



International Arbitration Committee

Welcome to the International Arbitration Committee Newsletter Regarding Arbitrator Appointments!

Dear Members of the Committee:

In keeping with its goal of staying at the forefront of issues in the field of international arbitration, the International Arbitration Committee of the ABA's Section of International Law is pleased to present you with this special publication regarding arbitrator appointments. Historically, the freedom of parties to select their own arbitrators has been recognized as one of the principal hallmarks of arbitration. In recent years, a lively debate has emerged regarding the merits of party-appointed arbitrators. Leading practitioners and scholars have raised a number of critical questions, the resolution of which may influence the future use of this method of arbitrator selection. They include:

- Are the benefits of arbitration reduced if the parties are unable to select their own arbitrators?
- Is party selection of arbitrators endangering the integrity of the arbitral process?
- How do institutions currently appoint arbitrators, and what standards do institutions establish for the selection of arbitrators by the parties?

In this publication, renowned experts set forth their views on these key issues, and representatives of many of the world's leading arbitral institutions describe in detail the procedures for institutional appointment of arbitrators and the rules and norms applicable to party selection of arbitrators. We thank them for their timely and thoughtful contributions to this important debate.

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Contents:

02 The Debate: Unilateral Party Appointment of Arbitrators, Edna Sussman

05 Must We Live with Unilaterals?, Jan Paulsson

10 The (Abbreviated) Case for Party Appointments in International Arbitration, Charles N. Brower

14 A Review of the Principles Governing Arbitrator Pre-Selection Interview, Giugi Carminati

20 The ICDR's Arbitrator Appointment Process – The Institutional Role and Available Options, Luis M. Martinez

25 Your Way or the ICC Way: Constituting An Arbitral Tribunal Under the ICC Rules of Arbitration, Victoria Orłowski and Ashleigh Masson

31 Arbitral Appointments at the LCIA, Adrian Winstanley

35 Appointment to Arbitral Tribunals at ICSID, Meg Kinnear

39 The HKIAC Appointment Process, Chiann Bao and James H. Chun

42 SIAC Arbitration Appointments Through the Looking Glass, Rachel Foxton

49 The VIAC Procedure for the Appointment of Arbitrators, Manfred Heider

53 Appointment of Arbitrators Under the SCC Rules, Celeste E. Salinas Quero

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The Debate: Unilateral Party Appointment of Arbitrators

Message from the Editor, Edna Sussman

This special publication of the Arbitration Committee of the American Bar Association's Section of International Law is dedicated to the subject of the appointment of arbitrators. A heated debate as to the desirability of the established system of unilateral party appointed arbitrators was launched by Jan Paulsson in his speech in Miami in 2010.¹ It was followed by an analysis by Albert Jan van den Berg which indicated that while there was a growing body of dissents in the context of investor state arbitration awards, virtually no party appointee in investment arbitrations had ever dissented against the interests of the party that appointed him or her.² Both accordingly argued that the system of party appointed arbitrators was flawed and that it created, in the words of Jan Paulsson, a "moral hazard."

An equally vigorous response defending the use of the unilateral party appointed arbitrator system was mounted soon after led by Charles Brower, who referred to it as one of the "most attractive aspects of arbitration as an alternative to domestic litigation."³ The debate continues. In a speech delivered in April of 2013, Johnny Veeder expressed the view that while he had originally been persuaded by the Paulsson/van den Berg argument, on reflection

he had concluded that the unilateral party appointed arbitrator system was the "keystone" of international arbitration and that "we should be wary of abandoning a well - established tradition without good cause."⁴

The 2012 *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* conducted by Queen Mary University of London and White & Case is instructive. It explored the question of user preferences on arbitrator appointment with the question "By what method do you favour selection of the two co-arbitrators in a three-member arbitral tribunal?" Interestingly, while a majority of 76% of all those surveyed preferred a unilateral appointment of the two co-arbitrators by the parties, there was a notable difference in the percentage of those favoring such a selection process in each user group: unilateral appointment was favored by 83% of private practitioners, 71% of in-house counsel and 66% by arbitrators. One can speculate as to the reason for these preferences and for the spread in the responses.

Why is it that only 66% of the arbitrators preferred this method, a percentage lower than the other groups? Do arbitrators feel constrained in some way when they serve in that position? Do some go beyond feeling that they should ensure that the position of the party that appointed them is understood but also feel they should ask questions that favor the position of the party that appointed them, or refrain from asking questions that might be

¹ Jan Paulsson, *Moral Hazard in International Dispute Resolution*, ICSID Review, Volume 25 Issue 2 Fall 2010.

² Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011).

³ Charles N. Brower and Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, *Arbitration International*, Vol. 29 (2013).

⁴ Sebastian Perry, *Party Appointments are the Keystone of Arbitrations says Veeder*, *Global Arbitration Review*, April 17, 2013.



damaging to that position? Conversely, do some party appointed arbitrators feel inhibited from asking questions that would favor the position of the party that appointed them in their desire to appear impartial to all of the parties?

While dissents are in fact rare outside the investor state context, do some party appointed arbitrators feel they should write a dissent or talk about doing so to drive a more favorable result for their appointing party? In the context of investor state disputes where dissents are more common and the issues that arise from treaty interpretation repeat themselves, there has been considerable criticism of having ad hoc private arbitrators decide matters of public concern. It has been suggested that many stakeholders doubt the impartiality and independence of the arbitrators, many of whom also serve as counsel in such cases and are thus motivated to make decisions helpful to them in their counsel practice (the “double hat” debate) or are driven to reach results that will lead to future appointments.⁵

So should we consider whether there are differences in the approach to the role taken by different party appointed arbitrators that create an inequity in the process? Are influences on the conduct of the arbitrator aspects of the issue to which further research should be devoted and consideration given? Are there countervailing benefits that should be considered such as ensuring that all sides of the issues are considered until the final decision point or fostering more active engagement in the issues by the co-arbitrators?

Why is it that 83% of the private practitioners preferred unilateral appointments by the parties, a percentage higher than the other groups? Is it to ensure knowledge of specific

industries? Is it to ensure an understanding of the culture and manner of presentation to be expected from them and their party? Is it to select an individual known to them and likely to share their view of the merits and to be a strong voice on the tribunal in setting forth their position? Is it largely a distrust of the ability of the arbitral institution to appoint good arbitrators? Or a combination of all of these factors? Are there other ways to satisfy these objectives?

Jan Paulsson attributes much of the reluctance to move away from the unilateral party appointed system to a lack of trust in arbitral institutions to appoint good arbitrators. There are many ways to address this and other concerns. Jan Paulsson points out in his original article the use by some institutions of “blind appointments” so that nominees do not know who appointed them or the use of a list procedure which permits the user to select from an initial identification of the candidates by the institution. Both methods ensure that all three arbitrator act in a wholly impartial manner without constraints. In his article in this publication, Jan Paulsson offers a few more options: jointly appointing the presiding arbitrator and letting him or her choose the co-arbitrators or negotiating the right to veto the other party's unilateral appointment once or twice.

Many other possibilities can be explored that may satisfy all interests and concerns. Refinements of the method for preparing the identification of the candidates by the institution to enhance party influence on those selected for consideration and for informing the parties further about the choices presented can be developed. For example, jointly conducted interviews of prospective arbitrators identified by the institution from their list after consultation with the parties as to preferences and needs; unilateral identification by counsel to the institution of

⁵ UNCTAD IIA, Issues Note 2, May 2013.



potential arbitrators for consideration for inclusion in the list offered to the parties thus providing the opportunity to move beyond the institution's established list, coupled with a blind appointment process; providing a list to the institution of 5 potential arbitrators developed unilaterally by the parties and letting the other party choose its arbitrator from the opposing party's list. The possibilities abound and our learned arbitrator community is well able to develop creative and effective alternatives for exploration. Piloting alternative modalities for arbitrator selection by the institutions when agreed by the parties may be useful to determine if a move away from the traditional party appointed system is practical and desirable. Such alternative procedures may also allay some of the concerns about the arbitrators in the investor state context where the creation of a standing international investment court has been suggested to completely replace the current system.⁶

A further question to consider is whether there might be ancillary benefits to a system in which all parties feel that all of the arbitrators have equal loyalty to all of the parties. One can consider whether the unilateral party appointed system breeds suspicion of the other party's appointment and has in recent years, with the increase in the amounts at stake in arbitration, led to the very significant rise in challenges to arbitrators that are now plaguing the system. Would a system that provides deeper assurance of impartiality by all arbitrators lead to a welcome reduction in arbitrator challenges?

Old habits die hard. The ultimate question that must be answered is: Is the party appointed method just a habit long imbued in the system or is a unilateral arbitrator selection process necessary for parties to trust in the

process, respect the award and continue to use arbitration for their disputes? As the debate continues on this issue we offer articles by Jan Paulsson and Charles Brower, setting forth their respective positions. In order to elucidate the appointment process utilized by many of the leading arbitral institutions we offer articles describing the arbitrator appointment process at the ICC, ICDR, LCIA, ICSID, SIAC, HKIAC, SCC and VIAC. We also offer an article summarizing some of the perspectives that have been published on the related subject of arbitrator interviews.

We trust you will enjoy this issue and welcome your comments and reactions which can be sent to me at ESussman@SussmanADR.com. We can collect your comments and distribute them as a group on the Arbitration Committee listserv.

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⁶ Id.



Must We Live with Unilaterals?

By Jan Paulsson

In a lecture given at the University of Miami in 2010,¹ I expressed the view that the unilateral appointment of arbitrators creates a moral hazard, and that ways should be sought to curtail the practice. This critical appraisal of what is admittedly a standard practice gave rise to much subsequent commentary,² and was not received with enthusiasm by the community of arbitration practitioners. This was to be expected, given the comforts of the status quo. Yet much of the reaction to the critique of unilateral appointments has been based on a fundamental misunderstanding. Alarmists view it as “an attempt to deny parties the freedom to choose their arbitrators.” If this were the idea, it would indeed be hard to defend. But the objection is a straw man. It is important to understand what is being proposed before taking a position.

There is no doubt that the ideal commencement of an arbitration is the empanelling of a tribunal – whether a sole arbitrator or three arbitrators – which is *jointly agreed*. My proposal, hardly revolutionary, is that the default rule (to be applied whenever the parties have neither jointly nominated the

entire tribunal nor expressly stipulated that there are to be unilateral appointments) should be that all arbitrators are appointed by the neutral appointing authority. This is already a feature of the much-used LCIA Rules (per the combined effect of Articles 5.5 and 7.1).

The suggestion that the LCIA regime is worth emulating – whether by arbitral institutions or drafters of arbitration clauses – is based on lessons drawn from experience with unilateral appointments. That experience, I believe, shows that the advantages of unilaterals are more than offset by the damage they cause, in the aggregate, to the process as a whole.

At the heart of the problem are disturbing doubts that will not go away: is it not rather obvious that the insistence on a “right” to name “one’s own” arbitrator has more to do with the hope that the nominee will share one’s own prejudices rather than both sides’ values? How can that possibly be squared with the legitimacy of arbitration, unless we throw up our hands and state once and for all that the only arbitrator is the one in the middle?

Whatever may have been the need to “sell” arbitration across cultural divides in times past, it seems likely today that the “clash-of-culture” theme in arbitration is exaggerated. It is more than plausible that the true concern is not so much about diffuse cultural particularities as the simple fear of being treated as an outsider..

¹ Published in expanded form as Jan Paulsson, *Moral Hazard in International Arbitration*, 25 ICSID REV. 339 (2010).

² See, e.g., Joseph M. Matthews, *Difficult Transitions Do Not Always Require Major Adjustment – It’s Not Time to Abandon Party-Nominated Arbitrations in Investment Arbitration*, 25 ICSID REV. 356 (2010); David Branson, *Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them*, 25 ICSID REV. 367; Michael Schneider, *Forbidding unilateral appointments of arbitrators – a case of vicarious hypochondria?*, 29 ASA BULL. 273 (Feb. 2011); Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson’s Moral Hazard in International Arbitration*, <http://kluwarbitrationblog.com/blog/2010/10/05>; Charles N. Brower & Charles Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 6 WORLD ARB. & MEDIATION REV. 3 (2012).



Unilateral appointments are more likely to exacerbate the problem than to resolve it.¹ Arbitrants fret about the possibility that their opponent may know how to seize a quiet advantage by appointing an especially influential arbitrator. The only solution which will be reliable in all circumstances is that any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body. Confidence-enhancement is properly focused on procedural rights (the right to be heard, the opportunity to confront the opponent's case, equality of arms) rather than risking the ineluctable contamination of the ideal – that of an arbitrator trusted by both sides – by a hidden operational code of clientilism.

It may be objected that these animadversions against the practice of unilateral appointments are excessive. The world of arbitration is well used to the phenomenon, and indeed it seems that three-member tribunals generally reach unanimous decisions. Let us accept that this is so. There are still reasons for grave concern.

In the first place, unanimity is not always achieved in principled ways. The practice of unilateral appointments, like it or not, implicitly militates in favour of compromise, and indeed may be said to create an expectation of it. The result may well be to the disadvantage of a party whose entitlement would be fully

upheld by an objective decision-maker. This dynamic toward compromise is also likely to contaminate the reasoning of the tribunal, transforming it into something more like a ritual than a record of genuine ratiocination. The practice of unilateral appointments may thus be an obstacle to coherently and sincerely motivated awards. Since the requirement of reasons is intended to serve as a check on arbitrariness, it follows that the subversion of this requirement carries the risk that awards fail to fulfil their important legitimating function.

Secondly, although one hopes they are rare, there have been instances of unscrupulous individuals offering scarcely veiled bargains. For example: "I will see it your way when I preside and you as co-arbitrator want a particular outcome; and I will then count on you when our roles are reversed." In skilled hands, this process can lead to unanimous but iniquitous awards without the slightest risk of detection. Such practices (and the very *fear* of such practices) would disappear with the eclipse of the unilateral nominee.

In the absence of unilaterals, no arbitrator will feel that the tribunal should go easy on the lawyer who took the initiative of appointing him. An arbitrator who is impartial as to the outcome of the dispute between the parties may nevertheless see nothing wrong with accommodating the procedural preferences of that lawyer, indeed may not even be conscious of an attitude of indulgence which serves the tactical interests of one side and may have an adverse effect on the efficient delivery of justice. An example of the kind of robustness which a truly impartial judge or arbitrator needs to exhibit on occasion relates to scheduling. Arbitrators are with increasing frequency asked to give assurances of their availability as a condition of appointment. With that in mind, arbitrators will act on the footing that lawyers too must be held to a similar degree of commitment, and not brook

¹ David Branson defends the practice of unilateral appointments on the grounds that it is what parties want; see *Sympathetic Party Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them*, 25 ICSID REV. 367 (2011). In so doing, he does not, it seems, consider that this may be the consequence of ignorance rather than discernment, especially in view of the carefully reasoned conclusion of Jennifer Kirby, in an important account of her extensive personal experience as an ICC official, to the effect that there may be "much to be lost" in the practice of nominating a co-arbitrator unilaterally, in *With Arbitrators, Less Can be More: Why the Conventional Wisdom and the Benefits of having Three Arbitrators may be Overrated*, 26(3) J. INT'L ARB. 337, 350 (2009). Branson's remarkable notion is that the way to deal with the moral hazard of unilateral appointments is explicitly to countenance amoral behavior (by acknowledging that such arbitrators are partisan).



any nonsense for fear of displeasing their appointers.

True enough, in rarefied environments where sophisticated professionals have ready insights into the way institutions operate, and about the personal reliability of leading individuals, the trouble with unilateral appointments is much attenuated. Lawyers have sufficient knowledge of arbitrators nominated by their opponents, and as for themselves tend to select persons who will be known quantities in the eyes of the presiding arbitrators. But in such an environment, why should not every appointment be joint, or at least made from a list of individuals proposed by a similarly reliable institution? Above all, this attractive model is simply unrealistic with respect to the run of the mill of arbitration. And if arbitration cannot produce run of the mill quality, it will be condemned to function as an enclave of limited relevance.

