of award by institution*" ranked only 11th among the considerations mentioned by these respondents.

5) Fry/Greenberg/Mazza (supra fn. 4), p. 328, para. 3-1182 refer in the same vein to *"the Court's endorsement functions as an internationally recognized seal of approval, which may make awards less prone to challenge or annulment simply by virtue of being an ICC award".*

Ⅱ. Statistical Background and Recent Trends

To fully consider the relevance of the scrutiny of arbitral awards, this section first proposes to take a close look at the growing number of cases filed with the Court and the ever-increasing number of awards rendered in ICC arbitrations over the past ten years (1.). It then describes the way in which recent practice changes have influenced the work flow regarding the scrutiny process (2.). Finally, it details the Court's practice with respect to dissenting opinions (3.).

1. Number and types of awards rendered 2004-2013

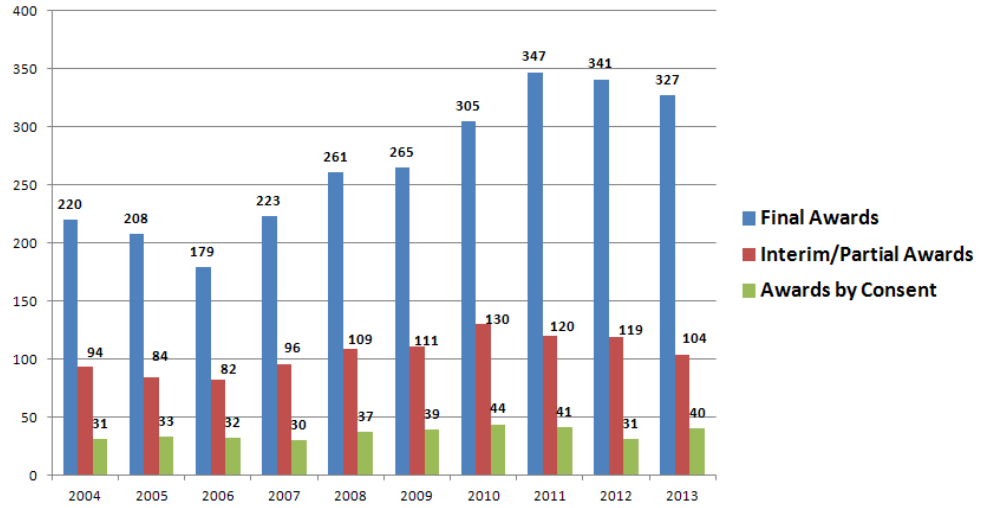
A total of 767 new cases were filed with the Court in 2013.[6] At the end of the year, 1,511 cases were being administered by the Court. Over the past ten years, the Court's workload has grown by almost 40%. Growth has been particularly strong during the years 2007 to 2010, with the number of cases handled by the Court rising by 15%.[7] In 2013 alone, 471 awards were rendered, of which 327 (69.43%) were final awards, 104 (22.08%) partial or interim awards and 40 (8.49%) awards by consent.[8]

6) ICC arbitration statistics can be found in the annual statistical reports, see e.g. "2013 Statistical Report" ICC Court Bulletin Vol. 25(1). Most statistics referred to in this paper have been published in such reports or will appear in future editions. The reports are also available online in the ICC Dispute Resolution Library at www.iccdrl.com.

7) In the examined period between 2004 and 2013 a total of 6,869 new Requests for Arbitration were registered. The individual breakdown for each year is as follows: 2004: 561 new cases, 2005: 521 new cases, 2006: 593 new cases, 2007: 599 new cases, 2008: 663 new cases, 2009: 817 new cases, 2010: 793 new cases, 2011: 796 new cases, 2012: 759 new cases and 2013: 767 new cases.

8) In the two preceding years, the total number of awards had actually reached an unprecedented level in ICC arbitration: 491 awards were rendered in 2012 of which 341 (69.45%) were final awards, 119 (24.24%) partial awards and 31 (6.31%) awards by consent. In 2011, 508 awards were rendered of which 347 (68.31%) were final awards, 120 (23.62%) partial awards and 41 (8.07%) awards by consent. The overall ratio between final awards, partial awards and awards by consent has thus remained relatively stable.

[TABLE 1] TYPES OF AWARDS: 2004 - 2013



2. Recent practice changes concerning the scrutiny process

From a closer look at the following scrutiny statistics, one may discern a trend in that the Court's review has become more formalized and thorough in the course of the last ten years.

While out of a total of 356 draft awards submitted to the Court in 2004, 252 (70.79%) awards were approved subject to comments, 93 (26.12 %) awards were straight-out approved without bringing any comments to the arbitral tribunal's attention and 11 (3.09%) awards were not approved. By 2013, out of 511 awards submitted to the Court, 466 (91.19%) awards were approved subject to comments, 5 (0.98%) awards were straight-out approved without bringing any comments to the arbitral tribunal's attention and 40 (7.83%) awards were not approved.[9)]

9) For the avoidance of any doubt, it should be emphasized that an award which is not approved by the Court once or even multiple times will have to be resubmitted for approval and therefore does not figure in the statistics regarding the total number of awards approved by the Court each year which was 345 for 2004 and 471 for 2013 (see table in section II.1. above. The overall ratio of awards rendered and awards approved subject to comments based on these numbers is therefore even higher with 73.05% (2004) and 98.94% (2013) respectively.

[TABLE 2] SCRUTINY STATISTICS: 2004 - 2013

One may argue that these numbers are representative of a stark trend towards a higher threshold for award approval and an increase in the number of comments that are brought to the arbitral tribunal's attention for its consideration. Other factors which may have contributed to this trend include, *inter alia*, the widening of the arbitrator pool in ICC proceedings or a potential decrease in the quality of awards that are being submitted for approval. In the author's view, this evolution of the Court's quality control is however primarily due to its rigorous approach to closely review each and every draft award submitted in ICC arbitration.

Recent practice changes in 2010 and 2011 to the way the scrutiny process is operated have also had a considerable impact on this trend.

First, the scrutiny process has become more formalized with the introduction of the ICC Award Checklist in 2010 and even more thorough in terms of review. The seriousness with which the individuals involved on the different review levels carry out their functions has led to an increase in the number of comments on draft awards.

