

Selection of Arbitrators in International Commercial Arbitration

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Introduction

This article revisits the fundamental right¹ of the parties to nominate or appoint arbitrators of their choice. It examines the selection process and practical considerations in choosing a sole arbitrator and a panel of arbitrators, dealing with party appointed arbitrators and the chairman.² This is examined from the perspective of ad hoc and institutional arbitrations. The default provisions of various national arbitration laws are examined. In discussing institutional arbitration, the arbitration rules of various institutions provide necessary insight. Arbitral practice and relevant court decisions are also examined.

It is universally acknowledged that, “the quality of arbitration proceeding depends to a large extent on the quality and skill of the arbitrators chosen.”³ The parties have chosen to opt out of litigation where a judge is appointed for them, into arbitration where they choose their own judge. They are the constructors of their dispute resolution mechanism and are therefore presumed to know who best should resolve their dispute. Thus the importance of the selection and appointment of the right arbitrator for the dispute cannot be over emphasized.⁴

The distinguishing feature of this article is the fact that it actually discusses and raises questions on the practice of interviewing prospective arbitrators. It also discusses the various issues to consider in exercising this fundamental right and its necessity in the first place, to assist parties and their advisers in the drafting of the appointment agreement; embarking on the selection process within the framework of acceptable international arbitral practice, standards and law. Arbitrator selection and appointment are squarely within the control and power of the parties. These are acts within the first frame of the arbitration process.⁵

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¹ *Siemens AG & BKMI Industrienlagen GmbH v Dutco Construction Co.*, Cass. Civ. 7 Jan 1992; XVIII YBCA 140 (1993) decision of the French Cour de Cassation to the effect that the fundamental right of the parties to appoint arbitrators exemplifies equal treatment of the parties which is a public policy issue. See Jean-Louis Delvolle, “Multipartism: The *Dutco* Decision of the French Cour de Cassation”, 9(2) *Arb Int* 197 (1993)

² See Grigera Naon, “Factors to Consider in Choosing an Efficient Arbitrator”, *ICCA Congress Series* no.9, 286 at 305, where he noted the importance of a preliminary interview in the selection process. See www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp Last visited 14 December 2004.

³ J. D. M. Lew, L. A. Mistelis & S. M. Kroll, *Comparative International Commercial Arbitration*, at 232 (Kluwer, 2003) A good example of this are the Libyan Oil Concession awards emanating from practically very similar facts and concession agreement but with each sole arbitrator reaching different conclusions. See *BP v Libya*, 53 ILR 300 (1979); *Texaco v Libya*, 53 ILR 420 (1979); and *Liamco v Libya*, 62 ILR 140 (1982)

⁴ Wang Sheng Chang, “Formation of the Arbitral Tribunal,” 17 *Arb Int* 401 (2001)

⁵ See the graphic construction of the various stages in arbitration in Thomas H. Webster, “Selection of Arbitrators in a Nutshell,” 19(3) *JIA* 261 at 262 (2002).

This article is based on certain assumptions – One, that the intended arbitration is over an international dispute.⁶ This would in effect delimit the jurisdiction of the article.⁷ Two, that the arbitrators, whether sole, chairman or party appointed are expected to be neutral, adhering to the same standards of impartiality, independence and disclosure requirements.⁸ Third, the office of the umpire does not apply so that the arbitrators shall not thereby act as advocates of the parties at any time.⁹ The issues raised in this article regarding the selection and appointment of arbitrators equally apply whether the international dispute is strictly of a commercial, investment or public law nature (where a State, or a State-controlled entity is involved) However, it must be conceded that certain issues (for example, the nationality of the arbitrators) assume more significance depending on the nature of the parties involved.¹⁰

Necessity of Selection of Arbitrators

One of the major differences between consensual arbitration and litigation (which is also seen as one of its main advantages) is the fact that the parties can and do select or choose their own dispute-resolver or judge called an ‘arbitrator’. In litigation, the parties accept whichever judge is assigned their case. In arbitration, the parties get to choose. Two prominent international arbitrators, writing on this point, have asserted that, “Once a decision to refer a dispute to arbitration has been made, nothing is more important than choosing the right arbitral tribunal. It is a choice which is important not only for the parties to the particular dispute, but also for the reputation and standing of the arbitral process itself.”¹¹ Thus to make an informed choice, the party has certain clear attributes it must look for in the prospective arbitrator. This would of necessity, depend on what the party hopes to achieve from the arbitration.¹² This of course, would differ depending on whether the party is a claimant or respondent, solvent or insolvent, amongst others.