The two evident solutions are (i) to opt for a sole arbitrator to be chosen, failing agreement, by a highly reputed institution or, (ii) if the true concern is that the case is too important to risk the lapse of even the most outstanding individual person (Homer's nod), three arbitrators appointed in the same way, *i.e.*, eschewing any unilateral nomination. Institutions may experiment with a variety of solutions, such as "blind appointments" (*i.e.*, seeking to ensure that nominees do not know who appointed them) or list procedures which have in common the feature that the initial identification of the field of candidates comes from the institution rather than from one party.

An attractive secondary effect of avoiding unilateral appointments is to open the door to a mix of expertise within the arbitral tribunal. International cases often benefit from competence in several disciplines. What happens when three arbitrators have been appointed because of their general acumen in commercial law but the core issue relates to

alleged infringement of a patent, or contentions of abuse of dominant position in a complex market, or the understanding of a most-favoured-nation clause in an international treaty? Or when three senior academics are nominated because of their solid reputations in the field of environmental law, but not one of them has any experience in presiding over a raucous hearing, or any notion of complex issues of accounting or taxation which would flow from a finding of liability?

Examples could be multiplied. They suggest that this is not only a matter of improving the quality of decision-making, but indeed an issue that relates to ethics: can parties with a particular constellation of problems be *properly heard* by persons who have accepted the mandate to resolve the dispute without being qualified to assess an essential aspect of it, somewhat like a triathlete who can run and cycle, but swims like a stone? This problem finds a solution in the joint or institutional appointments of the entire tribunal, allowing for a mix of capabilities without concern as to which is predominant.

Similarly, joint or institutional appointments allow parties to give the opportunity to one talented but inexperienced person to sit next to older hands, thus contributing to replenishment and diversity in the corps of arbitrators. Arbitrants making unilateral appointments do not take such chances.

All this being said, recognising the likelihood that insistence on the "right" to appoint an arbitrator will not soon go away, one should as a matter of pragmatism take stock of the existing means of reducing contamination.

One involves the restriction of unilateral nominations by specific contractual limitation, such as a requirement that no arbitrator may have the nationality of any party. In the absence of such a restriction, a party may find it politically impossible *not* to name one of its



nationals as arbitrators. That nominee may feel subject to political pressures – whether he or she succumbs to them or fights them. Such restrictions, in other words, are capable of reducing the risk of subversion of arbitral authority.

An even more effective mechanism, provided that it is properly conceived, may be an institutional requirement that unilateral appointments be made from a pre-existing list of qualified arbitrators. The danger here is that an arbitral institution ends up skewing the list to favour an “in-group” operating as an opaque oligopoly. Still, when composed judiciously by a reputable, inclusive, and continually replenished international body, such a restricted list may have undeniable advantages. In fact, they might be seen as leading to a useful hybrid of institutional and unilateral appointments; a party may indeed select any one of a number of arbitrators, but each of the potential nominees has been vetted by the institution and is less likely to be beholden to the appointing party.

Admirable arbitrators who remain wholly impartial and independent no matter how they are selected may be offended to hear it said that the tradition of unilateral appointments is a menace to arbitration. Yet it is so. The existing checks and balances are inadequate. None of the supposed reasons for this habit stand up to scrutiny, except the plaintive assertion that there is no better way.

It all comes down to this. The sole defence of unilateral appointment which is difficult to answer is that parties do not trust the arbitral institution to appoint impartial and apt arbitrators. Having accepted arbitration as a lesser evil, so the reasoning goes, they do so with severe mental reservations, fearing that the institution will appoint a presiding arbitrator who is not only inept in case management, but also too indolent to delve thoroughly into the evidence, too obtuse to understand essential

propositions of law, too prone to trust superficial impressions or intuitions, or – worse – turn out to be biased or unscrupulous. In such circumstances, the one thing a party can do is to insist on the opportunity to appoint one arbitrator whom it can trust to do his or her best to prevent injustice. It might not work; the two others may nonetheless ruin the process. But it is the best we can do, it is said; now do not ask us to accept that this institution appoint all three arbitrators!

The bearers of this message of despair need to consider two important responses. They both involve the exhortation not to be passive. The first is the suggestion that parties who sincerely desire a fair and cost-effective process should involve themselves with greater mental energy. A number of ideas may be considered whether or not an arbitral institution has a role in the matter. Once an arbitration has commenced, parties may seek ad hoc agreement between themselves, even if they cannot jointly select the entire tribunal. Thus, to take only a few examples, they might:

- jointly identify the presiding arbitrator, and only thereafter make their unilateral appointments,
- begin with the same joint identification, and then allow the president (i) freely to choose the other arbitrators, or (ii) to propose lists to be prioritised by the arbitrants, or
- negotiate with each other a reciprocal right to veto the other's unilateral nominee – perhaps once or twice.

Such imaginative approaches may create constructive dynamics and be more plausible than they may seem at first blush. Of course each side is focussed solely on the goal of constituting the tribunal most likely to view its case with favour, but that should not mean that it lacks rational respect for its adversary's



intelligence. The achievement of mutual comfort is not impossible. Nothing is lost for trying.

Secondly, this exhortation to active involvement should reasonably include the arbitral institutions. After all, their objective is that the process be smooth and unassailable. So when they take initiatives, like the American Arbitration Association's attempt to devise protocols that seek to engage the arbitrants under an "Enhanced Neutral Selection Process for Large, Complex Cases," it seems foolish not take advantage of the opportunity.

In our complex and transient modern world, the ideal of both parties having personal confidence in an arbitrator is unrealistic outside the realm of homogenous groups. How could individuals with whom the arbitrants have no personal experience fit the bill? It is practically impossible for unilaterally appointed arbitrators to claim such confidence, so trust must ultimately be institutional. If the reason to tolerate the unprincipled tradition of unilateral appointment of arbitrators is that there is no better alternative, the institutions that appoint arbitrators need to take a hard look at themselves and ask why they are exposed to concerns about (i) poor selections of arbitrators, and even (ii) cronyism and other forms of corruption. That is likely to be one of the great challenges for the international arbitral process in the coming years.

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The (Abbreviated) Case for Party Appointments in International Arbitration

By Charles N. Brower

In recent years, a handful of commentators have criticized the feature of party appointments in international arbitration. They have questioned the independence and impartiality of party-appointed arbitrators and suggested that international arbitration would be more credible if tribunals were appointed by neutral third parties, such as arbitral institutions. In my view, however, such criticisms are unwarranted. The right of the parties to choose the arbitrators is a basic and important element of international arbitration; indeed it is often described as one of the most attractive aspects of arbitration as an alternative to domestic litigation.¹ As party appointments enhance the perceived legitimacy of international arbitration, eliminating this right would clearly impede the further development of the field.

A. Historical Background

The right of the parties to appoint the arbitrators has existed for decades, even centuries.² An early treaty providing for such right was the Jay Treaty between the United States and Great Britain (1794), one of the earliest examples in modern history of the use

of an international tribunal to resolve an international dispute.³ The right was subsequently included in the Treaty of Washington between the United States and Great Britain (1871),⁴ The Hague Convention of 1899,⁵ and The Hague Convention of 1907.⁶ Moreover, the very first bilateral investment treaty ("BIT"), the Germany-Pakistan BIT (1959), provided for party-appointed arbitrators,⁷ as did one of the first BITs providing for investor-State arbitration, the Netherlands-Tunisia BIT (1963).⁸

Today the right to appoint an arbitrator is included in most BITs, all of the major international arbitration rules, and many of the world's domestic arbitration laws, including the UNCITRAL Model Law.⁹ Furthermore, none of the major international arbitral institutions requires that arbitrators be appointed from a

¹ See, e.g., Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 60 (2010); Loukas Mistelis & Crina Mihaela Baltag, *Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations*, 2(5) WORLD ARB. & MEDIATION REV. 83, 94 (2008).

² See Michael E. Schneider, *President's Message: Forbidding unilateral appointments of arbitrators – a case of vicarious hypochondria?*, 29(2) ASA BULL. 273, 273 (2011) ("The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not centuries . . .").

³ See Treaty of Amity, Commerce and Navigation, arts. V-VII.

⁴ See Treaty of Washington, art. I.

⁵ See 1899 Convention for the Pacific Settlement of International Disputes, arts. 24, 32; see also *id.* at art. 15 ("International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.").

⁶ See 1907 Convention for the Pacific Settlement of International Disputes, arts. 45, 87.

⁷ See Germany-Pakistan BIT, art. 11(3)(b).

⁸ See Netherlands-Tunisia BIT, art. 8.

⁹ See, e.g., ICSID Convention, art. 37(2)(b); ICSID Arbitration Rules, art. 3(1); UNCITRAL Arbitration Rules (2010), art. 9(1); UNCITRAL Arbitration Rules (1976), art. 7(1); SCC Arbitration Rules, art. 13(3); ICC Arbitration Rules (2012), art. 12(4); ICC Arbitration Rules (1998), art. 8(4); ICDR Arbitration Rules, art. 6; UNCITRAL Model Law (2006), art. 11(3); UNCITRAL Model Law (1985), art. 11(3).



closed list.¹⁰ In light of this extensive historical background, it would seem that the right of the parties to appoint the arbitrators has become an established principle of law in international arbitration.

B. *Perceived Legitimacy of the Proceedings*

One reason why parties have historically insisted on the right to name the arbitrators involves the parties' perceived legitimacy of the arbitration proceedings. Parties to an arbitration will tend to have greater faith in an arbitral process in which they themselves are invested, not just as disputants, but as the creators of the tribunal that will judge them.¹¹ Naturally, the parties and their counsel know more about the specific nuances of their case than anyone else. The parties are thus in the best position to identify the corresponding knowledge, skills, and expertise desired (or even needed) in a tribunal to adjudicate the dispute.

By the same token, a losing party may be less likely to challenge the legitimacy of the tribunal's decision-making process if that party played an intimate role in constituting the tribunal. Party appointments thereby promote the perceived legitimacy of international arbitration by helping insulate the resulting award from being challenged.¹² There thus is a

close nexus between the perceived legitimacy of international arbitration and the parties' appointment of the arbitrators.

C. *The "Arbitrator-Advocate"*

Notwithstanding enhanced perceived legitimacy, commentators have criticized party appointments in international arbitration. The primary criticism is that party-appointed arbitrators will not be neutral decision-makers, but rather will be biased in favor of the party who appointed them. However, critics overlook the internal controls that in practice prevent such an impermissible *quid pro quo*.

First, all of the major international arbitration rules today provide that arbitrators, including party-appointed arbitrators, must be and remain independent and impartial.¹³ Critics thus cynically presume that party-appointed arbitrators are untrustworthy and will ignore their mandate of independence and impartiality. Second, an arbitrator's reputation for apparent bias will undercut his or her credibility (hence influence) within a tribunal.¹⁴ No party will want to appoint such an individual as "there is little advantage to having one guaranteed vote on a three-

in the process from the perspective of the loser . . . [will likely] increase the possibility that the award will be complied with voluntarily without enforcement proceedings").

¹⁰ An exception is ICSID *ad hoc* annulment committees. See ICSID Convention, art. 52(3).

¹¹ See William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 644 (2009) (noting that "[t]o promote confidence in the international arbitral process, party input into the selection of arbitrators has long been common practice").

¹² See Giorgio Sacerdoti, *Is the party-appointed arbitrator a 'pernicious institution'? A reply to Professor Hans Smit*, 35 COLUM. FDI PERSPECTIVES (Apr. 15, 2011), <http://www.vcc.columbia.edu/content/party-appointed-arbitrator-pernicious-institution-reply-professor-hans-smit> ("Acceptance of the ultimate result (the award) by the parties is enhanced by their trust in the arbitral process where consent – including consent regarding the adjudicator – replaces judicial authority."); see also Richard M. Mosk & Tom Ginsburg, *Dissenting Opinions in International Arbitration*, in LIBER AMICORUM BENGT BROMS 259, 272 (1999) (noting that "greater confidence

¹³ See, e.g., ICSID Convention, art. 14(1); UNCITRAL Arbitration Rules (2010), art. 11; UNCITRAL Arbitration Rules (1976), art. 9; ICC Arbitration Rules (2012), art. 11(1); ICC Arbitration Rules (1998), art. 7(1); LCIA Arbitration Rules, art. 5.2; SCC Arbitration Rules, art. 14(1); ICDR Arbitration Rules, art. 7(1); see also IBA Guidelines on Conflicts of Interest in International Arbitration, General Principle 1.

¹⁴ See, e.g., NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 266 (5th ed. 2009) ("Experienced practitioners recognise that the deliberate appointment of a partisan arbitrator is counterproductive, because the remaining arbitrators will very soon perceive what is happening and the influence of the partisan arbitrator during the tribunal's deliberations will be dismissed."); *The American president: an interview with Rusty Park*, 6(2) GLOBAL ARB. REV. 28 (2011) ("The users should realise (as many smart ones do) that a partisan party-appointed arbitrator lacks credibility.").



person tribunal.”¹⁵ In practice this has proven true, as recently emphasized by Alexis Mourre: “[t]here is nowadays widespread awareness, amongst the users of arbitration, that hired guns do them more harm than good.”¹⁶ The system is thus self-policing.

D. *The Alternatives*

As an alternative to party appointments, Professor Jan Paulsson recently suggested that “any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body.”¹⁷ He further recommended an “institutional requirement that appointments be made [by the parties] from a pre-existing list of qualified arbitrators,” similar to that used for the Court of Arbitration for Sport.¹⁸ In my view, however, these alternatives are not viable.

The pre-existing list approach is undesirable because it unavoidably infuses politics into the system and creates an artificial barrier to entry. Potential arbitrators must have close connections with the States involved or with the appointing institution to be included on the institution’s list of potential arbitrators. Otherwise wannabe arbitrators will wage an extensive lobbying campaign of the former or to the latter. A pre-existing list also provides only a limited choice, whereas the pool of arbitrators is greatly expanded through the input of parties. This militates against the appointment of uniformly high-quality professional arbitrators. The current system of

party appointments, by contrast, is the highest form of a merit system; appointments are depoliticized as potential arbitrators effectively “stand for election” by parties every time a new case is brought.¹⁹

Institutional appointments are likewise undesirable. It is highly to be doubted that any institution could ever achieve a level of user confidence that even approaches that of selections made by sophisticated parties and counsel. No institution could have the full knowledge of potential arbitrators that clients and their counsel possess. Institutions therefore could never properly evaluate how much trust a party would have in the arbitrators it would appoint, which might negatively affect the perceived legitimacy of the arbitration proceedings. Along these lines, David Williams QC recently observed that parties generally avoid having an institution appoint the chairman of the tribunal, which “demonstrate[s] a lack of confidence in institutions in respect of appointments.”²⁰ Finally, before thrusting the job of appointing arbitrators onto the arbitral institutions, shouldn’t we ask them whether they actually want this additional responsibility?

E. *Conclusion*

The continued viability of international arbitration hinges on users of the system viewing it as a legitimate form of international dispute resolution. One important element of

¹⁵ See CRAIG, PARK & PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 196 (2000).

¹⁶ See Alexis Mourre, *Are Unilateral Appointments defensible? On Jan Paulsson’s Moral Hazard in International Arbitration*, KLUWER ARB. BLOG, (Oct. 5, 2010), <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/>.

¹⁷ See Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) *ICSID REV.* 339, 352 (FALL 2010).

¹⁸ *Id.*

¹⁹ See David J. Branson, *American Party-Appointed Arbitrators – Not the Three Monkeys*, 30 *U. DAYTON L. REV.* 1, 46 (2004).

²⁰ See David A R Williams QC, *Address to Society of Construction Lawyers FCL*, DIFC COURTS, Mar. 20, 2011 http://difccourts.complinet.com/en/display/display_main.html?rbid=2725&element_id=4500&print=1 (“[E]xperienced arbitrators have noted that where dispute resolution clauses call for the parties, or two party-appointed arbitrators, to appoint the Chairman it is commonly observed that they try very hard to avoid the default mechanism which is the utilisation of an institution to appoint the Chairman. This is said to demonstrate a lack of confidence in institutions in respect of appointments.”).



perceived legitimacy is the significant and timeless right of the parties to choose the arbitrators. As discussed in this contribution, neither the pre-existing list approach nor institutional appointments is an adequate alternative to party appointments. The right of the parties to choose the arbitrators should therefore be preserved, as eliminating it would negatively affect the perceived legitimacy of the proceedings and clearly impede the further development of the field.