Second, the Secretariat no longer conducts an informal pre-scrutiny of draft awards during which the Counsel in charge of the file formerly conveyed the Secretariat's comments on the draft award to the arbitral tribunal who in turn

submitted a revised draft award incorporating these comments which was then approved by the Court in its "clean version".[10] Since 2011, this course of action is only followed on an exceptional basis in cases in which the Secretariat considers an award to cover entirely straight-forward issues and to contain only minor formal deficiencies or, conversely, if it is in need of basic improvement and significant modifications in order to pass the Court's high quality standards and threshold for approval. All comments made in the course of the scrutiny process on behalf of the Secretariat and the Court are therefore now contained in one comprehensive letter sent to the arbitral tribunal following the Court's session at which the draft award was discussed. That being said, arbitrators may, however, when drafting or deliberating on awards, continue to approach the Secretariat with questions regarding the Court's practice on certain issues seeking to benefit from the Secretariat's institutional memory and guidance. Advice is often sought on complex jurisdictional or procedural matters,[11] but the arbitral tribunal takes all decisions alone and is ultimately responsible for the findings contained in the award.

A third recent development has been the introduction of Special Committee Sessions of the Court exclusively dedicated to dealing with draft awards in Italian, Spanish, Portuguese and German in 2010. In these sessions, which take place in regular intervals in addition to the weekly Committee Sessions of the Court, three Court members who are native speakers or who have language capabilities close to the level of a native speaker from the relevant jurisdictions, review and discuss the original language versions of such awards.[12] This

10) Pre-scrutiny was for example considered helpful as draft awards are established over time with the participation of each member of the arbitral tribunal, which can often lead to simple errors in drafting, *cf.* Michael W. Bühler/Thomas H. Webster, *Handbook of ICC Arbitration*, Sweet & Maxwell, 2014, p. 503, para. 33-19.

11) Fry/Greenberg/Mazza (*supra* fn. 4), p. 332, para. 3-1198 and Simon Greenberg, "Arbitral Awards under Scrutiny: an assessment", Philipp Habegger/Daniel Hochstrasser/Gabrielle Nater-Bass/Urs Weber-Stecher (eds.), *Arbitral Institutions Under Scrutiny: ASA Special Series No. 40*, Juris Net LLC, 2013, p. 97. Especially sole arbitrators often call the Secretariat with queries on how to deal with a certain issue in an award and are generally more open to including substantive issues in this non-prejudicial and open-ended exchange of ideas.

12) 81 awards were approved by the Court in the author's case management team in 2013. 24 (29.63%) of those awards were drafted in German and 57 (70.37%) in English. In 2013, a total of 12 Special Committee Sessions were held in German.

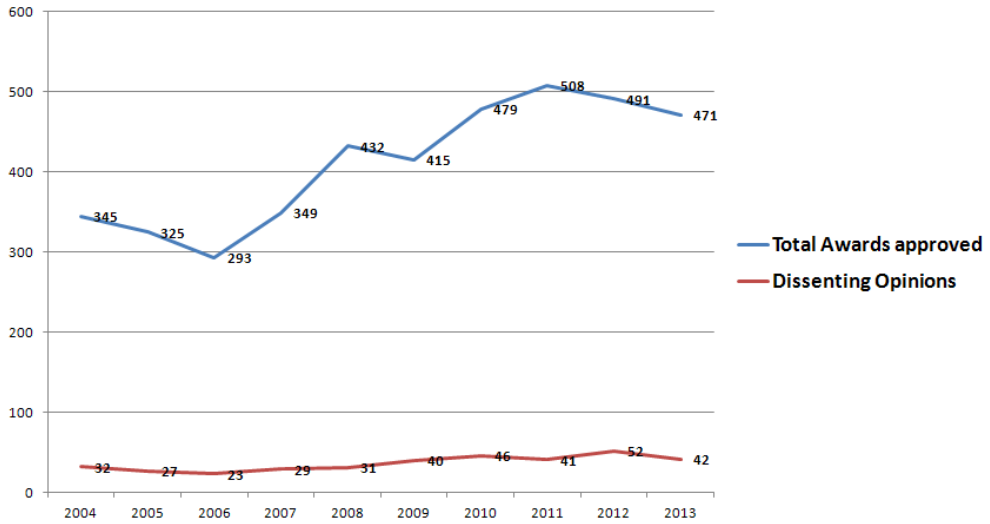
practice avoids the need to translate draft awards which are not drafted in English or French, the two official languages of the Court, and increases the overall familiarity with the applicable substantive laws. This innovation has helped raise the intensity of the review and reduce the overall turn-around time for submitting awards to the Court. The review is also more focused on substantive issues as even the best translations are sometimes still subject to interpretation or unable to properly address the linguistic or forensic specificities of certain legal systems.

3. The Court's practice regarding dissenting opinions

To complete the analysis of the Court's scrutiny process, one should also look at the evolution of dissenting opinions in ICC arbitrations over the last ten years.

In 2004, out of 345 awards rendered, 32 (9.28%) awards were rendered by majority with one of the arbitrators issuing a dissenting opinion. Out of a total of 471 awards rendered in 2013, 42 (8.92%) awards were rendered by majority with one of the arbitrators issuing a dissenting opinion.

[TABLE 3] DISSENTING OPINIONS: 2004 - 2013



Dissenting opinions have consistently been rather rare occasions in ICC arbitrations and do not have a direct impact on the scrutiny process. Article 31(1) of the Rules does not expressly foresee the possibility of rendering a dissenting opinion. The provision merely refers to a "*majority decision*". As a matter of practice, dissenting opinions are not scrutinized by the Court under Article 33 of the Rules.[13] The Court is, however, presented with a copy of the dissenting opinion for its information when it scrutinizes the majority's draft award.[14] If the Court considers that a valid point has been raised by the dissenting arbitrator, which the majority does not seem to have addressed, it will draw the majority's attention to such point.[15] The same approach may also be used to encourage addressing strong arguments of the dissenting arbitrator in the majority's award in order to make the majority's reasoning more convincing. On a few occasions, deliberations between the members of the arbitral tribunal have even continued following the Court's comments on the majority's decision and ultimately led to a dissenting opinion being withdrawn.

In case one of the arbitrators decides to issue a separate dissenting opinion, the Secretariat will (i) verify whether the majority has received the dissenting opinion, (ii) inquire if the majority wishes to modify its draft award further to the dissenting opinion, and (iii) ascertain if the dissenting arbitrator wishes for the dissenting opinion to be communicated to the parties once the majority's award has been approved by the Court.[16] If the majority is opposed to the notification of the dissenting opinion, it must set forth reasons as to why such communication to the parties might endanger the validity of the award. In any event, the communication of the dissenting opinion to the parties is subject to

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13) Since dissenting opinions are normally not included in the award but established in a separate document, the Court will not comment separately on a dissenting opinion and not take any formal decision regarding its approval.

14) The Court may, however, request modifications to a dissenting opinion that violates fundamental principles such as the confidentiality of the deliberations, *cf.* Fry/Greenberg/Mazza (*supra* fn. 4), p. 336, para. 1213.

