'CHANGE': WHAT IT IS, HOW IT IS VALUED AND WHO SHOULD RESOLVE ANY DISPUTE

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To paraphrase a Lord Justice of Appeal previously in charge of the Technology and Construction Court, this paper is in four parts:

Part 1: Introduction

Part 2: What is ‘change’?

Part 3: How is it valued?

Part 4: Who should resolve any dispute?

Introduction

In a perfect world, contracts would be clear and readily comprehensible. They would not lead to disputes and the parties would not require third party assistance to determine disputes. We do not live in a perfect world. This paper addresses the separate but linked issues of change, how it is valued, valuations, and the selection of the tribunal to determine disputes where the change, or its value or both, is put in issue by the parties.

To illustrate this, I will consider the Joint Contracts Tribunal (JCT) Intermediate Form of Contract[1] and the International Federation of Consulting Engineers (FIDIC) Red Book.[2] This gives scope to contrast provisions that might apply on modest domestic jobs to those used for large international projects. As the Red Book is historically derived from the Institution of Civil Engineers (ICE) forms, it is founded in common law, and even those of you who have not come across it in detail will be familiar with the form of its provisions, its style and intent.

What is ‘change’?

Change, or variation as it is usually referred to domestically, is on its face a simple concept and like a number of simple concepts, hides a plethora of potential difficulties. Change is doing something different from that which was anticipated at the signature of the contract, at its commencement or even much later. This definition will not necessarily move matters very much forward because it begs the question as to the parties’ responsibilities.

1 Intermediate Building Contract, 2005 edition, Joint Contracts Tribunal Ltd.

2 Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, first edition 1999, International Federation of Consulting Engineers.

What if the change is a different type of roof slate from that priced, because the Spanish slate you had anticipated using did not hold up to the rigours of the Manchester weather and so the building failed to be watertight in accordance with the relevant British Standard? On one level, changing from Spanish slate to Welsh slate is a change. It will probably increase the overall cost of the project, but who bears that cost depends on who bears the risk for such changes.

So the first requirement when considering change is to ascertain the scope of the parties' original responsibilities. Until you do that, you can not determine whether a change may give rise to an entitlement to extra monies. Clearly, if a contractor is responsible for the design or is working to a performance specification, the scope for claiming additional monies may be limited.

How is it valued?

The Red Book (of which shorthand title, we are all grateful) has been around for over fifty years. It first saw the light of day in August 1957. It is not the purpose of this paper to analyse its evolution, however throughout its various guises the draftsman has in large part been responding to criticisms of the contemporary ICE forms.

The definition of Variations (Clause 13.1) is wider than just physical work but it does not encompasses all activities necessary to complete the Works. I illustrate this point later. Further, the permissive nature of the definition in that clause can properly be viewed as an expansion of the formal definition in Clause 1.1.6.9. An example of this is Clause 13.1(f) permitting changes to the sequence or timing of the execution of the Works.

The IFC contract provides a useful contrast. The variations clause is Section 5. Variation is defined in what purports to be an inclusive definition of matters comprising 'the alteration or modification of the design, quality or quantity of the Works'.[3] Works are defined in the first recital and comprise, essentially, the permanent works. The requirement to undertake the further works is mandatory, save that those under clause 5.1.2 (imposition of any obligations or restrictions) are subject to a 'reasonable objection' proviso in clause 3.8.

The clause in the IFC contract is more limited in the circumstances it addresses than that in the Red Book, but neither is comprehensive. For example, the scope of neither variations clause allows the employer to vary the works fundamentally, for example from building a bridge over a river to building a tunnel under the river. Whilst theoretically such a change in scope is permitted on one reading of the variations clauses, under the common law (from which the FIDIC and JCT forms are both derived) such a fundamental change would not be recognised as a change in scope properly falling within the true nature of a variation.