In recognition of the primacy of this empowerment in arbitration, most arbitration laws following the New York Convention¹³ and the Model Law,¹⁴ would set aside an award where, “The composition of the arbitral tribunal or the arbitral procedure was

⁶ See Article 1(3) Model Law for the various interpretations of when a commercial transaction is international thus making any resultant dispute international as well.

⁷ In practice most of the issues considered in this article will equally be relevant in the selection of arbitrators in domestic arbitration. International arbitration may however, raise more complex issues for consideration.

⁸ The practice in some jurisdictions, notably in the USA, where in domestic arbitration, the party appointed arbitrator is not expected to be neutral, except where the parties so agree does not apply in international arbitration, especially in light of the new IBA Conflict Rules discussed below.

⁹ In some jurisdictions, notably in England and Hong Kong, it is permissible for the parties to appoint two arbitrators who would conduct the hearings. Where they fail to agree on a decision, they then appoint an umpire to whom the party-appointed arbitrators present, as advocates, the case of the appointing parties. The umpire then makes a decision. S. 21 English Arbitration Act 1996 (EAA) and S. 10 Hong Kong Arbitration Ordinance, 1997 (HKAO)

¹⁰ See article 6(4) UNCITRAL Arbitration Rules 1976 (UNCITRAL Rules); Article 38 ICSID Convention

¹¹ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, at 190 (3rd ed. Sweet & Maxwell, 1999)

¹² See Toby Landau, “Composition and Establishment of the Tribunal,” 9 *Am. Rev. Int. Arb.* 45 (1998)

¹³ United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards done at New York, 10 June 1958, vol. 330 UN Treaty Series, p. 38 No. 4739 (1959)

¹⁴ UNCITRAL Model Law on International Commercial Arbitration, adopted 21 June 1985 UN Doc. A/40/17 Annex 1

not in accordance with the agreement of the parties - -".¹⁵ This therefore makes it of utmost importance that the arbitral tribunal is properly composed. The proper composition of the arbitral tribunal is a matter the parties can waive during the arbitral proceeding. This the parties do, where (during the arbitral proceeding) they fail to raise the issue or contest it or reserve their right to raise it at the enforcement or setting aside stage.¹⁶ This waiver requirement ensures that parties do not (deliberately or otherwise) sleep on their rights and freely frustrate the whole arbitral process where the award goes against them.

The question of proper composition of the tribunal is also a jurisdictional one, which the arbitral tribunal is empowered by practically all arbitration laws to decide.¹⁷ In Brazil, where arbitrators enjoy partial immunity, nullifying the award on this ground is couched in terms of the award being made by, "a person who could not be an arbitrator." This may raise issues of personal liability against the arbitrator, especially where s/he had committed a fraudulent misrepresentation unknown to the parties during the proceeding and only discovered thereafter.¹⁸

Parties embark on arbitration to resolve a dispute or difference arising between them. They commence the proceedings to get a recognizable and enforceable award (barring settlement). Thus anything that would deprive them of obtaining a valid award at the end of the procedure is anathema and must be avoided. The composition (i.e., The selection and appointment) of the tribunal must therefore be in accordance with the agreement of the parties.

Parties Agreement

As a prerequisite of achieving this, the parties must agree on the composition of the arbitral tribunal. There are several recognized ways by which the parties can 'agree' on such composition. The parties can exercise this right by expressly agreeing on the appointment procedure in their arbitration agreement. They can achieve this by agreeing on the number of arbitrators and how they would be appointed.¹⁹ All arbitration laws recognize this right of the parties.²⁰ The parties can nominate a third party to make the appointment for and on their behalf. Appointments made thereto are validly made 'by the parties'. This is because such appointments are made under the 'seal' of the parties.