15) Bühler/Webster (*supra* fn. 11), p. 506, para. 33-30.

16) The general rule is that the dissenting opinion is communicated to the parties together with the majority's award. The Secretariat does, however, keep an internal file with statutory provisions or practices of certain countries pursuant to which the communication to the dissenting opinion could endanger the validity of the award.

the Court's control.[17]

Ⅲ. Functioning of the Scrutiny Process

According to the *Secretariat's Guide to ICC Arbitration* the scrutiny process "*serves primarily to maximize the legal effectiveness of an award by identifying defects that could be used in an attempt to have it set aside at the place of arbitration or resist its enforcement elsewhere. Scrutiny also improves the award's general accuracy, quality and persuasiveness*".[18] Against this backdrop, these two main purposes of the Court's review are analysed below, starting off with the mandatory nature of scrutiny by the Court (1.), to be followed by a closer look at the different stages of the scrutiny process (2.), and the limited scope of the Court's review powers (3.), an overview of several facets and recurring points dealt with by the Secretariat and the Court (4.), an empirical study of the duration of the scrutiny process, (5.) and an introduction to the ICC Award Checklist (6.).

1. Mandatory nature of scrutiny by the Court

As long as it has not been scrutinized and approved by the Court, an arbitral tribunal's draft award is not an award made in accordance with and as defined in the Rules by virtue of Article 2 (v) of the Rules.[19] Article 33 of the Rules foresees that "*any award*" is subject to the scrutiny process and "*shall*" be submitted in draft form for approval by the Court.

The scrutiny process is a cornerstone of the Rules from which the parties cannot derogate. Mandatory prior approval of all draft awards by the Court is a

17) As a matter of practice, the dissenting opinion is exceptionally not notified to the parties together with the majority's award if such communication is prohibited by mandatory laws or if the validity of the award is imperilled at the place of arbitration or in any country in which recognition or enforcement of the award is likely to be sought.

18) Fry/Greenberg/Mazza (*supra* fn. 4), p. 327, para. 3-1181.

19) Greenberg (*supra* fn. 12), p. 91.

fundamental and distinctive feature of ICC arbitration.[20]

This principle is best illustrated by the following case example: In a case from 2010, the Court decided that a case in which the arbitration clause provided, *inter alia*, that "[t]*he arbitration award shall not be subject to approval of the Court of Arbitration of the International Chamber of Commerce, the provisions of Article 21 of said Rules not applying*" [21] was incompatible with the Rules and could not proceed.[22]

Parties should generally tread carefully when considering any type of circumvention or extension of the scrutiny process. In appropriate circumstances, they may however deviate from Article 31(2) of the Rules which establishes the requirement that an ICC award "*shall state the reasons on which it is based*". Despite the use of the seemingly mandatory wording, it is for the Court to decide whether derogations from this requirement should be permitted recognizing the parties' procedural autonomy.[23]

The Court has occasionally approved unreasoned awards in the past. As this constitutes a *de facto* circumvention of the scrutiny process, the Court will consider exceptions to Article 31(2) of the Rules on a case by case basis, and always require that the parties' agreement to dispense with reasons is recorded in writing and signed by the parties.

The requirement that awards be reasoned is foreseen – on a non-mandatory

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20) Robert H. Smit, "Mandatory ICC Arbitration Rules", *Liber Amicorum in Honour of Robert Briner,* ICC Publishing, 2005, p. 864; see also Jean-François Poudret/Sébastien Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, p. 7; Horacio Grigera Naón, "The Powers of the ICC International Court of Arbitration vis-à-vis Parties and Arbitrators", ICC International Court of Arbitration Bulletin, Special Supplement: Arbitration in the Next Decade: Proceedings of the International Court of Arbitration's 75th Anniversary Conference, 1999, p. 55.

21) The reference in the arbitration clause appears to be a reference to Article 21 of the 1975 ICC Arbitration Rules, which provide for the scrutiny of awards in almost identical terms as Article 33 of the Rules. *Cf. Tribunal de grande instance de Paris*, 22 January 2010, SAMSUNG ELECTRONICS CO LTD v. Mr JAFFE (administrateur/liquidateur de la société QIMONDA AG), Reference JURIS 2010006.

22) Under Articles 1(1) and 1(2) of the 1998 ICC Arbitration Rules. *cf.* Fry/Greenberg/Mazza (supra fn. 4), p. 328, para. 3-1183.

23) Smit (*supra* fn. 20), p. 863, Yves Derains/Eric A. Schwartz, *Guide to the ICC Rules of Arbitration*, Kluwer Law International, 2005, p. 308, Fry/Greenberg/Mazza (*supra* fn. 4), p. 321, para. 3-1152.

basis – in many national arbitration laws. It further serves several functions, including as a:

- quality control mechanism against "*unprincipled compromise awards*";
- justification for awards that the losing party might otherwise decide to challenge;[24]
- inherent basis for the Court's scrutiny and approval of the award; and
- basis for reviewing awards in recognition or enforcement proceedings before state courts.

On the other hand, the requirement to have a reasoned award is not to be equated to a requirement for a well-reasoned award: "*bad or unpersuasive reasons are still reasons, and satisfy statutory requirements for reasoned awards*".[25] The parties' desire to avoid possible costs, delays and formalities associated with the arbitral tribunal's duty to reason awards should nevertheless always be counterbalanced with the benefits that the scrutiny process may entail as described in this article.

Pursuant to Articles 1(2) and 6(2) of the Rules, the Court is further the only body authorized to administer arbitrations under the Rules and conduct the "*scrutiny and approval of awards rendered in accordance with the Rules*". An extension of the scrutiny process to other bodies than the Court is therefore an issue of concern. In an arbitration that is purported to be conducted under the Rules but administered by another arbitral institution, any award rendered may be prone to challenges before state courts on the ground that the arbitration was not conducted in accordance with the parties' agreement.[26] Such an arbitration agreement featured prominently in the case *Insigma Technology Co. Ltd. v. Alstom Technology Ltd.* decided by the Singapore Court of Appeals on 2 June 2009.[27] This case concerned an arbitration clause providing for arbitration

24) Smit (*supra* fn. 20), pp. 845, 864. See *e.g.*, UNCITRAL Model Law on International Commercial Arbitration, Article 31(2): "*The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given* [···]." Most national arbitration laws also allow the parties to dispense with the reasoning requirement.

25) Gary B. Born, *International Commercial Arbitration*, Kluwer Law International, 2014, p. 3043.