3 JCT Intermediate Building Contract: note 1, clause 5.1; 'inclusive' and therefore not comprehensive.

As submitted by the learned editor of *Hudson's Building and Engineering Contracts*:

> 'The question is whether an unqualified obligation to complete exists in the case of work which the contractor could not foresee at the time of contracting and which proves difficult and impractical from this point of view. It is submitted that the obligation will extend to variations, such as extra work, which can be shown to be similar in general character to the contract work, but may not extend to unforeseeable variations which are different in character or location. However, a builder undertaking such work without protest will, it is submitted, be regarded as accepting the liabilities and it is [precluded] from subsequently seeking to repudiate them.'[4]

An issue which still causes confusion is the ability (or more correctly the inability) to vary the works by way of omission so as to give that work to others. This reflects the decision in *Cadmus v Amec*,[5] following the unreported decision of *Maidenhead v Johnson*,[6] both English cases.

More detailed FIDIC forms reflect this expressly. For example the Yellow[7] and Silver[8] Books and the Red Book (Clause 13.1(d)) specifically provide that 'A Variation may include ... omission of any work unless it is to be carried out by others'. In other words, it does not comprise the omission of any work which is to be carried out by others.

The IFC contact does not differentiate between the permanent works and the temporary works (the latter being the means to produce the permanent works or final result). The Red Book does. The reference to the Works as part of the definition of a Variation directs attention to Clause 1.1.5.8, which states that, '"Works" means the Permanent Works and the Temporary Works, or either of them as appropriate.'

The Permanent Works are self-explanatory, comprising the work to be executed by the Contractor under the contract; the Temporary Works raise more difficult issues. They are defined (Clause 1.1.5.7) as 'all temporary works of every kind (other than Contractor's Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects'. This definition would suggest that one is talking about physical work. This has led commentators to speculate as to whether, for example, a requirement to provide additional progress reports under Clause 4.21 would

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4 IN Duncan Wallace, *Hudson's Building and Engineering Contracts* (11th edition Sweet &Maxwell, London 1995), para 4.045.

5 *Amec Building Ltd v Cadmus Investments Ltd* 51 ConLR 105, (1997)13 Const LJ 50 (OR).

6 *Maidenhead v Johnson*, unreported (OR - Mr Recorder Knight QC) (copy available from the author; referred to in *Amec v Cadmus*, note 5).

7 The Plant and Design-Build Contract (Conditions of Contract for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor), first edition 1999, International Federation of Consulting Engineers.

8 The EPC and Turnkey Contract (Conditions of Contract for EPC Turnkey Projects), first edition 1999, International Federation of Consulting Engineers.

constitute a Variation. Would this be a variation under the definition at Section 5 of the IFC form? It is a difficult point and commentators differ.

This is not an isolated example. The proper execution of the works requires permanent works, temporary works and numerous other administrative tasks which do not fall easily within either of the foregoing descriptions. Can it really be the case that these are to be undertaken and potentially increased by an employer with no consequential reimbursement to the contractor?

Common sense suggests that such a situation should not be permitted and common sense is usually a good guide when approaching such questions, although it is not an infallible one. This is mainly because over the years, draftsmen appear to have made strenuous efforts to draft contracts of such labyrinthine complexity that the room for generous construction which existed with simple contracts is drafted out of existence by seeking to cover each and every possibility.

The answer to this and similar problems of interpretation is to be found by recognising that the FIDIC and JCT forms both originate from a common law jurisdiction. Under case law, two principles are clearly established:

(i) An architect or engineer has no implied authority to make a contract with a contractor binding on his employer, or to vary or depart from a concluded contract;

(ii) The consequence of the absence of such authority is a necessity to provide a power to, in effect, change the terms of a contract. Without this the parties can call for and demand compliance in accordance with the original obligations, and nothing more.

The benefit to an employer of a variations clause is that it allows the scope to be changed as of right at the employer's option, whereas the entering into a new contract of different scope would require a separate agreement between the parties and renewed negotiation.

How does one then apply these principles to requests to alter the scope of a contract where the requests do not fall easily within the definition of variation? The hypothetical example of additional progress reports suggests that the employer would have no power to require increased reports. Indeed, the employer could not even require it on the basis that the cost is ascertained on a pro-rata basis, applying whatever cost the contractor had included in its original price. This illustrates the principle that without an express power to vary the terms of the contract in that particular manner, the only way forward is to have a separate agreement.