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A Review of the Principles Governing Arbitrator Pre-Selection Interview

By Giugi Carminati

While several arbitral institutions and organizations have attempted to provide guidance, the issue of pre-selection arbitrator interviews continues to be a subject of considerable debate and varying points of view.¹ This article summarizes some of the different views concerning the practice and various arbitral rules and guidelines that address it. The goal is to provide readers with a 360 degree view of the guidelines that currently exist and leaves conclusions as to what is acceptable and desirable to the reader.

A. What's Actually Going On Out There?

The recently published Queen Mary University of London 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process (the "Queen Mary Survey") asked respondents questions about pre-selection interviews of arbitrators. The respondents had the following to say.

Respondents were asked, "Do you consider pre-appointment interviews with potential arbitrators appropriate?"² The answer was an unqualified "yes" by 46% of respondents and

sometimes yes by 40%. In other words, 86% of respondents approved of pre-selection interviews at least to a certain degree.³ The surveyors reported that most private practitioners and in-house counsel find "pre-appointment interviews to be useful as they assist in providing a clearer picture of the candidate's availability, personality and knowledge or experience in the specific field relevant to the dispute."⁴ The Queen Mary Survey authors note that two thirds of respondents reported having either interviewed or having been interviewed as a potential arbitrator.⁵ The most experienced with these types of pre-selection interviews were North Americans (87%), followed by Latin Americans (70%), Western Europeans (67%), and Africans and Middle Easterners (48%).⁶

The respondents were also asked, "Which topics are inappropriate for pre-appointment interviews?"⁷ The vast majority of respondents (85%) answered that interviewing the candidate about the candidate's position on legal questions relevant to the case was inappropriate.⁸ The second most inappropriate topic, according to the respondents (64%), was whether the candidate is a strict constructionist or someone who is influenced by the equities of the

¹ See, e.g., Queen Mary University of London 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process; D. Bishop and L. Reed, *Practical Guidelines for Interviewing, Selecting, and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, King & Spalding (2007), available at <http://ksintranet.kslaw.com/library/pdf/bishop4.pdf> (last accessed January 8, 2013); J. Sutcliffe, *Interviewing Prospective Arbitrators*, MEALEY'S INT'L ARB. REP. (Aug. 2007); C. Rogers, *Regulating Int'l Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53 (Winter 2005); M. Freidman, *Regulating Judgment: A Comment on the Chartered Institute of Arbitrators' Guidelines on the Interviewing of Prospective Arbitrators*, 2(20) Dispute Resolution Int'l (2008).

² Queen Mary Survey, at 6.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 7.

⁸ *Id.*



discussion, selected by 59% of respondents, was the candidate's prior views expressed, for example, as an expert or arbitrator, on a particular issue.⁹ A third of respondents (30%) deemed discussions of the candidate's attitudes to particular procedures inappropriate.¹⁰ Just over a quarter of respondents (28%) found discussions about potential nominations for chair inappropriate.¹¹ A mere 10% found discussions about the candidate's experience, knowledge of a particular legal topic, technical environment or industry inappropriate.¹² And lastly, 9% of respondents found *all* of the topics above *appropriate* to discuss at a pre-selection interview.¹³

With respect to disclosure of such interviews, respondents were asked whether the interviewing party or the arbitrator, if appointed, should: i) notify the opposing party of the interview; ii) disclose notes of the interview to the opposing party; or iii) neither notify nor disclose anything to the opposing party.¹⁴ Exactly half of respondents answered that the *interviewing party* is under no duty to disclose the interview. And 41% of respondents answered that the *arbitrator* is under no duty to notify the opposing party.¹⁵ On the other side, 43% of respondents believe that the interviewing party should notify the opposing party of the interview (33% believe mere notification is appropriate, while 10% believe that the interview notes should also be disclosed).¹⁶ Half of respondents believe that the interviewed arbitrator should notify the opposing party of the interview. A little over a

tenth of respondents (12%) answered that it is up to the interviewed arbitrator to notify the parties of the interview *and* disclose the interview notes.¹⁷ More than a third (38%) of respondents answered that the interviewed arbitrator should notify the parties of the interview, but not disclose interview notes to those same parties.¹⁸

This summary of the Queen Mary Survey is included to provide a backdrop for the below-summarized guidelines addressing pre-selection interview of arbitrators.

B. So Who Makes The Rules?

The short answer is: nobody. Apparently, until 2007, there were no uniform rules or guidelines governing pre-selection interviews.¹⁹ However, a number of arbitral institutions have, in one way or another, attempted to provide guidance for the process of pre-selection interviews, which, as shown above, are both common and largely accepted, albeit to varying degrees. This next section of the article collects rules addressing pre-selection interviews of arbitrators.

1. The AAA/ICDR

The AAA/ICDR publishes a "Fact Sheet" called *Enhanced Neutral Selection Process for Large Complex Cases*. As part of this enhanced neutral selection process, the AAA/ICDR provides a screening process that includes pre-selection interviewing of arbitrator candidates:

Oral or written interviews of the arbitrator candidates

The AAA will work with parties to develop an interview protocol in order for the parties to have an *opportunity to present questions to potential arbitrator candidates*, either through a telephone conference, or in writing.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See e.g., Fulbright Alert (Apr. 2007), Fulbright & Jaworski.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Id.*



Examples of interview question topics might include: *industry expertise, relative experience in similar disputes, the arbitrator's procedural handling practices, and any other questions that the parties would find helpful to the selection process.*²⁰

The list of acceptable topics is somewhat broad, going beyond the categories of qualifications and availability imposed by other sets of guidelines (discussed below). The list of acceptable topics is also not exhaustive, providing that the pre-selection interview can include "any other questions that the parties would find helpful to the selection process."²¹ The process, however, is done *with* the AAA/ICDR, which indicates oversight by a third-party and is conducted with the participation of all parties.

The AAA/ICDR International Rules ("AAA/ICDR Rules") prohibit *ex parte* communications between a party or its counsel and a prospective arbitrator, except to advise the candidate of the general nature of the controversy and the anticipated proceedings, and to discuss the candidate's qualifications, availability, and independence.²² The AAA/ICDR Rules also authorize the parties "to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection."²³

2. The IBA

In 2004, the IBA issued the new IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"). Section 4 of the IBA Guidelines comprises the

so-titled "Green List."²⁴ Items on the Green List need not be disclosed to opposing counsel because they do not lead to either the appearance of or any actual "conflict of interest . . . from the relevant objective point of view."²⁵ As a result, "the arbitrator has no duty to disclose situations falling within the Green List."²⁶ One of the items in the Green List is contact between the party and the arbitrator, which specifically includes the pre-selection interview:

4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.²⁷

Note, however, that the pre-selection interview need not be disclosed *only* if it is limited to a narrow set of topics, i.e.: i) availability; ii) qualifications; and iii) the names of possible candidates for chairperson.²⁸ The pre-selection interview *cannot* cover the merits or procedural aspects of the dispute and still fall within Section 4.5.1.²⁹ The IBA Guidelines, however, do not state whether discussing the merits and procedural aspects of the case is forbidden or whether it merely warrants disclosure.

3. The ABA

The ABA Code of Ethics for Arbitration in Commercial Disputes (2004) ("ABA Code of Ethics") also addresses pre-selection interviews. And although these rules are national, they are

²⁰ AAA Fact Sheet, available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003909 (last accessed on December 18, 2012) (emphases added).

²¹ *Id.*

²² AAA/ICDR, Int'l Arbitration Rules, Art. 7(2).

²³ *Id.*

²⁴ IBA Guidelines, Sec. 4.

²⁵ *Id.* at Part. II, Par. 6.

²⁶ *Id.*

²⁷ *Id.*, at Sec. 4.5.1.

²⁸ *Id.*

²⁹ *Id.*



included for the sake of completeness. The ABA Code of Ethics lists what the prospective arbitrator can ask about parties' identities and the general nature of the case as well as what the party or its counsel can ask about suitability and availability:

When the appointment of a prospective arbitrator is being considered, the prospective arbitrator: (a) may ask about the identities of the parties, and the general nature of the case; and (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment.³⁰

However, consistent with other guidelines, the parties and the candidate arbitrator are prohibited from discussing the merits of the case: "In any such dialogue, the prospective arbitrator may receive information from the party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case."³¹ This is consistent with the other guidelines outlined above, which generally prohibit discussion of the merits of the case.

4. The CI Arb

In 2007, the Chartered Institute of Arbitrators ("CI Arb") issued the first set of "institutional guidelines" addressing pre-selection interviews of arbitrators,³² CI Arb Practice Direction: Interviewing of Prospective Arbitrators (Practice Direction 16), usually referred to as the "Guidelines."³³ The Guidelines were developed by consulting practitioners from both civil and common law jurisdictions.³⁴ The Guidelines are recommendations and "do not

carry any implication of being mandatory."³⁵ Also, the Guidelines incorporate guidelines and statements authored by scholars and commentators. The rules are unique in their breadth and detail, especially with regards to the procedural aspects of the interview.

The Guidelines suggest that the arbitrator establish, in writing, rules governing the interview—whether it be the Guidelines themselves or "something else."³⁶ In addition, the Guidelines also provide that prior to the interview, the arbitrator be notified as to the "constitution of the interviewing team" and told "who will lead and how it will be conducted."³⁷

The Guidelines also suggest that the interview be conducted by either both parties jointly, or by one party in the presence of the other party's representative.³⁸ In addition to the other party's presence, the Guidelines provide for some manner of recordkeeping, either by means of an arbitrator's secretary or a tape recorder.³⁹ The authors of the Guidelines recognize that the recording requirement "has been attacked informally on similar lines by other practitioners as being excessive."⁴⁰ However, the authors persist in defending their position, stating that an arbitrator "would be well advised to follow this precaution to avoid any risk of suspicion or impropriety."⁴¹

The Guidelines do not allow the parties to discuss: i) the specific facts or circumstances giving rise to the dispute; ii) the positions or arguments of the parties; or iii) the merits of the case. The Guidelines note that the first two

³⁰ ABA Code of Ethics for Arbitration in Commercial Disputes (2004), Canon III, Par. B(1).

³¹ *Id.*

³² See e.g., Fulbright Alert (Apr. 2007), Fulbright & Jaworski, at 3.

³³ See, e.g., International Arbitration Fulbright Alert (Apr. 2007), Fulbright & Jaworski, at 1.

³⁴ Guidelines, at par. 1.3.

³⁵ *Id.* at 2.2.

³⁶ *Id.* at 3.1(1)-(2).

³⁷ *Id.* at 3.1(6).

³⁸ *Id.* at 3.1(4) (citing N. BLACKABY ET AL., REDFERN AND HUNTER ON INT'L ARBITRATION 4.71 (5th ed. 2009)).

³⁹ *Id.* at 3.1(5), (7).

⁴⁰ *Id.* at 3.1(7).

⁴¹ *Id.*



topics are problematic. Although “the interviewer is entitled to assess the arbitrator’s suitability for the appointment, the Guidelines note that there is “a distinction between asking questions designed to elucidate familiarity with a legal topic or a technical environment and a presentation of the facts of the case or the issues expected to arise and an enquiry as to the arbitrator’s views on them.”⁴² The Guidelines state that inquiring about knowledge is acceptable, but inquiring about the candidate arbitrator’s views about those areas is not.⁴³

The Guidelines allow the parties to discuss: i) the names of the parties and any third parties involved, or likely to be involved; ii) the general nature of the dispute; iii) sufficient detail “but no more than necessary, of the project,” to allow the interviewer and the arbitrator to assess the arbitrator’s suitability; iv) the expected timetable of the proceedings; v) the language, governing law, seat of and rules applicable to the proceedings, if agreed or the fact that some or all of these are not agreed; and vi) the candidate arbitrator’s experience, expertise and availability.⁴⁴

The Guidelines suggest the candidate arbitrator decline to answer any inappropriate questions and, of course, the interviewer should not ask any inappropriate questions.⁴⁵ The Guidelines also direct the candidate arbitrator to terminate the interview if they come to the conclusion that that interviewer is seeking a partisan arbitrator.⁴⁶

Finally, the Guidelines provide that a time limit should be agreed for the interview and that any “failed interviewee” can be reimbursed his or her reasonable travel

expenses for attendance at the interview, but “should not be reimbursed for his or her time save in exceptional circumstances.”⁴⁷ The selected candidate should not be reimbursed for travel expenses or time spent attending the interview. But the appointed arbitrator can submit expenses for reimbursement after the arbitral proceedings are underway, as long as the expenses are “clearly separated and identified as relating to the interview.”⁴⁸

C. So What’s Next?

No doubt, scholars, commentators, and practitioners will continue to debate the proper conduct of a pre-selection interview. And some—the marked minority—may continue to deem such pre-selection interviews always inappropriate. What remains to be seen is whether the arbitration world will move towards more regulation of the practice, less, or remain at status quo. This may depend on the perception over time of actual and perceived lapses that would encourage and create a framework for the development of guidelines that are generally accepted. An illustration of this point is the CI Arb’s suggestion that interviews be recorded—either in note form or by tape recorder—for disclosure to the other side. In practice, as shown by the Queen Mary Survey, the majority of practitioners would not favor such disclosure. In addition, and maybe most importantly, there remains a question as to whether pre-selection interviews, in fact, present a problem. Many lawyers may view this as a case of “If it ain’t broke, don’t fix it.”

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⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 3.1(10).

⁴⁵ *Id.* at 3.1(12)-(13).

⁴⁶ *Id.* at 3.1(14).

⁴⁷ *Id.* at 3.1(17).

⁴⁸ *Id.* at 3.1(18).



commercial litigation. Ms. Carminati recently co-authored a book on the laws governing commercial spaceflight.



The ICDR's Arbitrator Appointment Process - The Institutional Role and Available Options

By Luis M. Martinez

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA) and since its creation in 1996 its focus has been on providing international conflict management services for the global business and legal communities.¹ These services include a full range of international alternative dispute resolution (ADR) processes administered by multilingual staff applying tried and tested international arbitration and mediation rules. The ICDR administrators are divided into regionally specialized teams where their knowledge of local culture, different legal traditions and linguistic capabilities are important components of the administrative regime. This framework provides

a level of procedural predictability under the ICDR system and creates in its users an expectation of a quick, efficient and economical ADR process.²

One of the more crucial phases of an international arbitration concerns the appointment of the arbitrators. While the ability of the parties to select their arbitrators is recognized as one of arbitration's most desired features, the selection phase can be challenging. The ICDR will be guided by the arbitration agreement and the applicable rules while balancing a number of other factors such as the parties' requested qualifications for the arbitrators or their nominations, along with possible disclosures and conflicts, due process and its commitment to the efficiency and integrity of the ICDR dispute resolution system.

Many ICDR arbitrations are based on its model arbitration clause or closely follow its suggested language. Users by incorporating the ICDR's model clause in their contract, in addition to ensuring that the institution is properly designated to administer the case, take comfort in not having to address each and every procedural step with specificity as the ICDR's International Arbitration Rules (ICDR Rules) address all of the procedural issues that may arise and include default mechanisms that when triggered will ensure the completion of the arbitral process and ultimately an enforceable award.

¹ The global leader in conflict management since 1926, the American Arbitration Association (AAA) is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2012, over 250,000 cases were filed with the AAA in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. The ICDR received 996 new international case filings in 2012. The AAA has promulgated rules and procedures for commercial, construction, employment, labor and many other kinds of disputes. It has developed a roster of impartial expert arbitrators and mediators through 30 offices in the United States, and with the ICDR, which has offices in Mexico, Singapore, and Bahrain through the BCDR-AAA.