26) Greenberg (*supra* fn. 12), p. 91.

administered by the Singapore International Arbitration Centre ("SIAC") under the Rules. SIAC declared itself capable of administering the arbitration under the Rules by replacing actors like the Court with its own actors. While the Singapore courts accepted this approach, a Chinese court recently refused to enforce the final award in this matter.[28)]

Although it remains beyond contention that the scrutiny process is very labour-intensive and time-consuming, and delays the notification of an award to the parties, this article proposes that the additional work of the Court and its Secretariat enhances the quality and enforceability of any award rendered under the auspices of the ICC. Some of the added benefits of the scrutiny process, only to name a few, include putting the Secretariat's detailed knowledge of the file as well as its familiarity with the issues raised by the parties and the procedural requirements for the possible enforcement of the award to good use. Further, arbitrators can profit from the experience of leading arbitration practitioners from virtually every jurisdiction who act as Court members and dedicate their valuable time and service, not by playing the role of a *cour de cassation* or compensating for the absence of appeal, but simply by offering several sets of fresh eyes looking at the draft awards before them at each session. It is one of the main strengths of the scrutiny process that it involves several review levels because different individuals in the chain will spot and assess potential issues depending on their respective experience, legal backgrounds or levels of concentration.[29)] The Secretariat's management thereby plays an important role and attempts to ensure a degree of consistency in the process.[30)]

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27) *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 (Court of Appeals), see *e.g.* Jennifer Kirby, "Insigma Technology Co. Ltd. v. Alstom Technology Ltd.: SIAC Can Administer Cases Under The ICC Rules?!?", 25 Arb Int'l, Issue 3, 2009, p. 319.

28) Decision of the Hangzhou Municipal Intermediate People's Court of Zhejiang Province of February 2013, not yet published. This refusal has also been acknowledged by Anthony Cheah Nicholls/Christopher Bloch, "ICC Hybrid Arbitrations Here to Stay: Singapore Courts' Treatment of the ICC Rules Revisions in Articles 1(2) and 6(2)", Journal of International Arbitration, Kluwer Law International, 2014, Volume 31, Issue 3, p. 395.

29) Greenberg (*supra* fn. 12), p. 97.

30) Greenberg (*supra* fn. 12), p. 98.

2. Stages of the scrutiny process

The arbitral tribunal closes the proceedings pursuant to Article 27 a) of the Rules and, after having deliberated upon and drafted the award, submits a draft award for approval by the Court. Such draft is subsequently reviewed by five to six arbitration lawyers over the course of three distinct review levels. First, the Counsel heading the case management team in charge of the file studies the draft award and prepares a comprehensive agenda with suggested improvements and detailed mark-up pages containing typographical and grammatical suggestions. Second, the draft award and the corresponding agenda are reviewed by the Secretary General, Deputy Secretary General, Managing Counsel or General Counsel. Finally, about a week before the relevant Court session, these documents are sent to the members of the Court attending the session to which the award will be submitted for approval.

In cases involving particularly difficult procedural or substantive issues, a dissenting opinion, states or state entities, the draft award will regularly be submitted to a Plenary Session of the Court which only convenes once a month as opposed to one of the weekly Committee Sessions. This creates the added benefit of having a Court member serve as *rapporteur* for the case and produce a comprehensive written recommendation with respect to the approval or non-approval of the draft award. The choice of such *rapporteur*, who will orally present his report at the Court's session, is based on his familiarity with the applicable law, the legal questions involved and the language of the arbitration. If an award is submitted to a Plenary Session, the number of individuals reading the draft comprises up to thirty arbitration specialists and the depth of the analysis as well as the thrust of the comments made by the Court members is further increased.

Having the benefit of the serious and conscientious manner with which all individuals involved in the scrutiny process perform their review, the Court may then decide on one of three options available to it at each session. It can:

- straight-out approve the draft award without bringing any comments to the arbitral tribunal's attention;
- approve the draft award subject to the arbitral tribunal's consideration of the comments raised in the Secretariat's agenda and the discussion among the Court members at the session; or
- decide not to approve a draft award and send it back to the arbitral tribunal in order for the Court to fully understand the arbitral tribunal's reasoning and therefore to approve it in revised form.

It is not unusual for the ensuing discussion between the Court members and the Secretariat to last up to an hour with respect to a particular award.[31] This level of detail in the analysis may seem surprising to outsiders but stands example for the diligent manner in which the Court members assume their responsibilities in the scrutiny process. Whatever decision the Court may ultimately take, it is subsequently the Secretariat's role to interact with the arbitral tribunal and follow up on the incorporation of the Court's comments by way of a final review of the revised version of the draft award. The arbitrators may only initiate the signature process once this final review has been concluded. Again, it is important to note that only once the Court has approved an award, the arbitral tribunal may sign it and send it to the Secretariat for notification to the parties pursuant to Article 34 of the Rules.

3. Scope of the Court's review powers

The Court's power to require changes under Article 33 of the Rules is limited as it can require changes as to form but may only suggest changes as to substance. It is inherent to this process involving several players that opinions between arbitrators and the Court or its Secretariat diverge on where to draw the line between form and substance. By way of illustration, the correction of typographical and computational errors, as well as compliance with the items mentioned on the ICC Award Checklist, are considered to be matters of form.

31) David T. McGovern, "The ICC Arbitral Process – Part IV: The Award. Scrutiny of the Award by the ICC Court", ICC International Court of Arbitration Bulletin, Vol. 5 (1), 1999, p. 46.

The same applies to the absence of any reasoning for certain decisions or a possible failure by the arbitral tribunal to respect its mandate by deciding *ultra petita* or *infra petita*. On the other hand, the arbitral tribunal's liberty of decision will not be affected and covers matters of substance such as consistency between factual conclusions and legal outcomes and any decisions as to factual issues. Many years of daily routine at the Secretariat have shown that some grey areas between form and substance persist. Also, the Court frequently wrestles with the question where to draw the line. Potential conflicts are, however, almost always resolved by way of informal consultations between the Secretariat and the arbitral tribunal following the notification of the Court's decision with respect to the approval of the draft award. Sometimes, an arbitral tribunal acknowledges inconsistencies or a lack of clarity in its reasoning and makes the suggested amendments.[32] On other occasions, it explains to the Secretariat why certain changes were not considered and further illustrates the logic or reasoning behind the approach taken in its draft award.[33] In case of doubt, the Secretariat will always exercise its duties to the best of its ability and knowledge in a way to ensure that the award complies with the requirements at the place of the arbitration or the potential places of enforcement.

4. Scrutiny facets and recurring points

A myriad of issues that may be discovered during the scrutiny process could lead to significant changes to a draft award. As has been touched upon earlier, the scrutiny process involves the control of formal, editorial, substantial and legal points and, to a lesser extent, common sense aspects which may benefit from a fresh perspective.