Thus the parties can validly nominate an appointing authority to make the necessary appointments. They can expressly choose to use a List procedure for the

¹⁵ Article 24 (2) (iv) Model Law; Article V. 1 (d) New York Convention, 1958 (NYC); Article 52 (1) (a) ICSID Convention (requires annulment of the award); Article 1704 (2) (f) Belgian Judicial Code, 1998; Article 32 (II) Arbitration Law Brazil, 1996; Article 58 (3) Arbitration Law of PR China;

¹⁶ See Article 4, Model Law

¹⁷ This is pursuant to the principle of competence-competence.

¹⁸ See Articles 32 (II) and 17 under which the arbitrator would be liable for a criminal offence.

¹⁹ See generally on various appointment methods, Orkun Akseli, "Appointment of Arbitrators as Specified in the Agreement to Arbitrate," 20(3) *JIA* 247 (2003); Douglas Earl McLaren, "Party-Appointed vs List-Appointed Arbitrators: A Comparison," 20(3) *JIA* 233 (2003)

²⁰ See for example, Articles 10 (1) & 11 (2) Model Law; Article 743 NCCCP, Argentina 1981; Ss 15 (1) & 16 (1) EAA; Ss. 10 (1) & 11 (2) Arbitration and Conciliation Act, India 1996; Article 37 (2) (a) ICSID Convention

appointment.²¹ The parties can, in a Submission agreement, directly appoint the person(s) to act as arbitrator(s).²² These all apply in ad hoc arbitrations. Where the parties adopt institutional arbitration rules, without making any other express selection or appointment provision, they choose the selection and appointment procedure of the relevant institution as published in their rules (and unpublished internal rules). This is simply because the arbitration rules of the particular institution becomes an extension of the provisions of the arbitration agreement between the parties.²³ By choosing the relevant rules in their arbitration agreement, the parties incorporate such rules into the arbitration agreement. The express provisions of the arbitration agreement would, to the extent of any inconsistency with a non-mandatory provision of the rules, override and be applied.

Some arbitration institution rules provide that the parties may nominate (or designate) arbitrators for its appointment. Such institutions are not bound to appoint the arbitrators nominated by the parties.²⁴ This eventuality complies with parties appointing the arbitrators. This is because the parties, in their arbitration agreement (including the rules of the institution) have provided this protective caveat.

A necessary question that arises is determining at what point the institution's arbitration rules become part and parcel of the arbitration agreement. If it is at the time of conclusion of the arbitration agreement, then the applicable rules would be the rules in force at the time of the conclusion of the arbitration agreement. However, arbitration institutions provide that the effective rules will be those in force when the dispute arises.²⁵ This would in effect mean that the arbitration rules do not practically become part of the arbitration agreement until the dispute arises and the arbitration agreement becomes effective. This therefore implies that the applicable rules would be those in force at the date the arbitration agreement becomes effective.

Another related point is the fact that the legal relationship between the parties and the arbitration institution does not come into existence until the dispute has arisen and the arbitration institution, having being notified of its choice, accepts to administer the dispute resolution process under its rules. It is at this point, when the offer by the parties to the arbitration institution to administer the arbitration has been accepted by the institution, that the arbitration rules of the institution can actually become effective as part of the arbitration agreement.²⁶ As a matter of practical relevance, the arbitration rules of the chosen institution become relevant only *after* the institution has accepted to administer the arbitration. The relevant rules would be those operative at that relevant time.

This throws up another question: whether the parties can change the institution named in the arbitration agreement *before* the institution is notified of its nomination. The

²¹ See article 6. 1 (a) UNCITRAL Rules

²² See Article 1448 NCCP, France 1981; Article 10 Arbitration Law, Brazil;

²³ The LCIA Recommended clause concludes its first part as follows, "... which Rules are deemed to be incorporated by reference into this clause."

²⁴ See Article 7, LCIA Rules and Article 5 Swiss Rules, 2004.