² See Luis M. Martinez, *ICDR Awards & Commentaries*, in *A GUIDE TO ICDR CASE MANAGEMENT* (Grant Hanessian ed., 2012).



Having said that, experienced users armed with the knowledge of the type of dispute that may be common to their trade or industry will customize their clause accordingly providing for the dispute resolution mechanism that best addresses their needs. One area that users pay special attention to is the method of appointment that will be used for their mediation or arbitration. Pursuant to the ICDR system, parties can select any method of appointment they have agreed to by incorporating it into their arbitral agreement. Failing that, if they do not provide nor agree to a method of appointment, the list method is the ICDR's default mechanism for appointing the arbitrators.

A. *Pros and cons of appointment methods*

Parties have a number of options when appointing their arbitrators. One option used is the party-appointed method. The parties may each designate their own arbitrator and then those two arbitrators may designate the presiding arbitrator, the president of the tribunal. The party-appointed method in recent years has been the subject of great debate. Charles Brower and other advocates of this method argue that it is consistent with party autonomy and as arbitration awards are final and not subject to appeal unless the award is vacated, parties must have a high level of trust and confidence in the arbitrators they nominate.³

Moreover the level of complexity in many of today's international arbitrations require arbitrators with extensive subject matter expertise, cultural sensitivity and a strong foundation in the conduct of an international arbitration proceeding. Counsel and their clients argue that in addition to their research, which includes a review of the arbitrator's writings, speeches, and recommendations

from their colleagues, their ability to interview the prospective arbitrator provides another opportunity to interact and address any concerns that they may have in order to complete their profile and decide whether to proceed with their nomination or not. Of course the parties are hopeful that their nominated arbitrator will see the case their way and will also be able to sway the other members of the tribunal. Unfortunately that is where other commentators have identified potential problems that may arise as it is the norm in international arbitration and required under the ICDR Rules that all arbitrators be impartial and independent.⁴

Critics of the party-appointed method argue that there may be an inherent flaw in the system in terms of the expectations, practice and the *ex parte* interview conducted to select the arbitrator.⁵ In some cases, less experienced arbitrators may not appropriately control the interview process and fail to establish strict parameters regarding the permissible scope of acceptable questions. They may feel that they have to go beyond a party's possible spoken or unspoken expectation or belief that their appointed arbitrator at a bare minimum will ensure that the other two arbitrators understand their appointing party's position.

Some party appointed arbitrators may have the mistaken belief that they have an obligation to the party that appointed them which will impede their ability to be impartial and independent and they may engage in

⁴ For a review of the impartiality and independence requirement of the arbitrators and the permissible scope of communications between the arbitrators and the parties, see ICDR Rules Article 7.

⁵ Hans Smit, *The pernicious institution of the party-appointed arbitrator*, COLUMBIA FDI PERSPECTIVES, No. 33, Dec. 14, 2010.

³ Paulsson and van den Berg Presume Wrong, Says Brower, *Global Arb. Rev.*, Feb. 6, 2012.



dilatory tactics or, as some scholars have suggested, draft a dissenting opinion in support of their parties' position.

For example Jan Paulsson discussed two ICC studies observing that in over 95% of the dissenting opinions the authors were party-appointed arbitrators.⁶ This troubling statistic may suggest that a disproportionate number of party-appointed arbitrators lack impartiality or independence in arriving at their final decision.

In another article this trend was further confirmed by a review of dissenting opinions in the International Centre for Settlement of Investment Disputes (ICSID) investment-treaty arbitration awards where Albert Jan van den Berg examined 150 awards and found that nearly all of the 34 dissenting opinions were issued by the arbitrators appointed by the party that lost the case.⁷

These findings they argue support the trend to move away from the direct appointment by a party method towards appointments being made by the institutions either directly or from their panels using the list method thereby creating an important buffer between the arbitrators and the parties, thus removing the potential for the aforementioned problems. Anecdotally more than one party-arbitrator has noted that, while they understand the ICDR Rules require they be impartial and independent, on occasion during the course of the arbitration they were going to pose a question and before doing so paused and considered the question's impact on the case of the party that appointed them. They added that the issue never arises when they are appointed via the list method; in fact they were not aware of which parties' selections

from the list led to their appointment. Finally as the ICDR (or for that matter any other administrative institution) has little or no control over the party-appointed arbitrators by virtue of their not typically being on the institution's lists, these arbitrators do not have an expectation of future appointments and are less concerned about the institution's policies but may have a greater motivation to establish the track record of an arbitrator that has as their primary consideration the position of the party that appointed them and this may affect predictability and problems during the course of the arbitral proceedings.

B. *The ICDR List Method*

While the party-appointed method can and is used effectively with safeguards in place, the ICDR's default method of appointment, where the parties have not specified the use of the party appointed method in their contract, is the list method. This method has a number of benefits within the ICDR system and can provide the parties with options while minimizing the aforementioned risks. It removes the *ex parte* contact between the parties and the arbitrators and any confusion over their role or responsibilities towards the party that selected them. This can be a significant advantage in an international arbitration especially during any enforcement proceedings where these contacts may later be used to establish the foundation for possible bias or evident partiality during an action to vacate an arbitral award.⁸

⁶ Jan Paulsson, *Are Unilateral Appointments Defensible?*, KLUWER ARB. BLOG, Apr. 2, 2009.

⁷ Albert Jan van den Berg, *Dissents and Sensibility*, GLOBAL ARB. REV., Feb. 28, 2011.

⁸ For further analysis and discussion regarding disclosures and evident partiality, see AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, revised and effective March 1, 2004. See also *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994); *Positive Software v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007).



Arbitrators selected from the ICDR's roster have been vetted and their qualifications scrutinized in advance by a number of training programs highlighting "best practices" in a mock complex international arbitration and the application of the ICDR Rules and its Guidelines for Arbitrators Concerning Exchanges of Information along with its administrative system and policies.⁹ Such training reduces the risk of procedural errors or other failures such as the improper completion of the clearing of conflicts phase or failing to comply with the ICDR's expectations regarding time deadlines and the management of the arbitration.

It is *sine qua non* that the list method is only as good as the quality of the members who comprise that list. Recognizing the need for these exceptional international arbitrators, the ICDR has established a demanding set of qualifications for potential arbitrators seeking admission to its international panel. Openings on the panel are limited depending on the ICDR's caseload needs which may in turn drive the needs for a particular nationality, expertise or linguistic capability for that particular year. Applicants undergo a two-tiered review process that has resulted in a panel of eminently qualified international dispute resolution specialists from nations all over the world.¹⁰

When appointing the arbitrators by using the list method the ICDR will raise the issue with the parties during the administrative

⁹ The ICDR Guidelines for Arbitrators Concerning Exchanges of Information can be found on the ICDR's website at www.ICDR.org and reflect the ICDR's policies on document exchange and are required to be applied by the arbitrators serving on ICDR cases.

¹⁰ For information on the ICDR application, see the ICDR's web site at www.ICDR.org.

conference call and will consider all of the qualifications they have requested including a specific nationality, type of expertise or experience in a particular industry or perhaps fluency in a particular language or substantive law. Combining this party input with its own views from its review of the case, the ICDR creates a balanced list of potential arbitrators for consideration and selection by the parties.

The list of names will be transmitted along with their corresponding *curriculum vitae* which provide the arbitrator's professional work and ADR experience, as well as education, publications, affiliations, language capabilities and rate of compensation. Parties are asked not to exchange these lists and are allowed to object to anyone listed without providing any reasons. The parties must rank the remaining arbitrators with number 1 reflecting their first choice down to their last acceptable arbitrator remaining on the list. Once the parties return their lists to the ICDR, the arbitrators with the lowest combined rankings are invited to serve and once they clear the conflicts stage their appointments are confirmed by the ICDR.¹¹ While rare, parties seeking a broader range of options may request a second list.

The list method offers additional options; for example, lists can be customized for the selection of the presiding arbitrator only, an option which can significantly reduce the time that may otherwise be required to agree on that selection. The lists can be divided in the case of a tri-partite panel where the parties are seeking to have a panel that is comprised of an attorney, an engineer and an architect perhaps for an international construction case.

The ICDR can also make administrative appointments. If within 45 days from the date of the commencement of the arbitration, the parties have not mutually agreed on a

¹¹ For an example of the list strike and rank method, see *supra* note 2.



procedure for appointing the arbitrators, or have not designated their arbitrators by following their agreed upon procedure from the clause, the ICDR, at the written request of any party, shall complete the appointment process.¹²

In the event of multiparty cases, the ICDR applies ICDR Rules Article 6(5) and, absent the agreement of the parties, will make all appointments. This Article was drafted to avoid the potential problems that could occur as was the subject of the *Dutco* case where an ICC arbitration award was found to be contrary to public policy as not all of the respondents were allowed to appoint their own arbitrator.¹³ While the ICDR can appoint the entire tribunal in reality this hardly happens as the parties usually agree to coordinate and agree on the appointment mechanism.

C. Conclusion

The ICDR provides users with choices and allows them to utilize an arbitrator selection method that fits their needs and expectations. The ICDR is accustomed to and experienced in administering arbitrations in which the parties select their own party appointed arbitrators. But the ICDR also offers a carefully selected and trained list of international arbitrators from which users can choose the arbitrators in a process that insulates all of the arbitrators from any risk of even unconscious bias towards one of the parties, a selection method many users find preferable.

¹² See ICDR Rules Article 6 (3), which includes an administrative pause should the parties be conducting settlement discussions, as the ICDR requires a written request to complete the appointment process.

¹³ Stefan Kröll, *Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*, ITA BLOG, Oct. 15, 2010.

For any questions or comments regarding this article please contact Luis M. Martinez at Martinezl@adr.org. The opinions made are solely attributable to the author. They do not necessarily represent the views of the International Centre for Dispute Resolution, the International Division of the American Arbitration Association or the Inter-American Commercial Arbitration Commission.

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Your Way or the ICC Way: Constituting An Arbitral Tribunal Under the ICC Rules of Arbitration

By Victoria R. Orlowski and Ashleigh Masson

The 2012 Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”), like their previous iterations, recognize the paramount importance of constituting an arbitral tribunal properly. To understand how arbitrators are put in place under the ICC Rules, it is worth taking a moment to understand the terminology in the ICC Rules before discovering their basic principles. Where relevant, references to the applicable Articles of the ICC Rules appear in parentheses.

A. ICC Terminology: Understanding the Lingo

The International Court of Arbitration of the International Chamber of Commerce (“Court”) is an independent arbitration body that administers the resolution of disputes by arbitral tribunals in accordance with the ICC Rules. It does not resolve disputes itself.

“Arbitral tribunal” can refer to one or three arbitrators. When there is one arbitrator, he or she is the “sole arbitrator” and when there are three arbitrators, the third arbitrator is called the “president.”¹

Under the ICC Rules, parties or co-arbitrators “nominate” arbitrators. The Court’s Secretariat invites every potential arbitrator to complete a Statement of Acceptance, Availability, Impartiality and Independence (“Statement”) and circulates the Statement and the

nominee’s *curriculum vitae* to the parties. Nominees only become arbitrators if they are confirmed by the Court or by the Court’s Secretary General (“Secretary General”).

If a party objects to a nominee’s confirmation, be it based on a “disclosure” as to independence, qualifications, availability or otherwise, the Court will decide whether to “confirm” that nominee as an arbitrator. Parties generally choose their arbitrators. In the past five years, on average, 71.5% of arbitrators were confirmed, with parties choosing 58% of arbitrators and empowering co-arbitrators to choose 13.5% of arbitrators.²

The Court chose the remaining 28.5% of arbitrators. When the Court chooses an arbitrator, the Court “appoints” the arbitrator. The Court generally selects one of the ICC’s National Committee or Groups to “propose” an arbitrator. Like nominations, any arbitrator proposed by a National Committee or Group must be appointed by the Court, giving the Court the ultimate choice of whether the proposed arbitrator is appropriate for the arbitration. In addition, as described below, in certain circumstances the Court chooses an arbitrator itself, *i.e.*, “directly.”

Parties only can “challenge” an arbitrator for an alleged lack of impartiality or

¹ This term represents a change, at least in the English version of the Rules, as the term used in earlier versions of the Rules was “Chairman”. The term used in English is now gender neutral and is in line with the term used in the French text of the Rules.

² 2007 through 2011. This information can be found in the ICC Statistical Reports, which are published yearly in the ICC International Court of Arbitration Bulletin. They are available online through the ICC Dispute Resolution Library <http://www.iccdri.com>. Throughout, references to statistics have been taken from the information available for 2007 to 2011.



independence, or otherwise, once that arbitrator has been confirmed or appointed.

B. *Ten Tenets of Constituting an Arbitral Tribunal Under the ICC Rules*

The Court has extensive experience in constituting arbitral tribunals. In 2011 alone, it put 1341 arbitrators in place, consisting of 900 individuals from 78 different countries. While the process of constituting arbitral tribunals under the ICC Rules can appear complex, it essentially is a carefully crafted system of checks and balances. The basic tenets of this system are set forth below.

1. Considering the consensual nature of arbitration, the Court tries to give effect to any agreement of the parties as to the constitution of the arbitral tribunal, whether in the arbitration agreement or a subsequent agreement.

This allows parties the flexibility to create a method for constituting the arbitral tribunal that meets their needs and preferences.¹ Some examples of recent methods include requesting a customized list of arbitrators from the Court, a coin-toss as a tie-breaker between two candidates for President that the co-arbitrators were in a stalemate over, striking names off exchanged lists and having the Court pick one of the remaining names out of a hat, or simply to have the Court appoint all arbitrators, but the possibilities are limitless if the parties agree to such a procedure and it comports with the Rules. If there are ambiguities concerning the parties' agreed method of constituting the arbitral tribunal, which there often are, or potential issues under the Rules, the Secretariat will ask the parties to clarify such ambiguities. In the absence of such agreement, the ICC Rules provide a framework for the constitution of the arbitral tribunal.

¹ ICC Rules, Art. 11(6).

2. When the parties do not agree on the number of arbitrators, the ICC Rules provide for a sole arbitrator unless it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.²

In taking its decision, the Court considers the arbitration agreement,³ the parties' comments, the nature of the dispute, the amount in dispute, the presence of a State or State entity and any other relevant factors. While three-member arbitral tribunals conduct about 60% of ICC arbitrations,⁴ when the Court decides on the number of arbitrators, in 80% of the cases it submits the arbitration to one arbitrator.⁵

3. The ICC Rules contain realistic time limits for the parties to nominate arbitrators.

The Rules require claimants to provide information regarding the number of arbitrators and their choice thereof, including any required nomination, in the Request for Arbitration ("Request").⁶ If they fail to do so, the Secretariat requests the same within 15 days. Respondents must provide such information within 30 days of their receipt of the Request, either in their Answers to the Request for Arbitration ("Answers") or to receive an extension of time for filing their Answers.⁷ Where the respondent fails to nominate a co-arbitrator in its Answer, it usually is offered a further opportunity to make a nomination. These time limits apply regardless of any objections that may be raised as to

² *Id.* Art. 12(2).

³ For example, where an arbitration agreement referred to "one or more arbitrators" and to the "President of the Arbitral Tribunal", the Court, to give effect to the arbitration agreement, decided to submit the arbitration to a three-member arbitral tribunal.

⁴ Average between 2007 and 2011.

⁵ Average between 2007 and 2011.

⁶ ICC Rules, Art. 4.

⁷ *Id.* Art. 5.



jurisdiction. However, if the Secretary General refers such objections to the Court for a decision⁸ and the Court makes a *prima facie* finding to allow the arbitration to go forward with that party,⁹ the Court will entertain a party's request for additional time to nominate an arbitrator.

While 30 days may sound unduly long, a brief consideration of the steps a respondent may take to select an arbitrator or formulate comments on the process, including any time it takes for a Request for Arbitration to get into the right hands at the respondent's legal department, for respondent to find or consult legal counsel, analyze the Request, possibly contact the potential nominee, etc., dispels that initial perception. Parties that initially agreed to shorter time limits often mutually agree to extend them, finding that their optimistic time line may deprive them of an opportunity to choose the right arbitrator.