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32) Greenberg (*supra* fn. 12), p. 101.

33) It is ultimately the arbitral tribunal's prerogative to decide whether there is any merit to the concerns expressed by the Court or not. However, if no consensus is reached between the arbitral tribunal and the Secretariat on a particular formal or substantive issue, and given the conditional nature of the Court's approval pursuant to Article 33 of the Rules (*i.e.* "subject to" approval, *cf.* section III.2. above), the Secretariat may also decide to re-submit the revised version of the award to the Court if it is genuinely concerned that the Court's comments have not been adequately addressed by the arbitral tribunal.

Sometimes, it may be helpful to have an open mind that has not been involved in the proceedings and deliberation process make such contribution. A common example is the need that all awards exhaustively deal with the list of issues to be determined and the parties' prayers for relief as recorded in the Terms of Reference pursuant to Article 23(1) c) and d) of the Rules and the parties' most recent requests in case of changes to the relief sought. The Secretariat therefore routinely reviews the parties' most relevant submissions, double checks that all issues and claims have been properly covered in the draft award and also provides the Court members with a copy of the Terms of Reference in anticipation of the Court's session.

This practice acts as a safeguard against an inadvertent omission on behalf of the arbitral tribunal to deal with all claims and requests in its award. It further avoids the need for a provision in the Rules regarding the possibility to render additional awards.[34] *Alan Redfern* and *Martin Hunter* state in precisely this regard that the "*ICC prides itself on the overall quality of ICC awards, and the scrutiny process acts as a measure of quality control, ensuring amongst other things, that the arbitrators deal with all the claims*".[35]

When scrutinizing the award, the Court will further wish to truly understand the logic and reasoning for the decisions adopted by the arbitral tribunal.[36]

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34) Several institutional or national arbitration rules provide for "additional awards" regarding claims presented in the arbitral proceedings but not dealt with in the award. However, this is not the case in ICC arbitration, where the arbitral tribunal's intervention under Article 35 of the Rules is as such limited to "correction" and "interpretation" of the award. This voluntary omission does however not prevent ICC arbitral tribunals from rendering additional awards in cases where they have failed to decide a claim when such intervention is allowed by the *lex arbitri*, see for example § 1058 (1) No. 3 of the German Code of Civil Procedure; Art. 51 of Egyptian Law No. 27; Art. 1715 §3 of the Belgian Judicial Code; Art. 1061 of the Netherlands Code of Civil Procedure; s. 57 (3) (b) of the English Arbitration Act; Art. 1485 (2) of the French Code of Civil Procedure; Art. 32 of the Swedish Arbitration Act; Art. 33 (3) of the Danish Arbitration Act; Art. 39 (1) (c) of the Spanish Arbitration Law; Art. 1202 of the Polish Code on Civil Procedure and Art. 33 (3) of the UNCITRAL Model Law.

35) Alan Redfern/Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, 2009, p. 582, para. 9.209.

36) If the Court is not satisfied in this respect, it may treat such deficiency as a matter of form which it can control by withholding the approval of a draft award until the reasoning is rendered comprehensible, *cf.* Humphrey Lloyd/Marco Darmon/Jean-Pierre Ancel/Lord Dervaird/ Christoph Liebscher/Herman Verbist, "Drafting Awards in ICC Arbitrations", ICC International Court of Arbitration Bulletin, Vol. 16 (2), 2005, p. 31.

Therefore, it may also occur that Court members "*are sometimes frustrated by the lack of detailed reasoning on the truly dispositive issues and the lack of legal reasoning on the applicable law*".[37]

The predominant part of the Court's comments does, however, normally relate to formal points that, for example, may also have been adequately addressed with the help of an administrative secretary or simply by a last thorough reading of the draft award. The following overview illustrates how the Secretariat and the Court approach the review of awards, and on which parts of the draft award they put a particular focus in order to avoid recurring issues.

a) Numbers

The review process frequently involves:

- verifying mathematical calculations;
- adding all individual claims awarded in the body of the award and comparing this amount to the total amounts stated in the dispositive section; and
- checking whether numbers are used consistently throughout the draft award, not transposed or contain too many digits.

b) Interest

The Secretariat and the Court verify whether the draft award:

- discusses the parties' respective requests and the arbitral tribunal's statutory or contractual power to award interest;
- indicates the respective start and end dates;
- provides reasoning why these dates have been chosen by the arbitral tribunal;
- indicates a determinable interest rate and refers to its source of publication; and

37) Bühler/Webster (*supra* fn. 11), p. 504, para. 33-25.

- specifies whether interest is simple or compound, pre- or post-award interest.

c) Costs

The scrutiny process allows for formal deficiencies and lack of reasoning in relation to costs to be remedied.[38] The Court may, for example, as a point of form require that reasons for the arbitral tribunal's cost decision be added. The ICC Award Checklist contains an entire section dedicated to costs and the way the arbitral tribunal's reasoning and decision should be presented in the award. In the author's experience, it is furthermore no longer accurate that the Court "*very rarely draws the tribunal's attention to substantive points relating to costs*".[39] Special attention is given to examining whether:

- specific requirements in the arbitration clause with respect to the costs of the arbitration and the parties' legal and other costs are considered;
- both parties' arguments with respect to the allocation of costs are set forth;
- the proportion in which the parties paid the advance on costs is stated;
- reasoning for the cost decision is provided and the factors provided for in Article 37(5) of the Rules have been considered;
- reference is made to the arbitral tribunal's wide discretion under Article 37(1) and (4) of the Rules regarding the allocation of the costs of the arbitration and the reasonableness of the parties' legal and other costs;
- interest on costs, if requested, is dealt with a view to pre-award and post-award interest; and
- VAT issues are addressed permissibly in light of Article 2(13) of Appendix III to the Rules.

38) Gustav Flecke-Giammarco, "The Allocation of Costs by Arbitral Tribunals in International Commercial Arbitration", Jorge Goldman/Franz Stirnimann/Antoine Romanetti (eds.), *WTO Litigation, Investment Arbitration and Commercial Arbitration*, Kluwer Law International, 2013, p. 392.