It would, therefore, be left to the parties to reach a collateral agreement, that is an agreement separate from the original contract but related to the same works and dealing with this increased obligation. Alternatively, the parties could agree to amend the original contract to reflect the varied obligations. Either solution would require careful drafting and the re-opening of negotiations.

Before leaving this analysis of what constitutes a variation, it is noteworthy that the draftsman of the Red Book makes it clear what is, or should be, universally understood in contracts of this nature, namely that: 'Changes to the quantities of any item of work included in the Contract do not necessarily constitute a variation.'[9]

In contracts providing for payment on a measurement basis this must follow, and indeed this links in with Clause 14.1(c) which provides that:

> 'any quantities which may be set out in the Bill of Quantities or other Schedule are estimated quantities and not to be taken as the actual and correct quantities:
>
> (i) of the Works which the Contractor is required to execute; or
>
> (ii) for the purposes of Clause 12 [Measurement and Evaluation]; ...'

The words 'do not necessarily constitute a variation' tell us that even in a remeasurement contract, the issue is one of nature and degree.

How do you arrive at a valuation?

Readers may feel that there is nothing unusual about the IFC form, Section 5.3 (Measurable Work). Clause 5.3.1 provides rules for the measurement and valuation of additional or substituted work which can be measured or for which the Bills provide**.** This is standard fare and requires the contract administrator/architect to undertake the exercise. Would a contractor be content for the employer's contract administrator/architect to form his or her own view? A contractor may well wish to submit its evaluation with supporting analysis as to the correct approach. This may involve significant effort depending on the nature and extent of the variation. Also, a failure to do so at the time may mean that its only means of recovery would be by legal proceedings, which would be even more expensive. Even though the employer is seeking to change the scope of the contract, a contractor has no entitlement to be paid for (or recover) its costs of ensuring that it is not out of pocket. This may be an overhead cost but there is no way of estimating how many times this may arise under a contract and if the contractor prices defensively, it may well not even make the tender short list.

Clause 13.3 of the Red Book (Variation Procedure) illustrates this analysis as it deals with the procedure to be adopted where the Engineer requests a proposal prior to issuing a Variation. It provides, generally, that each Variation shall be evaluated in accordance with Clause 12 (Measurement and Evaluation) unless otherwise instructed or approved in accordance with Clause 13.

The Red Book leaves a contractor in no doubt as to the cost of preparing proposals in respect of variations sought by the employer. The requirement to prepare a proposal as to the cost and other on-going effects of variations is mandatory, however the costs are not recoverable. The FIDIC Contracts Guide offers a justification for this position:

9 The FIDIC Red Book: note 2, clause 13.1(a) refers.

> 'Since the Contractor's obligation to comply with a request is limited to such an explanation and/or to the listed documents, he is not stated as having any entitlement to payment. He may be unwilling to incur much Cost, such as by undertaking detailed design, for the purpose of complying with the request. Typically those preparing an offer are not paid for doing so, but payment may be appropriate if a detailed design is involved.'[10]

As the request for a proposal and the requirement to respond is mandatory under Clause 13.3, the process envisaged by that clause constitutes a step beyond Value Engineering (which under the previous provision, Clause 13.2, is permissive). Clause 13.3 requires the Contractor to expend time and thereby potentially incur cost for which he cannot demand payment. The recognition that 'payment may be appropriate if a detailed design is involved' is helpful, but does not assist the contractual analysis as to where such payment is to be recovered, unless the Variation is subsequently ordered and the cost of the earlier work is somehow included in the valuation.

Potentially of even greater concern is the requirement in Clause 13.3 not to delay work whilst awaiting a response from the engineer. Circumstances can clearly be envisaged where carrying on with the works would result in increased cost (whether abortive or otherwise) which might not have been taken into account in the proposal for evaluation. A contractor should make sure that the proposal recognises the potential for a fluid state of affairs pending approval, disapproval or comment from the engineer. There is no equivalent provision in the IFC form.

What I call 'mainstream' measurement and evaluation under Clause 12 of the Red Book and Section 5 of the IFC form has at its heart a simple and readily understandable approach. Work is measured and agreed rates (whether from the contract bills of quantities or schedule of rates) are then applied to the quantities or, where appropriate a lump sum.