If the Court decides that there will be a three-member arbitral tribunal, claimant receives 15 days from receipt of the Court's decision to nominate a co-arbitrator. Respondent then has 15 days to nominate an arbitrator¹⁰. The Secretariat applies the same process by analogy where the parties subsequently agree to have a three-member arbitral tribunal. If a party fails to nominate a co-arbitrator, the Court will appoint on its behalf.

When the arbitration agreement provides for a sole arbitrator but does not specify a time limit or method for nomination, the parties will have 30 days from respondents' receipt of the Request to nominate a sole arbitrator. Upon

request, the Secretariat may grant the parties additional time to nominate a sole arbitrator.¹¹

4. Parties may nominate any individual to act as an arbitrator, although all arbitrators are subject to independence and impartiality requirements and must be available to act.

The Rules do not contain any exemptions that allow for non-neutral arbitrators. On the contrary, Article 11(1) of the ICC Rules provides that "[e]very arbitrator must be and remain impartial and independent of the parties involved in the arbitration." All arbitrators have a continuing duty of disclosure that begins with their completing the Statement. In 2007, 11.4% of nominees filed disclosures in their Statements. In 2011, the percentage doubled to 22.6%, evidencing a trend towards greater disclosure. If a nominated arbitrator makes a disclosure, the Secretariat grants the parties a time limit to comment on the disclosure and facilitates the process of exchanging further information about the disclosure if the parties request it.

The same process of inviting comments applies when the Court considers appointing a prospective arbitrator who makes a disclosure. However, the Court only considers circulating such a disclosure to the parties if it considers it to be *de minimis*.

The Court also seeks to ensure that arbitrators are available. By signing the Statement, each prospective arbitrator confirms that he or she can devote the time necessary to conduct the arbitration diligently, efficiently and in accordance with the time limits in the Rules. Furthermore, he or she confirms that it is important to complete the arbitration as promptly as reasonably practicable and that the Court will consider the duration and conduct of the proceedings

⁸ *Id.* Art. 6(3).

⁹ *Id.* Art. 6(4).

¹⁰ *Id.* Art. 12(2).

¹¹ *Id.* Art. 12(3).



when fixing his or her fees.¹² Some of the Court's recent decisions evidence the Court's emphasis on this requirement. The Court has decided not to confirm arbitrators where objections were raised as to their availability and where, in the absence of objections, the Court was aware of past cases in which an arbitrator was removed by the Court due to his inability to timely fulfill his or her mandate.

While the process of confirming an arbitrator may take longer than when the parties directly appoint arbitrators under different rules, the process ensures that arbitral tribunals are constituted properly. The confirmation process reduces the number of challenges against arbitrators once they are in place, thus helping avoid the potentially disruptive nature of challenges and preventing nominees with significant conflicts from receiving a copy of the file, which often contains confidential or sensitive information. In 2011, parties brought a total of 39 challenges in 27 out of the approximately 1501 pending cases.

5. In arbitrations with multiple claimants or respondents, each side will nominate jointly a co-arbitrator.¹³

If one side is unable to make such joint nomination, the Court may appoint all three members of the arbitral tribunal.¹⁴ In considering whether to do so rather than only appointing an arbitrator on behalf of the side that failed to do so, the Court considers whether there is a suggestion that there may be differing interests between parties that are asked to nominate jointly. Similarly, if an additional party joins the proceedings,¹⁵ it may join in claimants' or respondents' nomination.¹⁶

If such additional party fails to join in claimants' or respondents' nomination, as in the absence of a joint nomination, the Court may appoint all three members of the arbitral tribunal.

6. When there is a three-member arbitral tribunal, the Court will appoint the President unless the parties agree to a different procedure.¹⁷

Parties often agree that the co-arbitrators will nominate the president or do so themselves. From 2007 to 2011, co-arbitrators nominated 51% of presidents. If the parties agree that the co-arbitrators will nominate the president, they will have 30 days to do so unless the Court fixes a different time limit or the parties otherwise agree.¹⁸

7. Sole arbitrators and presidents should not be the same nationality as the parties, unless there are "suitable circumstances" and no party objects.¹⁹

This requirement usually does not come into play in the context of nominations, as the parties' or co-arbitrators' nomination of the sole arbitrator or president is a suitable circumstance. When the Court appoints, it generally considers a suitable circumstance to be that all parties are of the same nationality, because usually there could be no perceived lack of neutrality in those circumstances. If the Court decides to appoint an arbitrator of the same nationality of the parties, it grants them a short time limit to object. If the parties do not object, the Court proceeds to appoint such arbitrator. In the interest of promoting the international nature of ICC arbitrations, the Court generally is hesitant to take a decision that would result in all three members of an

¹² *Id.* Art. 2(2) of Appendix III.

¹³ *Id.* Art. 12(6).

¹⁴ *Id.* Art. 12(8).

¹⁵ *Id.* Art. 7.

¹⁶ *Id.* Art. 12(7).

¹⁷ *Id.* Art. 12(5).

¹⁸ *Id.*

¹⁹ *Id.* Art. 13(5).



arbitral tribunal being of the same nationality. To preserve an independent and diverse arbitral tribunal, the Court also avoids appointing a president of the same nationality as one of the co-arbitrators, unless the parties agree otherwise.

8. When the Court is invited to appoint an arbitrator, it usually does so upon the proposal of a National Committee or Group, which allows the Court to have a truly global and diverse range of potential arbitrators.

It is worth a brief trip back in time to understand the origins of the appointment method in the ICC Rules. When the ICC introduced its arbitration rules in 1922, the world was a different place—there were no computers, no internet, no television and most communication was by mail. The ICC sought—and still seeks—to promote peace through international business and one way to do so was to provide parties with a method to resolve disputes that arose in international business. To do so effectively, ICC arbitration had to be truly international. The idea developed to use local chambers of commerce to assist the ICC in finding qualified arbitrators. The Court uses the same process today, needless to say by faster means of communication. The National Committee system allows the Court to find the right arbitrator for each arbitration. National Committees and Groups know the local arbitration community and are well situated to search for the best arbitrators in their region. They are of assistance, particularly when the parties have agreed to very specific characteristics, such as anything from an expert in the polyester film industry to a chartered quantity surveyor who is a lawyer and speaks Arabic.

Like nominations, when the Court appoints upon the proposal of a National Committee or Group, it uses a two-stage process. First, the Court decides which of the approximately 90

National Committees or Groups to invite. In making its decision, the Court considers, amongst other things, the parties' nationalities, the place of arbitration, the language of arbitration, the location of the parties' counsel, the applicable law, the amount in dispute and any requirements set out in the arbitration agreement. To minimize the costs of arbitration, the Court endeavors to find arbitrators at, near, or with easy access to the place of arbitration.

When the Court appoints a co-arbitrator, it usually will invite the National Committee or Group which represents the nationality of the party that failed to nominate. When appointing on behalf of multiple parties that have similar interests and fail to nominate jointly, the Court usually considers inviting a proposal from a National Committee or Group of a country of which one of them is a national, or where the interests behind them lies.²⁰

When deciding whether to appoint the proposed arbitrator, the Court considers the candidate's arbitration experience, availability and qualifications in light of the above-mentioned needs of the case. The Court's rate of non-appointment of proposals from National Committees of 3.6% over the last five years is slightly higher than the rate of its non-confirmation of arbitrators, which is 2.7%, evidencing the Court's determination to find the right arbitrators for each case.

9. The Court has the flexibility to directly appoint arbitrators, which further expands the pool of potential arbitrators.²¹

The 2012 Rules now empower the Court to directly appoint arbitrators where a National Committee or Group has been invited but failed to make a proposal, one of the parties is

²⁰ This current practice aligns with Article 9(6) of the 1998 Rules.

²¹ *Id.* Art. 13(4).



a state or claims to be a state entity, the country from which the Court seeks an arbitrator does not have a National Committee or Group or the President of the Court certifies that it is necessary. When the Court does so, it appoints any candidate it deems suitable.

10. The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator are final, and the reasons for such decisions shall not be communicated.²²

This provision was debated heavily in the process of drafting the 2012 ICC Rules, but remains the same as its predecessor in the 1998 Rules. Two policy reasons for this provision are that it supports the finality of the Court's decisions and that, practically, it would be difficult to fully provide reasons for such decisions, which may be based, at a typical session, on 25 to 35 different legal perspectives and reasons that end in the same conclusion.

In conclusion, the ICC Rules reflect a historical evolution, maintaining their international perspective, while responding to users' demands for available, impartial and independent arbitral tribunals. Parties choosing the ICC Rules maintain the autonomy to fashion an arbitral tribunal to meet their needs while benefitting from the Court and its Secretariat's extensive experience in constituting arbitral tribunals. When questions arise as to how they can do so, the Secretariat is available to assist from the conception of the arbitration agreement through the process of constituting the arbitral tribunal and beyond.

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²² *Id.* Art. 11(4).



Arbitral Appointments at the LCIA

By Adrian Winstanley

A. Introduction

Parties to international arbitration are entitled to expect of the process a competent and diligent arbitrator, who will, in timely fashion, render a just, well reasoned and enforceable award, and that any administering institution should be working to support this outcome.

The parties naturally want to succeed in their claim, defence, or counterclaim, and may reasonably be expected to seek arbitrators who are sympathetic to their position.

An administering institution, on the other hand, wants the arbitration to succeed (that is to reach a just and binding conclusion); to safeguard the process; the effectiveness and reputation of arbitration; and its own reputation.

The institution, therefore, must be at pains to appoint arbitrators with no preconceived views on the merits, and no bias towards either side.

B. Procedures for Selection and Appointment

In all cases, whether or not the arbitrators are nominated by the parties, the basic LCIA procedure is as follows, save that steps four, five and seven are omitted in the case of party nomination.

1. The Secretariat reviews the Request for Arbitration and the accompanying contractual documents, and the Response (if any).

2. A résumé of the case is prepared for the LCIA Court.

3. Key criteria for the qualifications of the arbitrator(s) are established and recorded.

4. The criteria are entered into the LCIA's database of arbitrators, from which an initial list is drawn.

5. If necessary, other sources are consulted for further recommendations.

6. The résumé, the relevant documentation, and the names and curricula vitae of the potential arbitrators are forwarded to the LCIA Court.

7. The LCIA Court advises which arbitrator(s) the Secretariat should contact (who need not be, but usually will be, from among those put forward by the Secretariat), to ascertain their availability and willingness to accept appointment.

8. In the case of a party nomination, the Court advises whether it considers the nominee suitable, subject to conflicts checks.

9. The Secretariat sends the candidate(s) an outline of the dispute.

10. When the candidate(s) confirm their availability, confirm their independence and impartiality, and agree to fee rates within the LCIA's bands, the form of appointment is drafted.

11. The LCIA Court formally appoints the tribunal and the parties are notified.

Given the Secretariat's considerable experience in selecting arbitrators, and personal knowledge of many candidates, there are some cases in which a suitable selection of candidate arbitrators may be put



forward to the Court by the Secretariat without the need to interrogate the database.

Whilst the LCIA is concerned that each arbitrator should be appropriately qualified as to experience, expertise, language and legal training, it is also mindful of any other criteria specified by the parties in their agreement and in the Request and Response.

The LCIA is also concerned to ensure the right balance of experience, qualifications and seniority on a three-member tribunal; in particular, what qualities the Chair should have to complement those of his co-arbitrators. The LCIA is mindful also of any particular national and/or cultural characteristics of the parties to which it should be sensitive, so as to minimise conflict. Similarly, it addresses such issues as whether the arbitrator(s) should have a light touch or a firm touch, bearing in mind, for example, the degree of professionalism it expects of the parties, given whom they have chosen to represent them.

The LCIA also considers the nature of the case (sum in issue, declaratory, technically complex, legally complex, etc); the initial stance of the parties (aggressive, constructive, etc); the identity and known characteristics of the parties' lawyers and, indeed, whether the parties are represented at all.

The LCIA is equally concerned to ensure that all arbitrators are not only suitably qualified and without conflict, but are also available to deal with the case as expeditiously as may be required. This does not mean that an arbitrator must have an immediately clear diary, but some cases place greater demands on an arbitrator's time (in reviewing submissions, dealing with preliminary issues, in hearings etc) earlier in the proceedings than do others.

The LCIA is also amenable to a joint request by the parties that it provide a list of candidate arbitrators, from which they may endeavour to

select the tribunal, whether in straightforward negotiation, or by adopting an UNCITRAL-style list procedure. In such cases, the selection process described above is carried out in respect of all candidates to be included on the list, so that any candidate selected by the parties has already confirmed his willingness and ability to accept appointment and has been approved for appointment by the LCIA Court.

Thus, the process of selecting arbitrators is by no means mechanical; it is a considered combination of science and art, as to which the LCIA, both in its Secretariat and in its Court, is well qualified.

C. Rules Concerning Selection and Appointment

By Article 1.1(e), of the LCIA Rules, if the arbitration agreement calls for party nomination, the Claimant should nominate an arbitrator in the Request for Arbitration.

By Article 2.1(d), the Respondent should nominate an arbitrator at the time of the Response.

By Article 2.3, failure by the Respondent to nominate within time (or at all) constitutes a waiver of the opportunity to nominate.

By Article 5.3, there is a presumption in favour of a sole arbitrator unless the parties have agreed in writing otherwise, or unless the LCIA Court decides that the circumstances of the case demand three.

By Article 5.5, the LCIA Court alone is empowered to appoint arbitrators, though always having due regard for any method or criteria for selection agreed by the parties.

By Article 7.1, any purported agreement that the parties themselves, or some third party, shall appoint an arbitrator is deemed an agreement for party nomination.



By Article 7.2, the LCIA Court may, itself, select an arbitrator, notwithstanding an agreement for party nomination, if any party fails to nominate, or nominates out of time.

By Article 8, multiple parties lose the right to nominate if they cannot agree that they represent two sides to the dispute for the purposes of the formation of the tribunal.

By Article 9, the LCIA Court may abridge the time for the appointment of the tribunal, in cases of “*exceptional urgency*” and may, thus, require a Respondent to nominate its arbitrator within a shorter period than the 30 days prescribed by Article 2.

D. *Independence, Impartiality and Challenges*

One of the key functions of an administering institution is to provide procedures, checks and balances for ensuring the independence and impartiality of the arbitrators it appoints, and for dealing with doubts about independence or impartiality fairly and expeditiously, should such doubts arise.

A party which has concerns that such circumstances exist, has a duty promptly to bring a challenge, which, if not accepted by all other parties, or by the arbitrator himself, will be referred to the LCIA Court.

In common with the decisions of all arbitral institutions, the decisions of the LCIA Court, though conclusive and binding upon the parties and the tribunal, are administrative in nature, and the LCIA Court is not required to give any reasons for these decisions.

The LCIA Court has, however, long adopted the practice of giving reasons when determining challenges; a practice in which it is greatly assisted by the procedure set out in its Constitution by which challenges are referred either to the President or a Vice President or to a Division of three or five members of the

Court, chaired by the President or by a Vice President.

In November 2011, abstracts of 33 challenged decisions of the LCIA Court were published in a special issue of *Arbitration International*, and further abstracts will be published in due course.

E. *Rules and Procedures Concerning Independence and Impartiality*

By Article 5.2, it is an express requirement that an arbitrator shall not act as advocate to any of the parties and shall not advise a party on the merits or outcome of the arbitration.

By Article 5.3, arbitrators are required to complete a statement of independence before appointment, declaring that they are independent of the parties and impartial. The statement may, however, be qualified if there are circumstances that the arbitrator believes may give rise to doubts as to his or her independence or impartiality.

Any doubts as to whether circumstances ought to be disclosed must be resolved in favour of disclosure.

The LCIA's response to a disclosure will depend upon the LCIA Court's assessment of its significance. Thus, a disclosure that is regarded by the institution as one that should have led the arbitrator simply to decline the appointment will lead to the institution rejecting the arbitrator.