39) Michael W. Bühler, "Costs of Arbitration: Some Further Considerations", *Liber Amicorum in Honour of Robert Briner*, ICC Publishing, 2005, p. 179.

d) Operative part

The scrutiny process aims at ensuring that the operative part of the award:

- does not contain any reasoning or refers to reasoning;
- contains orders that are enforceable taking into account the type of relief requested (in particular with respect to declaratory relief or requests for specific performance);
- orders the relief granted in the body of the draft award and accurately reflects all decisions taken by the arbitral tribunal; and
- either finally decides all issues or reserves remaining issues to one or more subsequent awards.

e) Local requirements at the place of arbitration

In the process of administering thousands of arbitrations with the help of the Court's members from currently 89 different countries, the Secretariat regularly becomes aware of country-specific pitfalls that should be avoided in the drafting process to maximize the chances of enforcing an award in a particular jurisdiction. The Court's comments on the award therefore sometimes refer to special requirements concerning the formal validity of awards at the place of arbitration or where enforcement proceedings may be needed.[40] Just to name a few:

- **Netherlands/Belgium**: All awards need to be registered with the competent body unless the parties expressly waive this requirement.[41] An Award by Consent rendered in the Netherlands is also to be signed by the parties;[42]
- **Sweden**: The award must mention that the parties may bring an action regarding the compensation of arbitrators before state courts within three

40) Fry/Greenberg/Mazza (*supra* fn. 4), p. 335, para. 3-1209.

41) Pursuant to Article 1058(1) b) of the Netherlands Code of Civil Procedure an original of the award is to be registered with the registry of the district court in which the place of arbitration is located. Pursuant to Article 1702(2) of the Belgian Judicial Code an original of the award is to be deposited with the clerk of the court of first instance within which the place of arbitration is located.

42) Article 1069(2) c) of the Netherlands Arbitration Act provides: "*An arbitral award on agreed terms shall be regarded as an arbitral award to which the provisions of Sections Three to Five inclusive of this Title shall be applicable, provided that:* [···] (c) *the award is also signed by the parties*".

months from the date on which the relevant party received the award;[43]

- **Turkey**: The award should fully recapitulate all time extensions granted by the Court for rendering the final award pursuant to Article 30 of the Rules;[44] and
- **Dubai**: The award must be issued in the UAE. Each page of the award must be signed by the arbitrators.[45]

f) Due process considerations

Due process issues mostly arise in connection with the arbitral tribunal's handling of evidence or procedural requests in still on-going proceedings. These issues may sometimes be averted by the Secretariat before the closing of the proceedings and the submission of the draft award for scrutiny through timely interventions and consultations with the arbitral tribunal. However, also draft awards may give rise to due process issues such as that the arbitral tribunal:

- relies on a factual issue that neither party had referred to in the arbitration;
- fails to address a legal or factual point made by the parties;

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43) Article 41(1) of the Swedish Arbitration Act provides: *"A party or an arbitrator may bring an action in the District Court against the award regarding the payment of compensation to the arbitrators. Such action must be brought within three months from the date upon which the party received the award and, in the case of an arbitrator, within the same period from the announcement of the award. Where correction, supplementation, or interpretation has taken place in accordance with section 32, the action must be brought by a party within three months from the date upon which the party received the award in its final wording and, in the case of an arbitrator, within the same period from the date when the award was announced in its final wording. The award shall contain clear instructions as to what must be done by a party who wishes to bring an action against the award in this respect".*

44) Article 529 of the Turkish Code of Civil Procedure provides: *"The arbitrators are obliged to render their award within a period of six months from the day of their first session. Failing to do this, all past actions are null and void and the dispute shall be solved by the competent court. This time limit may only be extended by consent of the parties, explicit and in writing, or by a decision of either the president of the court or a judge thereof."*

45) Article 215(5) UAE Code of Civil Procedure provides: *"The judgments of the arbitrators shall be given by a majority opinion. They shall be written together with the dissenting opinion and shall include in particular a transcript of the arbitration agreement as well as a summary of the statements and documents of the parties, the grounds for the judgment, the decree date, its place of issue and the signatures of the arbitrators; however, if one or more of the arbitrators abstain from signing the judgment, a record thereof shall be made, and the judgment shall be valid if it is signed by the majority of the arbitrators.".*

- relies on a legal point that neither party had relied upon in their submissions, or on which they did not have an opportunity to comment;
- omits to reveal evidence to the parties which it has obtained through its own investigations and on which the reasoning supporting the award is based; or
- bases its reasoning on a view that is at odds with the parties' submissions, which is only disclosed in the draft final award.

In cases in which the parties' right to be heard may have been impaired or the consideration of arguments by the arbitral tribunal requires further submissions by the parties, the Court will – as a precautionary measure – frequently ask the arbitral tribunal in its comments on the draft award to re-open the proceedings and grant the parties an opportunity to comment on specific issues of fact or law.

g) Consistency of decisions

With respect to the consistency of decisions rendered under the *aegis* of the Court, it is important to keep in mind that the Court "*is not a court of appeal and does not scrutinise the award to see whether the decisions are correct or not*".[46] The Court is not a "*fact determining body*".[47]

As set out above, the principal purpose of scrutiny is rather to bolster an award's legal effectiveness. It serves to maximize the award's chances of surviving an attempt to set it aside at the place of arbitration or to resist enforcement elsewhere.[48]

As a quality control mechanism, the scrutiny process further ensures that the award meets the parties' expectations. The Court's comments on substantive points, if any, will be aimed at ensuring that all issues are dealt with and not at criticizing the award's findings or the outcome of the award.

While the scrutiny process may, on occasion, lead to an arbitral tribunal

46) Bühler/Webster (*supra* fn 11), p. 504, para 33-24.
47) McGovern (*supra* fn. 31), p. 47.
48) Greenberg (*supra* fn. 12), p. 93.

modifying a substantive aspect of its decision, this will generally only "*result from the Court's identifying a problem such as missing elements in the decision, weaknesses in the reasoning, inconsistencies, the failure to deal with certain issues or claims, or dealing with claims or issues not raised by the parties*".[49]

With respect to consistency between awards rendered in related ICC cases or ICC cases involving similar procedural or substantive issues, it is furthermore important to recall that both the Court and the Secretariat are under an obligation to preserve the confidentiality of proceedings which may be related to a certain dispute and will therefore not communicate any details regarding decisions that were previously rendered by other arbitral tribunals to the arbitrators deciding a specific case.

5. Duration of the scrutiny process

Conducting the scrutiny process in an expeditious manner is a perpetual striving of the Court and its Secretariat. At the same time, the attention to detail and diligence required when reviewing draft awards, sometimes comprising of several hundred pages, is time consuming and may sometimes pose organizational challenges.

Some authors have stated that the scrutiny process "*causes concern to some arbitrators, which consider it unnecessary and time consuming*"[50] and that its duration "*is a matter of irritation in some ICC arbitrations*".[51] In some isolated instances, this time concern may hold true but delays generally result from a fundamental issue with the award that the arbitral tribunal must address or several consecutive non-approvals by the Court.