Matters get more interesting when there is no directly applicable price or rate. In those circumstances, recourse is had to prices for similar work to the extent appropriate. If no help is found there, a fair rate and price is required.

The importance of the contractor attending any measurement cannot be overstated. In the Red Book, it is specifically provided that if the Contractor does not attend, records prepared by the Engineer shall be accepted as accurate (Clause 12.1). This is a *deeming* provision. The IFC form does not specify this as such, but in practice the same thing applies.

The provisions on valuation, and in particular the recourse to bill rates and prices, has led commentators to note that there is no provision for the correction of errors in the rates or prices. However, this is to misunderstand the nature of such contracts. When considering the terms of a contract, common law jurisdictions do not concern themselves with the *intention* of any

10 The FIDIC Contracts Guide, first edition 2000, International Federation of Consulting Engineers.

party to the contract, save to the extent that the intention is clear or can be ascertained from within the four corners of the contract. It follows that to characterise a rate as 'a mistake' is in common law jurisdictions, both contractually irrelevant and inadmissible.

A vivid illustration of the consequences of this approach is the decision of His Honour Judge LLoyd QC in the English case of *Henry Boot Construction v Alstom Combined Cycles*.[11] That was a case concerning the ICE Conditions of Contract 6th edition which, as I have already noted, historically is similar to the FIDIC forms. Additional temporary work was instructed and a prior contractual price for that type of work was applied. Unfortunately, that price was mistakenly calculated and it was argued by the contractor that the provisions for a fair valuation (being found in Clause 12.3(b) of the Red Book by analogy of argument) should apply so as to avoid the injustice of an application of an incorrect price.

The court held that the fact that a price was mistaken does not mean that there is no price specified in the contract for such work. The court left the parties in no doubt, stating:

> 'A mistake in a rate or price or in its application binds both parties ... A party to a construction contract is therefore stuck with the rate or price whether the contract price is expressed as a lump sum or subject to recalculation by adjustment or after re-measurement using the correct rates and prices which are constituent elements or the contract or tender sum. So too is an employer stuck with the rates and prices which have been accepted by him as part of the contract.
>
> The fact that the rate or price otherwise applicable may appear 'too high' or 'too low' is immaterial: the parties have agreed that such a rate or price is to be used to value variations.'[12]

In response to the observations of the learned judge, one can only speculate as to the number of circumstances in which significant variations are ordered by an employer which result in the application of a rate which is recognised as being too high or, alternatively, significant omissions are instructed which, by happy coincidence, remove elements of work which have been underpriced by the contractor!

Who should resolve the dispute?

As will be appreciated from the foregoing analysis, the types of dispute which can arise fall broadly into the following categories:

(i) Whether the instruction constitutes a variation;

(ii) If so, whether it is a variation permitted under the contract;

(iii) If so, the proper valuation of that variation.

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11 *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [1999] BLR 123, 64 Con LR 32 (TCC).

12 *Henry Boot v Alstom*, note 11.

Experience suggests that disputes are usually a combination of more than one of these factors.

For the purposes of this analysis, it is assumed that the dispute adjudication board (DAB) under the Red Book has been appointed but fails to provide a decision which proves satisfactory to both parties; and further that an amicable settlement pursuant to Clause 20.5 has similarly failed.

Clause 20.6 of the Red Book prescribes that the parties shall engage in an International Chamber of Commerce (ICC) arbitration with three arbitrators. Such prescription is ultimately a matter for the parties, and employers may prefer different standard rules or even choose to amend the Red Book to incorporate project-specific arbitration terms. The same observation applies to the IFC form, which provides for single arbitrator arbitration.

I shall assume that the parties have decided not to litigate their dispute. If they do decide to go to court, they have little choice of forum; still less choice so far as a judge is concerned, as they have very little opportunity to object to whoever is appointed to determine the dispute.

Commercial parties frequently see advantages in a private consensual process such as arbitration. Being consensual, the scope to choose arbitrators and rules is wide. To illustrate the considerations of independence I will draw on the ICC Rules,[13] as they are prescriptive whereas the JCT Arbitration Rules[14] are generally silent (although, in my view, the central principles underlying them are the same).