A disclosure, considered to be such that it might raise doubts as to the arbitrator's independence or impartiality in the mind of one or more of the parties, will be placed before the parties before confirmation of the appointment, to elicit any objections that might lead the LCIA Court to decline the appointment and thus avoid a more disruptive challenge at a later stage.

A disclosure that is made through an abundance of caution, rather than for any



reasonable doubts that it might raise, would not inhibit the appointment, but would, nonetheless, be brought to the parties' attention at the time of notifying the constitution of the tribunal.

By Article 6 of the Rules, there is a bar on the appointment of sole arbitrators or chairmen of the same nationality as any of the parties, unless the parties who are not of the same nationality as the proposed appointee all expressly agree in writing.

By Article 10, the removal of an arbitrator, once appointed, may be initiated by fellow arbitrators; by the institution of its own motion; or, most commonly, by a party mounting a formal challenge.

By Article 10.1, co-arbitrators may ask the LCIA Court to revoke the appointment of a colleague, in the event that that colleague refuses to act or is considered to be unfit for his or her responsibilities.

By Article 10.2, the LCIA Court may, of its own motion, remove an arbitrator who it considers to be acting in deliberate violation of the Rules, or failing to act impartially, or failing to avoid unnecessary delay.

However, the removal of an arbitrator at the initiation either of co-arbitrators or of the institution is rare, which is an affirmation of the effectiveness of the rigorous selection process employed by the institution.

By Article 10.3 an arbitrator may be challenged by a party *"if circumstances exist that give rise to justifiable doubts as to his impartiality or independence"*.

The challenging party must lodge its challenge within 15 days of becoming aware of the circumstances giving rise to it. If, within a further 15 days, the challenged arbitrator steps down or the other party or parties to the arbitration accept(s) the challenge, the arbitrator will automatically be removed, with

no inferences being drawn as to the validity or otherwise of the challenge. More usually, however, the challenge will be referred to the LCIA Court for determination.

By Article 11.1, the LCIA Court may refuse to appoint an arbitrator nominated by a party if it considers the nominee not to be independent or impartial, or to be in some other way unsuitable.

An arbitrator may be considered *"unsuitable"* if, for example, he lacks the requisite knowledge of the language of the arbitration, of the applicable laws, or of the subject matter.

This Article provides a significant safeguard against bias and inefficiency in the case of party nominations, where the institution's rigorous selection process may not have been applied.

F. *Officers of the LCIA Court*

By the Constitution of the LCIA Court, the President of the Court is only eligible for appointment if all parties agree to nominate him as sole arbitrator or as Chairman. Vice Presidents may only be appointed if nominated by a party, or by the parties jointly.

The President or any Vice Presidents nominated in this way are, of course, excluded from taking part in the appointment of the tribunal to which they have been nominated and from any other function of the Court relating to that arbitration.

Adrian Winstanley is the Director General of the LCIA and a member of the LCIA Court. He fulfils the role of Chief Executive Officer, with day to day responsibility for all aspects of the conduct of the business of the LCIA, and is the principal point of contact between the institution and its Board and Court.



Appointment to Arbitral Tribunals at ICSID

By Meg Kinnear

A. Introduction

The practice of ICSID is to support the disputing parties in reaching consensus whenever possible during this process. At the same time, ICSID is conscious of the importance of constituting the Tribunal in an expeditious manner, and the ICSID Convention and Arbitration Rules set time frames for completion of the various steps in the appointment process so that no party can prevent the timely constitution of a Tribunal.

Articles 37 to 40 of the ICSID Convention and Rules 1 to 12 of the ICSID Arbitration Rules are the main provisions governing arbitral appointments.¹ The basic process is outlined below, however, parties should remember to consult the treaty, law or contract at issue in their dispute as these may also address the qualifications of arbitrators, the number of arbitrators on a Tribunal, or the method of their appointment.

B. Qualifications of ICSID Arbitrators

Parties to an ICSID case can select any arbitrator they wish, subject to three requirements imposed by the Convention and Arbitration Rules:

- General qualifications – The ICSID Convention requires arbitrators to be persons of high moral character who may be relied upon to exercise independent judgment and who have recognized competence especially in law, but also in commerce, industry, or

finance.² In practice, parties usually seek arbitrators with: (1) expertise in international investment and public international law; (2) experience in presiding over complex international arbitrations; (3) the ability to work in the language(s) of the case; and (4) availability to act in a timely manner.

- Nationality – The majority of the Tribunal must be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless each individual member of the Tribunal is appointed by agreement of the parties.³ For example, in an arbitration between a Korean investor and the State of Malaysia, the Tribunal could not include two Korean arbitrators, two Malaysian arbitrators, or one Korean and one Malaysian arbitrator, unless the parties agreed to this composition.

- No prior involvement in the dispute - A person who previously acted as a conciliator or arbitrator in any proceeding to settle the dispute at issue in the arbitration cannot be appointed to the Tribunal.⁴

C. Number of Arbitrators and Method of Appointment

An ICSID Tribunal may consist of a sole arbitrator or any uneven number of arbitrators that the parties agree on.⁵ If the parties cannot agree on the number of arbitrators, the Tribunal will consist of three arbitrators.⁶ In practice, most ICSID Tribunals consist of

¹ This article addresses appointment of tribunal members in arbitrations governed by the ICSID Convention. Different provisions may apply to the appointment of ICSID ad hoc Committees and to appointment of arbitrators under the ICSID Additional Facility or other sets of rules.

² ICSID Convention Articles 40(2) & 14(1).

³ ICSID Convention Article 39; ICSID Arbitration Rule 1(3).

⁴ ICSID Arbitration Rule 1(4).

⁵ ICSID Convention Article 37(2)(a).

⁶ ICSID Convention Article 37(2)(b).



three arbitrators, although occasionally parties will agree to have a sole arbitrator. It is rare to have tribunals of five or more members.

The parties can agree on any method to constitute the Tribunal. Usually parties agree to name one arbitrator each (the party-appointed arbitrator) and to select the presiding arbitrator by mutual agreement or to have the party-appointed arbitrators name the presiding arbitrator. While these models are seen most frequently, other methods are possible. For example, in several recent cases parties have agreed that the ICSID Secretary-General will select the presiding arbitrator from a short-list submitted by the parties, or that the presiding arbitrator will be selected from a short-list compiled by ICSID.

If the parties cannot agree on the number of arbitrators and the method of appointing the Tribunal, Article 37(2)(b) of the ICSID Convention imposes a default method: that each party will appoint one arbitrator and the parties will jointly name the presiding arbitrator.⁷

D. *Process and Timing*

The Tribunal must be constituted “as soon as possible” after registration of the request for arbitration.⁸ The Convention and Rules set out the time allotted for each step in the process, but these may be shortened or extended by agreement of the disputing parties.

As soon as the request for arbitration is registered, the ICSID Secretariat asks the parties whether they have agreed on the number of arbitrators and the method of constituting the Tribunal. Such an agreement is often found in the applicable treaty, contract or law. In practice, claimants usually note any agreement concerning the number of arbitrators and the method of constituting the Tribunal in their request for arbitration. Some

claimants may even name their party-appointed arbitrator in the request for arbitration in order to expedite the process. If the parties have an agreement as to the number of arbitrators and the method of appointment, that agreement will be applied.

Absent such agreement, the parties have up to 60 days to exchange proposals on the number of arbitrators and the method of their appointment. The sequence followed is that: (1) the requesting party (usually the claimant) proposes the number of arbitrators and the method of appointment within 10 days after registration of the request; (2) the responding party (usually respondent) must reply to this proposal within 20 days of receiving it, either by accepting the requestor’s proposals or by making a counter-proposal; and (3) the requesting party must either accept or reject the counter-proposal within 20 days of receiving it.⁹

If this process does not result in an agreement within 60 days after registration of the request for arbitration, either party can elect the default method of appointing a Tribunal set out in ICSID Convention Article 37(2)(b): two party-appointed arbitrators and a presiding arbitrator agreed on jointly by the parties.¹⁰ While the parties are free to continue their discussions on the number of arbitrators and method of appointment beyond the 60 day period if they both wish to do so, Article 37(2)(b) gives each party the ability to move forward on constitution of the Tribunal if they believe further discussions would not be productive. ICSID leaves this election to the parties and does not intervene unless one party asks it to do so after the 60 day period.

Where a party elects the default method in ICSID Convention Article 37(2)(b), that party will name their arbitrator and propose a

⁷ ICSID Convention Article 37(2)(b).

⁸ ICSID Convention Article 37(1); ICSID Arbitration Rule 1(1).

⁹ ICSID Arbitration Rule 2(1).

¹⁰ ICSID Arbitration Rule 2(3); ICSID Convention Article 37(2)(b).



presiding arbitrator. The party receiving this proposal must promptly name its arbitrator and either concur in the proposal for presiding arbitrator or propose a different person as President.¹¹ If the Tribunal has not been constituted within 90 days from the date of registration, either party can ask ICSID to appoint the arbitrator(s) not yet appointed and to designate the President of the Tribunal.¹² This approach allows the parties maximum flexibility to name a Tribunal by consensus while ensuring that the process cannot be held up if the parties are unable to reach consensus. In about 75% of all ICSID cases, the parties agree on the full Tribunal, and do not request assistance from ICSID in constituting the Tribunal. Where parties invoke ICSID assistance, it is usually to appoint the President, although occasionally ICSID will be asked to designate both an unnamed party appointee and the presiding arbitrator.

ICSID follows a two-step process when it is asked to appoint a missing arbitrator. First, it sends the parties a ballot listing five or more potential arbitrators, with the curriculum vitae of each nominee. Each of these nominees has been conflict checked by the Centre, and the parties are asked to indicate which of these nominees would be acceptable. This is a simple "yes/no" check-off, and the parties are asked to return the ballot form to the Centre in a short time (usually 5-10 days). The parties are not required to share their ballot selections with one another, but may do so if they wish. If the parties concur on a candidate proposed in the ballot, ICSID will name that person.¹³ If the parties do not concur on a candidate, ICSID will propose an arbitrator from the ICSID Panel

of Arbitrators.¹⁴ Again, ICSID will do a conflict check and provide the parties with the candidate's curriculum vitae before naming an arbitrator from the List of Arbitrators. On average, ICSID concludes these steps within six weeks of being asked to appoint the missing arbitrators.

E. *Acceptance of Appointment by Arbitrators*

Communications between the parties respecting the number of arbitrators and the method of appointment may be transmitted through the ICSID Secretary-General or directly between the parties with a copy sent to the Secretary-General.¹⁵ Parties are required to notify the Secretary-General of the appointment of each arbitrator. Usually the appointing party will send the Centre a letter including the name, nationality and curriculum vitae of the arbitrator to be appointed. As soon as the Secretary-General is so advised, the Centre seeks formal acceptance of the appointment from the arbitrator. If an arbitrator fails to accept appointment within 15 days of the Centre's request, the Secretary-General will so advise the nominating party and invite them to appoint a different arbitrator.¹⁶

F. *Constitution of Tribunal*

The Tribunal is deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all of the arbitrators have accepted their appointment.¹⁷ The date of constitution is

¹⁴ ICSID Arbitration Rule 4. The ICSID Panel of Arbitrators is composed of four people named by each of the (currently) 148 member States and 10 people named by the Chairman of the ICSID Administrative Council. They serve for renewable six year periods, but are eligible for appointment at any time until a successor has been designated: see Articles 12-16 of the ICSID Convention. The ICSID website maintains an up to date list of the Panel of Arbitrators.

¹⁵ ICSID Arbitration Rules 2(2) & 3(2).

¹⁶ ICSID Arbitration Rule 5.

¹⁷ ICSID Arbitration Rule 6.

¹¹ ICSID Arbitration Rule 3.

¹² ICSID Arbitration Rule 4.

¹³ Such a candidate is deemed to have been appointed by agreement of the parties. If parties agree on more than one ballot candidate, ICSID will select one of the arbitrators agreed-upon.



important as it triggers several other steps in the process. For example, the first session of the tribunal and the parties must take place within 60 days of constitution¹⁸ and a party should file any objection that a claim lacks legal merit within 30 days of constitution of the Tribunal.¹⁹

G. *Declaration as to Confidentiality and Conflict*

Each arbitrator must file a declaration before or at the first session of the Tribunal in the form stipulated in ICSID Arbitration Rule 6(2). In that declaration, the arbitrator agrees to keep information obtained in the process and at deliberations confidential, undertakes to judge the matter fairly, and declares any relationship that “might cause [their] reliability for independent judgment to be questioned by a party.” Each arbitrator assumes a continuing obligation to disclose potential conflicts of interest in the declaration. The Centre provides the declarations to the parties as soon as they are received. A party wishing to challenge an arbitrator must do so promptly after constitution of the Tribunal, in accordance with the procedure in ICSID Convention Articles 57 to 58 and ICSID Arbitration Rule 9.

H. *Conclusion*

Given the importance of increased investment flows among States and ICSID’s mandate to facilitate investor-State arbitration and conciliation, ICSID has taken numerous steps to ensure that parties are well-equipped to select a Tribunal and to navigate the ICSID process thereafter. These steps include implementation of the ballot process, efforts to increase the size and diversity of the Panel of

Arbitrators, encouraging States to nominate qualified persons to the Panels, and replenishing the nominations to the Panel of Arbitrators by the Chairman of the ICSID Administrative Council. Such initiatives complement recent efforts by the Centre to improve user service generally and to expand outreach and technical assistance. These efforts will continue given the growth of the global economy and increased international investment, and the important role of ICSID in providing an impartial and effective dispute settlement system for resolution of investment disputes.

Meg Kinnear is the Secretary-General of ICSID, and heads the ICSID Secretariat in the administration of cases under the ICSID Convention, the ICSID Additional Facility, the UNCITRAL Arbitration Rules and other rules as parties may re

¹⁸ ICSID Arbitration Rule 13. The parties can agree to a different period for holding the first session if they wish.

¹⁹ ICSID Arbitration Rule 41 (5) allows objections for lack of legal merit and requires a party to make such objection “no later than 30 days after constitution of the Tribunal, and in any event before the first session of the Tribunal.”



The HKIAC Appointment Process

By Chiann Bao and James H Chun

The arbitrator appointment process for HKIAC administered arbitrations is governed by Section III of the current HKIAC Administered Arbitration Rules (2008) (the "HKIAC Rules").¹ The following paragraphs discuss the HKIAC's appointment procedures and internal practice.

A. *Designations by Parties or Arbitrators*

The HKIAC Rules prescribe standard procedures for the appointment of a sole arbitrator and a three-member tribunal.

Where the parties have agreed to refer the dispute to a sole arbitrator, parties are given the opportunity to jointly designate the sole arbitrator within 30 days from the later of (i) the date on which the Notice of Arbitration was received by the Respondent or (ii) the date on which the parties agreed that the matter would be handled by a sole arbitrator. Parties are free to designate arbitrators outside of the HKIAC's List of Arbitrators and Panel of Arbitrators.²

Any arbitrator designated by the parties or by the party-appointed arbitrators must be confirmed by the HKIAC Council in accordance with Article 10.1 of the HKIAC Rules. Before confirmation, the HKIAC Secretariat would request that an arbitrator submit a signed declaration form confirming his or her availability to decide the dispute as

well as his or her impartiality and independence, and disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Additionally, the HKIAC would ask that the arbitrator submit his current CV, together with his or her terms of appointment if applicable.³ Upon receipt of such documents, the HKIAC would forward them to the parties, who then may raise any objections or concerns. Confirmation of the arbitrator is made on the basis of the arbitrator's independence, impartiality and availability.

If the parties fail to jointly designate the sole arbitrator within the 30-day time limit, the HKIAC Council will be tasked with appointing the sole arbitrator pursuant to Article 7.2 of the HKIAC Rules. Appointments by the HKIAC are discussed in further detail below.

Where parties have agreed upon a three-member tribunal, each party has the opportunity to designate one arbitrator of its choosing, and those co-arbitrators are responsible for selecting the presiding arbitrator to complete the tribunal. Typically, the claimant will designate its co-arbitrator at the time of filing of the notice of arbitration or shortly thereafter, but the rules do not bar the respondent from making the first designation.