In an attempt to establish a time frame for the duration usually to be expected given the complexity of the scrutiny process, other authors have stated "*it is not surprising that it typically takes two to four weeks between the date when the draft award is sent to the case counsel and the date when the Court's decision is communicated to the arbitral tribunal*"[52] or "*despite its rigor, the scrutiny*

49) Fry/Greenberg/Mazza (*supra* fn. 4), p. 335, para. 3-1207.
50) Redfern/Hunter (*supra* fn. 34), p. 582, para. 9.208.
51) Bühler/Webster (*supra* fn. 11), p. 508, para. 33-37.

process is designed normally to take as little as two weeks from the date the Secretariat receives the draft award".[53] As will be seen below, in the author's own experience, the review period usually ranges from one to four weeks. During the various stages of the scrutiny process described above, potential problems that might affect the enforceability of the draft award are often discovered and its overall duration thus depends on various factors such as the condition of the draft award, the internal time limits for the submission of matters to the Court and the responsiveness of arbitral tribunals in making the requested changes.

The following sources of delay may lead to an unusually long scrutiny process:[54]

- need to translate the award into one of the Court's official languages, *i.e.* English or French;
- unusually poor quality or above-average page length of draft awards;
- delays encountered in the preparation of a dissenting opinion;
- need to submit a matter to a Plenary Session of the Court which only takes place once a month as opposed to the regular Committee Sessions of the Court which are held on a regular basis once a week; or
- failure to pay the advance on costs which may prevent the submission of the draft award for approval by the Court pursuant to Article 34 of the Rules and 1(3) of Appendix III to the Rules.

In case of a genuine emergency, fast track proceedings or unforeseen delays, the President of the Court may be invited to take an urgent decision pursuant to Article 1(3) of the Rules and approve draft awards on an expedited basis to address the urgency of the situation or make up for lost time.

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52) Jacob Grierson/Annet van Hooft, *Arbitrating under the 2012 ICC Rules*, Kluwer Law International, 2012, p. 213.

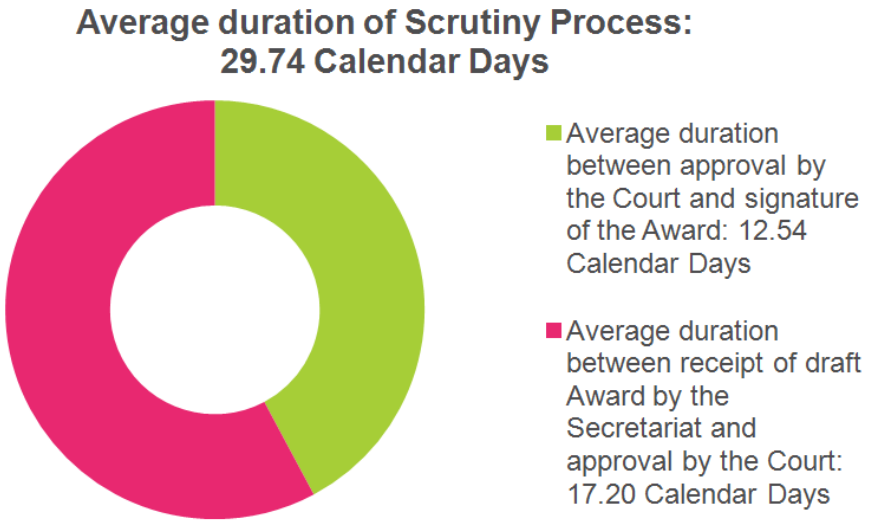
53) Fry/Greenberg/Mazza (*supra.* fn. 4), p. 337, para. 3-1217. Jennifer Kirby, "The ICC Court: A Behind-the-Scenes Look", ICC International Court of Arbitration Bulletin, Vol. 16 (2), 2005, p. 17.

54) Fry/Greenberg/Mazza (*supra* fn. 4), p. 338, para. 3-1218. In practice, delays encountered due to the need to translate draft awards into one of the Court's official languages have been significantly reduced following the introduction of Special Committee Sessions of the Court in Italian, Spanish, Portuguese and German as described in section II.2. above.

An internal study of 225 awards rendered between 2011 and 2013 in the author's case management team has revealed an average duration of the entire scrutiny process of 29.74 calendar days, counting from the receipt of the draft award by the Secretariat to the date of signature of the award by the arbitral tribunal. The first phase of the scrutiny process between the Secretariat's receipt of the draft award and the Court's approval of the award took 17.20 calendar days on average. The second phase of the scrutiny process spanning from the Court's approval of the award to the date it is signed by the arbitral tribunal took 12.54 calendar days on average.

This internal study also recalled several occasions of accelerated or protracted scrutiny processes, ranging from 2 days to 56 days on the Secretariat's side for the first phase and 1 day to 48 days on the side of the arbitral tribunal for the second phase. The shortest total duration of the scrutiny process from submission of the draft award to the Secretariat to signature of the award by the arbitral tribunal was 7 days and the longest total duration 83 days.[55]

[TABLE 4] STUDY OF 225 Awards: 2011 - 2013



55) As described above, the duration of the scrutiny process depends on several internal and external factors and may therefore vary considerably in each case. The results of the presented study are therefore not representative of all case management teams at the Secretariat and are merely intended to serve as a rough benchmark.

As always, concerns about time efficiency should be balanced out by taking into account cost considerations. The scrutiny process can prevent delays and costs that might result from an application for correction or interpretation of awards under Article 35 of the Rules where a defect is only spotted after the award is rendered. Equally, it may safeguard against an award being set aside or refused enforcement by state courts.[56]

The scrutiny process may also permit considerable hidden savings if the arbitration is more speedily resolved or difficulties at the enforcement stage are avoided as a consequence of ICC's involvement the scrutiny process.[57]

6. ICC Award Checklist

Annex 1 to the present article reproduces the most recent version of the ICC Award Checklist ("Checklist") which is a useful tool for arbitrators conducting arbitrations under the Rules.[58]

As part of its on-going drive to increase efficiency and transparency, the Court has issued formal recommendations for drafting ICC arbitral awards. The checklist reminds arbitrators of key information that must normally be included in an ICC award which is submitted to the Court for approval. In an attempt to improve the readability of awards, it further draws attention to matters of presentation, stressing the importance of clarity and consistency.[59] The Checklist reduces the Secretariat's workload and the Court's comments on draft awards as it integrates a number of formal comments routinely made in the course of the

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56) Fry/Greenberg/Mazza (*supra* fn. 4), p. 328, para. 3-1182

57) Eric A. Schwartz, "The ICC Arbitral Process – Part IV: The Costs of ICC Arbitration", ICC International Court Bulletin, Vol. 4(1), 1993, p. 17: "*It is often overlooked that the direct costs of the arbitration may bring with them a number of hidden savings (for example time gained and appeals avoided)*"; see also: Flecke-Giammarco (supra fn. 37), p. 397.