Arbitrator independence

Incorporation of the ICC Rules, in their unamended form, requires and provides for each party to nominate an arbitrator, with the ICC Court[15] appointing a chairman. Article 7 states the following requirements for prospective arbitrators:

(i) Existing and continued independence of the parties;

(ii) A statement of independence and disclosure of facts and circumstances which might call into question such independence;

(iii) An ongoing obligation to disclose such matters which may arise during an arbitration.

These requirements are of a very general nature and susceptible to different interpretations in different jurisdictions. They are, however, important because even a party-nominated arbitrator is susceptible to challenge under Article 11. The primary basis of challenge is lack of independence, whilst by use of the words ‘or otherwise’ the ICC clearly recognised that this is not a closed category.

13 ICC Rules of Arbitration, in force as from January 1998.

14 The Joint Contracts Tribunal 2005 edition of the Construction Industry Model Arbitration Rules (CIMAR).

15 Being the International Court of Arbitration of the International Chamber of Commerce.

It is important to recognise that the ICC Rules do no more than state principles which are of almost universal recognition, if not also application. There is, however, little assistance as to what constitutes a lack of independence. On this point, approaches differ across jurisdictions. Further, are we considering independence of mind or independence of connection, or both?

By way of example, English lawyers would not raise an eyebrow if faced with an opponent and an arbitrator from the same chambers or indeed, lawyers who know each other socially. On any basis, however, that cannot be described as independence of association. Ironically, it is sometimes suggested that such an association will lead the arbitrator concerned to be even more conscious of the necessity for independence of mind. Further, there is a view frequently expressed that advocates are not keen to have arbitrators appointed with whom they have a social or similar association because this may result in more favourable treatment being granted to the other party. This could be through either a conscious, or more likely unconscious, endeavour on the part of the arbitrator to impose and demonstrate his independence.

Interestingly, the issue of two English barristers belonging to the same chambers came before the French courts in circumstances where one of the barristers was acting as counsel for one party while the other was chairman of the tribunal. The Paris Court of Appeals rejected a complaint of lack of independence, noting that belonging to the same chambers was essentially a matter of sharing premises and staff without creating professional ties involving shared interests or any form of economic or intellectual dependency. It noted that members of the same chambers, because of the chambers' specialisation, often argued cases against one another or participated in arbitral tribunals before which another member of the same chambers was acting as counsel.

This approach has been adopted in other jurisdictions, although it is not strictly correct to view members of chambers as economically independent one of the other. Frequently, there will be expense sharing agreements, the proportion of each member's contribution depending directly or indirectly on the earnings and requirements of other members of chambers.

On questions of independence, a distinction can be made between the law in England Wales and, for example, the UNCITRAL Model Law[16] and other international codes. The Arbitration Act 1996 only contains a requirement for impartiality.[17]

So how do you select your arbitrator and what degree of connection will be acceptable and what will not? Domestic law adopts a pragmatic approach to independence of association but the position will, in my view, only get tighter, so looking abroad gives us an idea of things to come. Certainly if your dispute has an international element, then it is likely that these issues will be raised when potential arbitrators are considered. The principles apply to both lawyer

16 United Nations Committee on International Trade Arbitration Law Model Law on International Commercial Arbitration, 1985.

17 Section 24(1)(a).

and non-lawyer arbitrators, although a past professional association between a non-lawyer and a party is likely to be more objectionable than for a lawyer.

If we are looking at a valuation dispute, why not appoint a quantity surveying expert rather than a professional lawyer? The answer is that there is no reason. Any arbitrator will need to be a master of procedure, particularly because if an arbitrator is not firm, proceedings can drift causing delay and increased costs. Lawyers would point to the fact that there are few disputes that raise only technical issues. If nothing else, issues of procedure and evidence require legal experience. Also, a central skill of a specialist lawyer is the ability to deal with technical issues (the current and recent Technology and Construction Court judges are an excellent example of this). But the same applies to experienced non-lawyer arbitrators. I have appeared before a number of such non-lawyer arbitrators in large and complex disputes and had no difficulty. The best legal and non-legal arbitrators share the same central qualities of judgment and common sense. These qualities mean that their advice is frequently in demand, which can lead to subsequent issues of independence when they act in an arbitral capacity rather than a private capacity (and here I leave out of consideration, full time arbitrators).