¹ The HKIAC Administered Arbitration Rules (2008) is due to publish its revised HKIAC Rules in the next few months. It is anticipated that the revised HKIAC Rules will take effect in May 2013.

² The HKIAC maintains a List of Arbitrators and a Panel of Arbitrators, the distinction being that the latter comprises of arbitrators with more substantial experience in arbitration practice. The CVs of the List and Panel of Arbitrators can all be found on the HKIAC's website.

³ Pursuant to Article 36.2 of the HKIAC Rules, the parties have 30 days from the date of the notice of arbitration to agree on one of two methods for determining the fees of the arbitral tribunal: (i) a schedule of fees based on the amount in dispute or (ii) a separate fee arrangement agreed between the parties and the arbitrator. A separate fee arrangement is almost always based on an hourly rate system. When an hourly rate applies, the HKIAC would request that the arbitrator provide his or her terms of appointment for the parties' consideration.



Regardless of when and by whom the first designation has been made, the opposing party has 30 days from the date on which it receives notification of the first appointment to select its own arbitrator.

Once both parties' designations have been confirmed by the HKIAC Council, the two co-arbitrators would have 30 days to jointly select the presiding arbitrator. If a party fails to designate its arbitrator, or if the co-arbitrators fail to select a third arbitrator, the HKIAC Council is empowered to appoint an arbitrator on behalf of such party pursuant to Article 8.1 of the HKIAC Rules.

B. *Appointment by the HKIAC*

When tasked with appointing an arbitrator pursuant to Article 7 or 8 of the HKIAC Rules, the HKIAC Council considers several factors including *inter alia* the arbitrators' (i) qualifications, (ii) track record with HKIAC arbitrations and (iii) the nationality (if necessary). These factors are discussed in the subsections below.

After due consideration of potential candidates, the HKIAC Council would advance its nomination to the parties, who will then be given an opportunity to comment on the nominated arbitrator. If there are no valid objections are submitted by the parties, the HKIAC would proceed to consult with and seek advice from at least three members of the HKIAC Appointment Advisory Board before making a final decision on the appointment of any arbitrator.

1. Qualifications

It goes without saying that nominating an arbitrator with the right credentials to manage the case and to decide the dispute is one of the most important decisions of the arbitral process.

The arbitrator's professional experience would be one aspect that the HKIAC would

strongly consider. The extent of experience required will vary case by case, and the assessment would largely depend on the amount in dispute, the complexity of the case and the role for which the arbitrator is being considered (i.e., sole arbitrator, co-arbitrator or presiding arbitrator). For instance, where the amount in dispute is substantial and the legal questions at issue complex, the HKIAC would naturally favor an experienced arbitrator. A seasoned arbitrator might also be preferred in cases where the HKIAC has to appoint a presiding arbitrator of a three-member tribunal, as the position generally requires that such arbitrator takes the lead in managing the conduct of the arbitration and in rendering procedural orders and arbitral awards. The same could be said for when HKIAC is appointing a sole arbitrator, who will have to exclusively handle the case.

Depending on the circumstances of the case, other qualities, such as an arbitrator's area of expertise and language skills, may also weigh in heavily on the HKIAC's nomination. When a dispute requires knowledge in a specialized industry (e.g., maritime, construction or insurance), the HKIAC would be minded to appoint an arbitrator that has expertise in or, at the very least, sufficient exposure to the relevant area of law. Where the parties' agreement specifies the language of the arbitration, the HKIAC would choose an arbitrator that has shown an ability to conduct the proceedings in the requisite language.

2. Track Record with HKIAC Arbitrations

The HKIAC would also take into account an arbitrator's past performance. Relevant considerations might include a history of challenges or complaints being filed against an arbitrator, as well as instances of unreasonable delay in advancing proceedings or issuing awards. Preference would be given to those arbitrators that have regularly displayed an ability to efficiently manage the



proceedings, act fairly and impartially between the parties and timely issue enforceable awards.

3. Nationality of the Arbitrator

The nationality of the arbitrator will be relevant when an arbitration involves parties of different nationalities. Pursuant to Article 11.2 of the HKIAC Rules, the default position is that the sole or presiding arbitrator cannot have the same nationality as any party. When appointing a sole or presiding arbitrator under such circumstance, the HKIAC would only consider those arbitrators that have a different nationality from any party.

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SIAC Arbitration Appointments Through the Looking Glass

By Rachel Foxton

The Singapore International Arbitration Centre (the "SIAC") came of age this year celebrating the close of its 21st year with a record number of new arbitration cases. (The full details and annual report will be available on February 19, 2013.)

Many readers will be familiar with our service. For our new friends I would like to take this opportunity to introduce the background to the SIAC and the type of arbitration services that we offer.

The SIAC was established in 1991 as a not for profit organization to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in Asia.

We are based in and operate from Maxwell Chambers, a magnificent state of the art arbitration and alternate dispute resolution hearing facility, which provides 14 hearing rooms and 12 meeting rooms of which Singapore is rightly proud but there is a lot more to the success and popularity of SIAC arbitration than bricks and mortar.

The new filings for 2012 involved parties from 41 jurisdictions, confirming that we are more than a pan Asian arbitration provider. Our rules are user friendly to those from common law and civil jurisdictions from the USA, Europe, the Middle East and Asia.

The Secretariat of the SIAC has lawyers qualified in the USA, Canada, China, India, Indonesia, Korea, Malaysia, Singapore and England and Wales, and the SIAC outlook and experience is a global one.

We handle a broad range of cases ranging from international trade, shipping, insurance, banking, construction, and energy to licensing agreements, sports arbitration, telecoms and biotechnology.

In addition to the administration of cases under the SIAC and UNCITRAL Rules and authentication of arbitral awards in Singapore, one of the services we provide is the appointment of arbitrators under the Singapore International Arbitration Act and the SIAC and UNCITRAL Rules.

Lawyers experienced in representing parties in arbitration often contend that there is no more important aspect of arbitration than the selection of the arbitrator. Like many institutions, the SIAC maintains an international panel of arbitrators with a broad range of knowledge and expertise (currently 380 arbitrators from 32 jurisdictions).

The SIAC panel is not a permanent one. Each panel is appointed for a term of two years and at the conclusion of the term the panel becomes vacant and we start afresh to compile a new panel. This is done by inviting people to join and also by considering applications for membership.

The current panel which was appointed with effect from January 1, 2013 will last until December 31, 2014. At that time the entire panel term will expire and the Board of Directors will consider the needs of the institution and the trends of the cases that are crystallizing and appoint a new panel accordingly. This means that we can always



ensure that the SIAC panel accords with the status quo of arbitration at our centre and will match projected needs in expertise and experience.

The SIAC has a number of criteria that it considers for panel membership including the numbers of members from any one jurisdiction. There are certain jurisdictions where we have been rather overwhelmed by expressions of interest and applications from many retired judges and highly eligible lawyers. So as not to unduly unbalance our panel, in terms of country representation and legal system representation, we do have to be rather selective.

The panel list is a helpful guide and those on it are selected because they are talented in their fields, however we are not inflexible when it comes to permitting the parties a right of selection of an arbitrator. We do not operate from a closed list, nor is it mandatory for parties to appoint an arbitrator listed on our panel. The SIAC reserves the right to appoint persons who are not on our panel in appropriate cases.

As of December 31, 2012, the SIAC made 167 individual appointments of arbitrators to 155 sole member tribunals and 12 three member tribunals. Of these, 105 appointments were made under the SIAC Rules (including six emergency arbitrator appointments) and 62 appointments were made by us under other regimes and ad hoc cases. The arbitrators appointed by the SIAC came from Australia, Austria, China, Hong Kong SAR, India, Korea, Malaysia, New Zealand, Singapore, the United Kingdom and the USA.

When the SIAC is called upon to appoint an arbitrator, the SIAC choose on the basis of the arbitrator's expertise, experience relevant to the dispute and neutrality. The Secretariat may put forward to the Chairman of the SIAC a number of curricula vitae of appropriate candidates from a neutral country whose expertise and experience are appropriate to

the dispute in question. The Chairman will decide who will be appointed having reviewed the curricula vitae and the documents filed in the case. Sometimes clauses are very detailed in terms of the qualifications required of the arbitrator and where appropriate we may appoint a candidate who is not currently listed on the SIAC panel to meet the requirements in the clause.

As you will see from the case studies discussed below, the appointment process including conflict searches by the appointees may take as little as 48 hours. These time frames are competitive with many other administered arbitration providers.

The first case study is an appointment made under the SIAC Rules, which involved a ship sale dispute between Japanese and Bangladeshi parties. In this case, the parties made an agreement for the sale of a ship, which was docked at a port in Bangladesh. The parties got into a dispute over the terms of payment. The seller sought to terminate the agreement and sell the ship to a third party. The buyer got an injunction from the Bangladeshi court against the sale of the ship to any third party until final determination of issues in arbitration. The ship was incurring demurrage costs running into several thousand dollars per day. The SIAC received the notice of arbitration in early February and constituted the tribunal within 72 hours of receipt of the appointment request. The selected arbitrator was a shipping expert from the SIAC panel of neutral nationality who had over 40 years experience in the trade.

The second case study is one pursuant to the Emergency Arbitrator provisions under the SIAC Rules. In July 2010, the SIAC was the first institution in Asia to introduce an Emergency Arbitrator procedure.

A party in need of emergency relief prior to the constitution of the tribunal may apply for



such relief pursuant to Rule 26.2 and Schedule 1 of the SIAC Rules. Under this mechanism:

- (i) the Chairman of the SIAC will appoint an Emergency Arbitrator within one business day of accepting an application for emergency relief under these provisions;
- (ii) any challenge to the appointment of the Emergency Arbitrator must be made within one business day of his appointment; and
- (iii) the Emergency Arbitrator must establish a schedule for considering the application for emergency relief within two business days of his appointment.

There have been 11 cases under this procedure since the rule was introduced in July 2010.

This particular case involved BVI, Vietnamese and Singapore parties. The nature of the emergency relief sought was an order from the Emergency Arbitrator to grant the claimant access to inspect a major property development in which all the parties had transacted. The SIAC received the Emergency Arbitrator application at 10:40 p.m. on a Thursday evening. The next day, the Chairman of the SIAC determined that the application should be accepted and on the basis of the nature of dispute, nationalities of the parties and relief sought, appointed a construction expert from Hong Kong who was a recognized leading international arbitrator with over 30 years experience as Emergency Arbitrator.

The key role that any arbitral institution plays in arbitration under the UNCITRAL rules is when we are asked to appoint an arbitrator. The SIAC can be designated as an appointing authority by the parties or by the PCA. In the majority of the UNCITRAL cases that we handle, the SIAC is nominated to appoint by the parties.

In this next case study, the SIAC was designated by the parties to appoint an arbitrator and administer the case under the 1976 UNCITRAL Rules. This case involved a dispute between Irish and Singaporean parties relating to an alleged failure of payment under a Deed of Guarantee by the respondents. The SIAC received the notice of arbitration on October 29, 2010 and sent out first letters to the claimant and respondent on November 3, 2010 (within the third working day).

By the end of November 2010, the claimant requested the Chairman of the SIAC, pursuant to Article 6(3) of the UNCITRAL Arbitration Rules 1976, for the appointment of a sole arbitrator as the respondent was not responding to any communications. This is a scenario when the Chairman may dispense with the list procedure and will appoint using the usual SIAC Process. A neutral arbitrator with over 25 years experience was appointed and the tribunal was constituted on December 8, 2010.

A similar example where the SIAC was asked to appoint under UNCITRAL 2010 Rules and where the list procedure was followed involved Indian and Chinese parties who were in a dispute related to a sale and purchase contract for iron ore to be exported from India. The arbitration commenced in July 2012 and in late July 2012 a response received from respondent.

In August 2012, the Chairman of the SIAC decided the list procedure was appropriate and five names of experienced arbitrators of neutral nationality were communicated to the parties.

In September 2012 the parties returned the list with their order of preference and on October 8, 2012, a sole arbitrator was appointed and parties informed.

Institutions may see a growing role in relation to appointments under UNCITRAL arbitration. In line with the expansion of that



vast area of international relations, investment treaty arbitration has grown exponentially and has been a major development in contemporary international law. Bilateral and multilateral investment treaties continue to provide for significant dispute resolution guarantees, allowing private investors a direct recourse against a sovereign state should that investor believe that its investment has been expropriated or otherwise impeded.

The Organization for Economic Cooperation and Development 2012 report on dispute resolution provisions in international investment agreements has a graph that shows that since 1979 when UNCITRAL was first used in these agreements it has grown to 60% of agreements in this arena choosing UNCITRAL arbitration – second only to ICSID.

There are 158 contracting states to ICSID but countries such as India, Brazil, Mexico Venezuela, Laos and Myanmar are not members. This leaves the importance of BIT claims and UNICITRAL Arbitration and a growing role for institutions when they are asked to make arbitral appointments under the UNCITRAL regime.

At the recent UNCITRAL Conference held in Korea in November 2012, most institutions who participated agreed that more guidance should be given to appointing authorities on when to dispense with the list procedure as it is open to tactical abuse to prevaricate on the progress of arbitration.

The overall conclusion is that an institution such as the SIAC, has considerable expertise to make appointments when requested to do so and assuming there are no conflicts, we will appoint an individual purely on the basis of neutrality and expertise as efficiently as possible.

Rachel Foxton is the Director of Business Development at the SIAC and has overall charge of SIAC's marketing activities and publications. She qualified as a solicitor in the UK and regularly designs conferences and seminars on international arbitration.



The VIAC procedure for the appointment of arbitrators

By Manfred Heider

A. The VIAC

The International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC - Vienna International Arbitral Centre) is the leading arbitral institution in Central and Eastern Europe. It was established in 1975. As regards international arbitration, Austria came into the picture in the early seventies as the venue for East-West commercial arbitrations as a neutral country along with Switzerland and Sweden. For this reason, the Austrian Federal Economic Chamber, which is the umbrella organization of the nine Regional Economic Chambers, established the VIAC in 1975 particularly for the settlement of East-West commercial disputes.

Soon after its foundation the VIAC came into the searchlight of the American Arbitration Association which in 1977 had entered into a trilateral agreement with the Foreign Trade Chamber of the Soviet Union and with the Stockholm Chamber of Commerce. As a result, the three parties agreed to recommend to their members to arbitrate disputes at the Arbitration Institute of the Stockholm Chamber of Commerce. This agreement served as a pattern for negotiations of the American Arbitration Association's Board with the Foreign Trade Chambers of various member countries of the CMEA which was an economic organization under the leadership of the Soviet Union that comprised the countries of the Eastern Bloc along with a number of socialist states elsewhere in the world. The CMEA was the Eastern Bloc's reply to the formation of the Organization for European Economic Co-operation in non-communist Europe.

In the late 1970s a working group consisting of experts from the United States, Hungary and Austria started its consultations whether Austria and, in particular, Vienna would be eligible as the venue of arbitration for East-West disputes and therefore could be recommended to parties from both sides. The American delegates within this committee were (among others) Judge Howard M. Holtzmann, Robert Coulson and Gerald Aksen. As the findings of the working group turned out to be quite positive a series of trilateral agreements between the American Arbitration Association, the Austrian Federal Economic Chamber and various Eastern Foreign Trade Chambers was concluded, the first one with the Hungarian Chamber of Commerce as partner from a CMEA country. The other CMEA countries to follow were Bulgaria, Czechoslovakia, the German Democratic Republic, Poland and Yugoslavia. Under these trilateral agreements the partners recommended to their members to arbitrate their disputes under the auspices of the UNCITRAL Arbitration Rules using the Secretariat of the International Arbitral Centre of the Austrian Federal Economic Chamber as administering body and VIAC's Board as Appointing Authority.

Since the fall of the Iron Curtain, VIAC has operated on worldwide basis. It administers only international cases in the sense that at least one of the parties has its place of business or normal residence outside of Austria at the time of the conclusion of the arbitration agreement, or cases involving parties having their place of business or normal residence in Austria but where the dispute has an international character.