58) It can be downloaded free of charge in the ICC Dispute Resolution Library at http://www.iccdrl.com.

59) Simon Greenberg, a former Deputy Secretary General of the Court, described the checklist as "*a time-saving tool to help avoid many of the formal corrections requested by the Court when scrutinizing awards under Article 27 of the ICC Rules*". Mr. Greenberg added: "*It will help to make sure that busy arbitrators do not overlook details that can improve the effectiveness of their awards and thereby contribute to the quality of ICC awards and the efficiency of the scrutiny process*", official ICC press release February 2010 available at http://www.iccwbo.org/iccdfbbe/index.html.

scrutiny process.[60] The general aim of the Checklist is thus to improve the overall quality of ICC awards, render them more uniform, and, in particular, ensure their enforceability.[61] It may also help reduce frustrations for arbitrators who might otherwise receive a large number of formalistic comments.[62]

Since the beginning of 2010, the Checklist has been disseminated among users of ICC arbitration and is now also communicated at the time of transmission of the file pursuant to Article 16 of the Rules to every arbitral tribunal. It is intended to provide arbitrators acting under the Rules with some guidance when drafting awards and in no way constitutes an exhaustive, mandatory or otherwise binding document. It aims at facilitating the arbitrators' mission but is not exhaustive of issues that may be raised by the Court under Article 33 of the Rules. After more than four years of existence, it is, however, safe to say that the Checklist has largely facilitated the scrutiny process, increased the awareness of arbitral tribunals about the formal requirements of ICC awards and, most importantly, unified their presentation standards which are now more than ever recognizable as carrying the ICC's *imprimatur* in potential enforcement proceedings.

Compliance with the requirements set forth in the Checklist is strictly enforced by the Secretariat in all cases. The standards and practices recommended therein have proven to be a beneficial reference document, and the Checklist is thus again sent to the arbitral tribunal together with the Secretariat's letter notifying the arbitral tribunal of the Court's decision regarding the approval of the draft award, marking the points which have not yet been fully complied with.

Ⅳ. Enhanced Enforceability

It can also be inferred directly from the Rules that an enhanced enforceability of awards is the overarching goal of the scrutiny process: protecting the integrity of arbitral awards is the guiding principle followed in the scrutiny process and recognized in Article 41 of the Rules and Article 6 of Appendix II to the Rules.

60) Fry/Greenberg/Mazza (*supra* fn. 4), p. 332, para. 3-1197.
61) Bühler/Webster (*supra* fn. 11), p. 501, para. 33-14.
62) Greenberg (*supra* fn. 12), p. 107.

As has been demonstrated above, the scrutiny process puts these principles into practice and enhances the quality and enforceability of ICC awards. State courts throughout the world readily and regularly enforce ICC awards.[63]

Article 41 of the Rules provides: "*In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law*". Article 6 of Appendix II to the Rules provides in pertinent part: "*When the Court scrutinizes draft awards* [···]*, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration*". Both provisions are frequently referred to by the Court in the course of the scrutiny process when an award may be at odds with mandatory procedural or substantive laws or public policy considerations at the place of arbitration or other countries in which recognition and enforcement of the award may be sought.

As *David T. McGovern*, member of the Court from 1988 to 1993, has put it, the Court's main role is to "*examine a written text and to attempt to cure it of any faults or weaknesses that might endanger its validity as an award or its enforcement*".[64] *Jennifer Kirby*, a former Deputy Secretary General of the Court, went as far as to state that she "*has never seen a draft award that did not benefit - often enormously - from scrutiny, be it because of typographical and computational errors, erroneous legal reasoning or even procedural errors so severe as to undermine the enforceability of the award altogether*".[65] *Simon Greenberg*, another former Deputy Secretary General has put it in slightly different words by emphasizing that "*there is, however, ample anecdotal evidence that the process improves the award's chances of being enforceable. Almost any lawyer who has worked in the Court's Secretariat, most Court Members, and some regular ICC arbitrators could offer examples of cases where they have seen real and important improvements in an award's enforceability as a result of scrutiny*".[66]

The Court's and the Secretariat's main duties thus consist of spotting and

63) Fry/Greenberg/Mazza (*supra* fn. 4), p. 339, para. 3-1224.
64) McGovern (*supra* fn. 31), p. 46.
65) Kirby (*supra* fn. 52), p. 16.
66) Greenberg (*supra* fn. 12), p. 104.

correcting potential errors which may save parties years of legal trouble in enforcement proceedings.[67] At the same time, the scrutiny process is designed to improve the overall quality of ICC awards and thus the parties' satisfaction with the proceedings, which in turn increases the chances that an award is voluntarily complied with.[68]

When seized with setting-aside proceedings or a request for enforcement of an ICC award, state courts obviously have to make their own independent judgement based on the legal standard applicable for their decisions and are normally not concerned with the comments made by the Court during the scrutiny process.[69] The mere fact that the Court has endorsed the award and may have spotted potential problems should however help to reduce the chances of setting aside or resisting enforcement of an award.

International awards such as most awards rendered in ICC proceedings[70] are enforced all over the world. Only very scarce empirical data exists regarding the percentage of arbitral awards which are honoured voluntarily, the number of cases which result in recognition and enforcement proceedings or settle after the award was rendered.[71] For the purposes of ICC arbitration, although relevant questionnaires are being sent to all parties requesting certified copies of ICC awards, one can only rely on this data, other anecdotal evidence or publicly available state court decisions.

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67) McGovern (*supra* fn. 31), p.47.

68) Greenberg (*supra* fn. 12), p. 103.

69) Bühler/Webster (*supra* fn. 11), p. 507, para. 33-34. The details of the scrutiny process are in any event confidential and the Secretariat's agendas are normally not brought to the attention of the state court.

70) In 2013, 80% of all cases filed with the Court were cross-border disputes between parties of different nationalities, while 66% concerned disputes between parties from different regions.

71) According to a study conducted by Price Waterhouse Coopers and Queen Mary University in 2008, 92% of arbitration disputes are successfully resolved in one way or another, *cf.* "*International Arbitration: Corporate attitudes and practices*"; available at http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf.

V. Conclusion

It is beyond any doubt that the scrutiny process is and will remain one of the hallmarks of ICC arbitration. Experience has shown that the review of arbitral awards by the Secretariat and the Court is considered to be helpful and welcomed by arbitrators and parties alike. The scrutiny process undoubtedly further increases the quality and enforceability of awards. Arbitrators and the ICC should thus continue to work together on refining this unique control mechanism which significantly reduces the danger of invalidated awards.

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