In a leading text on international commercial arbitration[18], examples are given where, under French law, arbitrators have been found to be insufficiently independent:

(i) Where at the same time as the arbitral proceedings, an arbitrator was personally paid to provide advice and technical assistance to one of the parties to the arbitration;

(ii) Where at the time of the signature of the agreement in which he was appointed as a replacement arbitrator, an arbitrator was acting as a paid consultant to a company of the same group as one of the parties to the arbitration;

(iii) Where the arbitrator was employed by a party on the day after he had made his award.

It is clear that mere suspicion of bias or feeling of unease is generally insufficient to warrant removal. As a guiding principle, there must be some form of justification for perceived or actual lack of independence and that justification should be capable of illustration by reference to known or readily established facts. A particular example may be the involvement of an arbitrator in a related dispute. For this analysis I leave aside the difficulties he may have in putting out of his mind evidence which was heard in that earlier dispute and may not be called in the same way (or at all) in the second dispute. Concern as to lack of impartiality would appear to be justified if an arbitrator had reached a decision which could be viewed as adverse to one of the parties in the later adjudication. Of course, as any lawyer will tell you, every case turns on its facts and one must be wary of anything more than general principles in this area, which is particularly fact sensitive.

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18 Emmanuel Gaillard and John Savage (editors), *Fauchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, September 1999).

There is also the well worn problem with accusations of bias relying on publications or other pronouncements emanating from an arbitrator which may be viewed as contrary to the interest of the complaining party. Both domestic and international arbitrators are not adverse to publishing papers or giving talks. In so doing, it is difficult to avoid expressing opinions. There is doubtless enough published material from all of us which, with sufficient time and a good search engine, would identify information that might give rise to concern as to the disposal of an issue in a forthcoming arbitration. Thankfully, such challenges rarely meet with approval, wherever they are made. Again it is a question of fact and degree, and arbitrators are not considered such rigid creatures that they are not receptive to different arguments from those they have encountered in the past. Expressions of opinion will therefore have to be particularly forthright or trenchant before a challenge on this ground is likely to be entertained.

On a related point, 'beauty parades' still take place, where parties consider potential arbitrators to form a panel. For this and related reasons many commentators view the concept of *independent* party appointed arbitrators as hypocrisy. I do not subscribe to such a criticism. Many of us will have come across arbitrators who argue the appointing party's position with, perhaps, more vigour than independence would suggest. Speaking personally, my invariable experience is that this is counter-productive for the party that appointed the panel arbitrator. It usually embarrasses the chairman and frequently embarrasses the lawyers of the party who appointed the arbitrator (and perhaps, the party also). Further, given that most arbitrations are recorded, the possibility of challenge to any subsequent award relying on such conduct must surely militate against the rather simplistic approach of having a 'place-man' arguing a party's position both inside and outside the arbitration room.

If guidance is sought in this area, a good place to start is the guidelines issued by the International Bar Association.[19] They adopt a red-orange-green traffic light system as to the situations which give rise to doubts regarding an arbitrator's impartiality and independence.

So what can the parties expect of their arbitrator?

In August 2009, the ICC Court required arbitrators wishing to be appointed to disclose details confirming their *availability* in addition to independence. This additional requirement was to meet an apparent concern as to the cost and, in particular, the time taken to conclude arbitrations. The form arbitrators now have to complete has the title 'ICC Arbitrator's Statement of Acceptance, Availability & Independence'. It may cause some concern to arbitrators (and, indeed, successful practitioners who act as arbitrators) when they see they are faced with a question such as:

> 'Are you aware of any other professional engagements or activities likely to require a substantial time commitment from you in the next 12-

19 IBA Guidelines on Conflicts of Interest in International Arbitration, 2004, International Bar Association <www.ibanet.org>

18 months? *(Please answer yes or no; If yes, please provide details on a separate sheet).*'

Further guidance is given in relation to independence in the following terms:

> 'In deciding [whether to tick the "nothing to declare" box] you should take into account, having regard to Article 7(2) of the Rules, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals and all other relevant information.'