B. *The VIAC's organisational structure*

VIAC's organisational bodies are:

- the Board consisting of at least 5 members (currently 10) appointed for a period of five years by the Enlarged Presiding Committee of the Austrian Federal Economic Chamber by nomination of the President of VIAC. The Board members are prominent Austrian and foreign members in the field of arbitration from various professions including lawyers, academics and judges.
- the President who is elected by the members of the Board (one of their number).
- the International Advisory Board consisting of international arbitration experts who may be invited by the Board of VIAC for the duration of its period of office.
- the Secretary General who is appointed by the Enlarged Presiding Committee of the Austrian Federal Economic Chamber for a period of five years. The Board has a right to make a proposal for the position of the Secretary General due to its key position within the VIAC.
- the Secretariat which is the executive arm of the Secretary General.

VIAC's bodies are independent and not subject to any instruction by the Austrian Federal Economic Chamber. The independence is guaranteed by the Austrian Federal Act on Economic Chambers.

C. *The composition of the arbitral tribunal*

The parties are free to agree that their dispute may be decided either by a sole arbitrator or by an arbitral tribunal consisting of three arbitrators. When no agreement on the number of arbitrators has been made and the

parties do not agree on the number of arbitrators, the Board of VIAC has discretion to determine whether the dispute is to be decided by a sole arbitrator or by an arbitral tribunal taking into consideration in particular the difficulty of the case, the amount in dispute and the interest of the parties in a rapid and cost-effective decision. The practice of the current Board is to decide on a sole arbitrator if the amount in dispute does not exceed 1 Million Euros.

D. *The appointment of arbitrators*

Under VIAC's Arbitration Rules ("Vienna Rules") the parties nominate arbitrators, i.e. name candidates. At present such nomination is not subject to later acceptance or confirmation by VIAC but will be under the amended Vienna Rules which will become effective by July 1, 2013. Under the new Vienna Rules an arbitrator is appointed when he/she is confirmed by the Secretary General. Only where the parties fail to nominate an arbitrator (co-arbitrator or sole arbitrator), the Board of VIAC will make the appointment.

When accepting the mandate the arbitrator shall confirm his/her independence and impartiality, the submission to the Vienna Rules and, under the new Vienna Rules his/her availability. Of course, he/she is obliged to disclose all circumstances with regard to his/her independence and impartiality.

If the dispute is to be decided by a sole arbitrator, the parties may agree on a sole arbitrator and indicate that person's name and address to the Secretary General within thirty days. The parties are completely free in choosing the arbitrator, there are no special requirements on nationality or being part of a list and VIAC is not entitled to review the qualifications of a chosen arbitrator.

If no such agreement is reached within that period, the sole arbitrator shall be appointed by the Board of VIAC. There is no time-limit for



such appointment but it is usually carried out without undue delay, approx. 3-4 weeks. There are no specific criteria that the Board should take into account when appointing an arbitrator but it follows from the Vienna Rules that the nationality of the parties as well as any experience in the field of the dispute must be taken into account.

If the dispute is to be decided by an arbitral tribunal, each party may nominate an arbitrator. Usually, this is already done in the statement of claim and the memorandum in reply and the parties are then bound by their nomination. The party that has not yet nominated an arbitrator shall be requested to indicate the name and address of an arbitrator within thirty days after service of the request. If the party has not appointed an arbitrator within that time limit, the arbitrator shall be appointed by the Board of VIAC.

The two party-appointed arbitrators (or arbitrators appointed by the Board) then are to nominate a Chairman and indicate his name and address within thirty days after service of the request. If no such indication is made within that period, the Chairman shall be appointed by the Board.

When appointing arbitrators the Board of VIAC tries to respect the intentions of the parties. This means that when a party has nominated its arbitrator only after expiry of the 30 days period as of the Vienna Rules the Board will appoint this person as an arbitrator for the concerned party. The same principle applies when in multiparty situations not all parties have jointly nominated their arbitrator and one or more parties have remained silent. Then, the Board will appoint the arbitrator nominated by the parties which have actively participated in the nomination procedure also with effect for the silent party (parties).

The Board of VIAC also remains neutral regarding the nationality of arbitrators. In 2012,

about two third of the arbitrators appointed by the parties were Austrian nationals. However, the proportion of Austrian parties was clearly below 25 percent. In contrast, the Board of VIAC when appointing arbitrators in lieu of foreign parties in the last two years always decided for foreign arbitrators, in most cases for persons of the same nationality as the party that failed to make a nomination. If a sole arbitrator was to be appointed by the Board and an Austrian party was involved the Board almost never decided for an Austrian national. The few exceptions were made in cases with extremely low amounts in dispute to save travel costs.

As per the end of April 2013, 80 international arbitral proceedings were pending at VIAC with an aggregated amount in dispute of 1.4 billion Euros. The arbitrators (whether nominated by the parties or appointed by the Board) come from the following countries:

| | | | |
|------------------|----|-----------------|---|
| Austria: | 85 | P.R. of China | 2 |
| Switzerland: | 9 | Poland: | 2 |
| Germany: | 5 | Slovenia: | 2 |
| Czech Republic: | 4 | United Kingdom: | 2 |
| Hungary: | 4 | Ukraine: | 2 |
| Slovak Republic: | 4 | | |
| Spain: | 4 | | |

One arbitrator each from:

Bulgaria, Dubai, Greece, Romania, Serbia and the United States.



E. *Conclusion*

Leading arbitrators from all over the world are sitting on tribunals under the Vienna Rules. Austria is a highly qualified and desirable venue for international arbitration.

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Appointment of arbitrators under the SCC Rules

By Celeste E. Salinas Quero

Arbitration is about choice. Parties choose the law governing the contract, the rules to conduct the arbitral proceedings, the seat of arbitration, counsel which represents their interests and, most importantly, parties choose the decision makers: the arbitrators. The parties' right to appoint their arbitrators is one of the clearest expressions of party autonomy, an essential principle of arbitration, which has made arbitration such an attractive means of dispute resolution.

The 2010 SCC Rules were carefully drafted, recognizing the importance of party autonomy, particularly in appointment procedures. Article 13 of the 2010 SCC Rules governs the appointment of arbitrators. The first sentence of Article 13 sets the grounds for appointment of arbitrators and follows the autonomic tone of the SCC Rules: parties are free to agree on a different procedure for appointment; by default, when the parties have not agreed upon a procedure, or when the agreed deadlines to appoint have expired, the SCC Board appoints the arbitrator(s). Article 13 provides a simple and effective appointment procedure, which on average does not exceed three months after a request for arbitration is received by the SCC Secretariat.

A. Who can be appointed?

Anybody can be appointed, given that they have legal capacity and are independent and impartial. The SCC does not have a list of arbitrators. Thereby, the SCC Board makes each appointment taking into consideration the specific needs of each case

and is not limited to appointing members of any particular list.

Before being appointed as an arbitrator, a person must disclose any circumstances which may give rise to justifiable doubts as to their impartiality.ⁱ The SCC Rules set a low threshold for disclosure. Prospective arbitrators must disclose circumstances that may give rise to justifiable doubts, indicating by this wording that the mere possibility (not the probability) of such doubts calls for disclosure.ⁱⁱ In practice, arbitrators comply with their duty of disclosure by filling in a standard form which the Secretariat sends to the arbitrator inviting them to confirm their independence and impartiality and to indicate if they wish to disclose any circumstances in connection with the arbitration.

Importantly, a distinction is to be made in the way party appointed arbitrators and SCC appointed arbitrators comply with their duty of disclosure: the former do not need to fill in the abovementioned form before they are appointed by the parties, whereas the latter (usually the chair) must fill in the form upon appointment by the Board.

B. How are SCC appointments made?

The appointment of arbitrators by the SCC could be described as a two-step procedure. First, the matter is discussed by the SCC Secretariat, and, second, a proposal for the appointment is presented before the SCC Board.

The SCC Secretariat comprises a Secretary General, a Deputy Secretary General and three different divisions, each headed by a



legal counsel and one assistant. Each legal counsel and its assistants are responsible for one third of all registered cases at any given time.

The SCC Board has an international Board of Directors, and consists of 15 members, of whom six are Swedish and nine international members. As of 1 January 2013, the SCC Board includes members from China, England, Egypt, Denmark, Germany, Russia, Scotland, Sweden, Switzerland, and the USA. The different nationalities not only add to the diversity of the decision making process, but also to the representation of the nationalities of the parties which most frequently appear in SCC arbitrations.ⁱⁱⁱ

The SCC Board meets once a month. At each meeting and when necessary, the SCC Board makes decisions under Article 9 of the SCC Rules, including decisions on the number and appointment of arbitrators. The exact dates of SCC Board meetings are listed in the calendar at the SCC website to facilitate transparency and foreseeability for parties and counsel.

C. Number of arbitrators and appointment procedure

Article 12 of the SCC Rules allows the parties to agree on the number of arbitrators. Where the parties fail to agree on the number of arbitrators, the tribunal will consist of three arbitrators unless the Board, taking into account the complexity of the case and the amount in dispute or other circumstances, decides that the dispute will be decided by a sole arbitrator.

Criteria for assessing the number of arbitrators include the amount in dispute, the nationality of the parties, and the complexity of the case. Other circumstances may also be taken into account, depending on the characteristics of each case.

In three-member tribunals, the SCC usually appoints the chair. In some cases, the SCC also appoints the co-arbitrator on behalf of one of the parties.^{iv} When the dispute is to be resolved by a sole arbitrator, it is common that the SCC makes the appointment. Yet the parties are first invited to jointly appoint the sole arbitrator within 10 days.^v When the parties fail to jointly appoint the sole arbitrator, the SCC Board makes the appointment.

In any case, Article 13 of the SCC Rules allows the parties to deviate from the default appointment procedure by agreeing on a different procedure, for example by introducing a list procedure or other elements in the appointment process.

D. Procedure for appointment: role of the SCC Secretariat

The first step of the appointment proceedings takes place at the SCC Secretariat. The SCC receives and registers the request for arbitration, which in most cases includes information on the arbitrator appointed by the claimant.^{vi}

Upon receipt of the request for arbitration, the counsel in charge of the division will send the request to the respondent for comment. Respondents are invited to comment on claims raised, on the number of arbitrators, if called for by the parties' arbitration agreement, or other circumstances of the case. If needed, respondents are also invited to appoint their arbitrator.

At this stage, all communications between the parties regarding the number of arbitrators and the method of appointment are transmitted through the SCC Secretariat. After the counsel has sent the claimant's request to the respondent, the two most common scenarios are that the respondent either files an answer to the request for arbitration, or



remains inactive and does not participate in the proceedings.

a) The respondent answers the request for arbitration or comments on the request for appointment

In this scenario, when the respondent appoints an arbitrator in its answer,^{vii} the SCC Secretariat contacts the party-appointed arbitrator and sends them the standard form for confirmation of acceptance of the appointment and statement of independence and impartiality. In any case, if the respondent fails to appoint its arbitrator within the deadline stipulated by the parties or set by the SCC Secretariat, the SCC will proceed to make the appointment.

Article 9 of the SCC Rules bestows on the SCC Board the exclusive power to appoint arbitrators.^{viii} The Secretariat's task is then to propose to the SCC Board the names of the arbitrators which it considers should be appointed for a specific case.

Usually the Secretariat proposes at least three names for each appointment by the SCC Board. When considering what names to put before the Board, the Secretariat may take into account the following factors:

- the nationality of the parties;
- the nationality of the party-appointed arbitrators;
- the subject matter of the dispute;
- the law applicable to the dispute;
- the language of the proceedings;
- the seat of arbitration;
- the complexity of the dispute;
- the level of particular legal expertise and skills required;

The importance of each criterion varies depending on the circumstances of the case.

(It should be noted that the criteria above have not been listed in any order of preference.)

b) The respondent does not participate in the arbitral proceedings

If the respondent remains inactive, this does not preclude the proceedings from continuing. The consequence of the respondent's inactivity is that the legal counsel will pursue the administration of the case, and depending on whether the dispute contemplates a three-member panel or a sole arbitrator, the SCC will appoint the respondent's arbitrator and the chair, or a sole arbitrator, as the case may be.

1. The role of the SCC as appointing authority

The SCC also often acts as appointing authority in investment arbitrations. In these cases, the SCC receives a "Request for appointment" which, depending on the case, may be a request for appointment of the chair, or of the respondent's arbitrator. In its role as appointing authority, the SCC can make appointments under its own rules or under other sets of rules, such as the UNCITRAL Arbitration Rules, or in ad hoc proceedings under the rules agreed upon by the parties.

2. Teamwork

Members of the SCC Secretariat regularly meet and discuss cases to be presented before the SCC Board at the monthly Board meeting. At the Secretariat meetings each counsel presents to their colleagues and to the Secretary General and Deputy Secretary General the cases that are to be taken to the Board for appointment.

At this stage the SCC Secretariat discusses the names proposed by counsel. The Secretariat can approve or amend the list of names proposed by counsel. This is a collective decision making process, in which



the counsel of other divisions and the Secretary General and Deputy Secretary participate, sharing their expertise and opinions on the proposals made by each counsel. Once the Secretariat agrees on the names proposed by counsel, the case is ready to be put before the SCC Board at its next meeting.

E. Procedure for appointment: role of SCC Board

At the Board meeting, each legal counsel will present their case to the SCC Board, including proposals for decisions to be taken by the Board. The SCC Board discusses each one of the names presented by counsel. In the decision making process, each Board member is invited to share their views. When Board members cannot be physically present at the meeting, they participate via telephone conference, or submit opinions in writing to the Secretariat before the meeting.

Notably, when discussing cases before the Board meeting takes place, the Secretariat considers potential conflicts between any of the Board members and the parties in dispute or their counsel. When a Board member has a conflict of interest, they do not participate in the decision making process to appoint the arbitrator in the dispute.

The SCC Board takes into account the same criteria as listed above when deciding on appointment of arbitrators. The Board members may agree or disagree with the Secretariat's proposal. In case of disagreement, the Board members may change the order of preference of the names, or may agree on new names for the list.

F. Execution of the SCC Board Decision and Confirmation of Appointment

Once the SCC Board has approved a list of names, the legal counsel will contact the approved arbitrators in the order decided by the Board.

As Article 14(2) of the SCC Rules provides, the legal counsel will send to the appointed arbitrator a confirmation form for acceptance of the appointment and a statement of independence and impartiality. The form invites the prospective arbitrator to disclose any circumstances which they consider that in the eyes of the parties may raise justifiable doubts as to their independence and impartiality. This form is filled in by the arbitrator before they are appointed. As mentioned above, in the case of party-appointed arbitrators, the form is filled in by the arbitrator after the party has made the appointment.

Once the arbitrator signs and submits to the Secretariat the confirmation form with the statement of independence and impartiality, the counsel informs all parties of the appointment, with a copy for the attention of the tribunal, finalizing the appointment proceedings.

G. Conclusion

The appointment procedure at the SCC is quite straightforward and efficient. On average, the constitution of a tribunal takes no more than three months after registration of a request for arbitration until communication of the Board's decision to the parties. When the SCC acts as appointing authority, the appointment procedure is even faster; normally less than one month after receiving the request for appointment.

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ⁱ See Article 14 of the SCC Rules.

ⁱⁱ See KAREN DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 38 (2012).

ⁱⁱⁱ Of the international parties appearing before the SCC in 2012, Russian parties continued to be the second most frequent nationality represented at the SCC, followed by Chinese, Norwegian, German and Finnish parties. For more information on SCC statistics visit <http://www.sccinstitute.com/hem-3/statistik-2.aspx>.

^{iv} See Article 13(3) of the SCC Rules.

^v See Article 13(2) of the SCC Rules.

^{vi} Article 2 of the SCC Rules provides that "A Request for Arbitration shall include: (vi) if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Claimant."

^{vii} Article 5 of the SCC Rules provides that "The Answer shall include: (iv) comments on the number of arbitrators and the seat of arbitration; and (v) if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Respondent."

^{viii} See Article 9 of the SCC Rules.