It is the ICC's underlining. A clear implication is that a relationship – even indirectly – with the parties, lawyers or other representatives is a matter which must be disclosed fully. On one view, this would require full details of chambers' expense sharing arrangements and possibly their relationship to individual members' income. It is most unlikely that such disclosure would be acceptable to arbitrators, even full time arbitrators, who retain connections with groups of lawyers in the UK or elsewhere. Similar problems would be encountered across other more or less organised associations of individuals who act as arbitrators. An unintended consequence of this may be to widen the pool of 'acceptable' or 'appointable' arbitrators to include those who have no ties and are ready and waiting for work simply because of their relative lack of experience on the international stage.

A further problem which is not often recognised and has led to difficulties in the recent past, is the involvement of lawyers behind the scenes. If, for tactical reasons, a party does not wish to disclose the full extent of its legal team, it may find itself facing objections to either its own nominated arbitrator or, indeed, the chairman. In such circumstances, there is a real likelihood that the consequence of non-disclosure of the identity of the legal team could rebound against that party if it subsequently transpired there was an 'objectionable association' with a member of the tribunal (be it a single arbitrator or a member of a panel). On these facts, the arbitrator himself would remain wholly innocent of the connection, with the consequence that a party may be required to change some or all of its legal team. This has happened in practice and the cost consequences of such a course of action could be considerable, and the disruption to the tactical arbitration plan (which would have been agreed some time before) potentially very damaging.

The extent of permitted connection came before the Court of Appeal in *AT&T Corporation and Lucent Technologies v Saudi Cable Company.*[20] ATT was awarded a cabling project and was contractually required to purchase the cable from Saudi Cable. Disputes arose between AT&T and Saudi Cable and these were sent for resolution by way of ICC arbitration. The tribunal chairman had

20 *AT&T Corporation v Saudi Cable Company* [2000] 2 All ER (Comm) 625, [2000] 2 Lloyd's Rep 127, [2000] BLR 293 (CA).

a non-executive directorship of Nortel, a rival to AT&T, not only generally but as a bidding party for the contract. This appeared to be an innocent omission due to a clerical error. However the Court of Appeal found (perhaps understandably given the approach of the English courts to such matters) that, applying the test that there had to be 'a real danger of bias', this could not be demonstrated to exist. I suspect that had the point been taken at the time of the appointment, the ICC would have taken a different view, and that reflects the prevailing wind. In other jurisdictions, relief has more recently been given where counsel and the tribunal were from the same chambers and the arbitration was not being conducted in a country which was familiar with such a practice.[21]

Concerns as to independence and impartiality, whilst universal concepts, are not always judged by the same criteria. Clearly, the parties can agree to contract out of the ICC arbitration provisions. One must, however, be wary of losing the good with the bad. There is much to be said for ICC arbitrations and the clear rules under which they are conducted. There is certainly a middle way where, by amendment, the parties could make specific provision for the requirements of arbitrators, their appointments and commitment requirements.

Under the IFC form, this could be done by amendment to the standard conditions and by imposing requirements on any specified appointing body. Under *ad hoc* arrangements, the parties can instruct their lawyers in detail as to what is required. For obvious reasons this is best and most easily undertaken before any dispute arises.

In moving away from the strictures suggested by the ICC, the parties would widen the potential pool of arbitrators and would then have a better opportunity of appointing an arbitrator appropriate to that particular dispute. In considering potential appointments for panel arbitrators, it should be recognised that appointing an arbitrator overly sympathetic to that party's position is unlikely to assist. It will not and cannot guarantee a positive result. In my view, it is likely to act against such a conclusion; but even if that is not the case, the arbitrator's own conduct could create significant difficulties in the enforceability of any award.

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21 As such, the excitement which the International Centre for the Settlement of Investment Disputes ruling in *Hrvatska Elektoprivreda v The Republic of Slovenia* (http://icsid.worldbank.org/ICSID) created may turn out to be more illusory in practice than real.

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is to promote the study and understanding of
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