²⁵ The Model Arbitration Clause of the Swiss Rules of International Arbitration 2004 provides in part, "... shall be resolved in accordance with the Swiss Rules ... in force on the date when the Notice of Arbitration is submitted in accordance with these Rules." See also the Introduction to the LCIA Rules

²⁶ A number of commentator take the view that the institution makes the offer which is accepted by the parties contrary to the views argued in this article and further developed elsewhere.

answer would be a 'Yes'. The parties can amend their agreement so long as they mutually agree. One party cannot however, unilaterally amend the arbitration agreement. Even though a third party, the arbitration institution, has been mentioned in the arbitration agreement, it only becomes involved in the arbitration agreement when it has knowledge of its appointment and accepts the appointment. The parties can amend the arbitration agreement and choose a different arbitration institution (or even decide to have an ad hoc arbitration) when the dispute arises before the named arbitration institution is notified and accepts to act. Likewise, the named arbitration institution can upon notification, decline to accept the invitation to administer the arbitration. This non-acceptance does not nullify the arbitration agreement (to which it is not a party even though mentioned in it). The parties can contest the arbitration institutions decision in a national court or appoint another institution in its place. They will only be required to amend the arbitration agreement to accommodate the newly appointed institution.²⁷

Party Selection

Thus having established the various ways parties can agree on the appointment of arbitrators, we now turn to the selection requirements. We start by posing the question: 'Can parties select?' To answer this question, we must look at various arbitration laws, rules and commentaries. Parties can and do select the arbitrators. Tore Wiwen-Nilsson sees the selection of an arbitrator as, "the process by which an individual is found suitable to become an arbitrator."²⁸ The selection process, of necessity, precedes the nomination, confirmation and appointment of the arbitrator(s).

Sole arbitrators

Where the arbitration agreement requires a sole arbitrator to be appointed, it may provide the method or means of appointment. In Submission agreements, the particular arbitrator to act may be appointed and named in the arbitration agreement. It is submitted that since Submission agreements are concluded *after* the dispute has arisen, the parties would contact and get the acceptance of the proposed sole arbitrator to act before naming him in the Submission agreement. This being the case, the sole arbitrator so named in the Submission agreement, would have consented to so act.²⁹

It is an acknowledged fact that most arbitration agreements are pre-dispute and do not contain the name(s) of the arbitrator(s).³⁰ The arbitration agreement may however, indicate the number of arbitrators and how they would be appointed. In ad hoc proceedings, the arbitration agreement may nominate an appointing authority to make the appointment of the sole arbitrator. The arbitration agreement may also give

²⁷ This situation would not fall under Article II.3 NYC because the arbitration agreement is always capable of being performed as long as the parties are willing to give it effect. The decline of a named arbitration institution to act should not make the agreement, "null and void, inoperative or incapable of being performed".

²⁸ In a Paper delivered at the British Institute of International & Comparative Law (BIICL) Arbitration Practitioner Workshop series in London (17/02/2004) titled, "The Selection, Status and Immunity of Arbitrators."

²⁹ This is very important since in Article 1448 para.3, NCCP France, a submission agreement becomes null and void, "if an arbitrator appointed therein fails to accept his mission."

³⁰ See Emilia Onyema, "Drafting an Effective Arbitration Agreement in International Commercial Contracts," 7 *VJ* 277 at 283 (2003);

guidelines on relevant qualifications, skills, expertise, or otherwise required of the appointee.

Arbitration laws make default provisions for the appointment of arbitrators to apply where the parties have not made any provisions. The UNCITRAL Rules of Arbitration in article 6 provides that either party may propose, “the names of one or more persons, one of whom would serve as the sole arbitrator.” The UNCITRAL system envisages the presence of an appointing authority to function, especially where the parties cannot agree on an appointee. Therefore, UNCITRAL Rules provide that if the parties have not nominated an appointing authority then they can ask the Secretary General of the Permanent Court of Arbitration at The Hague to designate an appointing authority for them.

Where the parties entrust the appointment of the arbitrator(s) to an appointing authority, they exercise their appointment rights and powers indirectly. The law bestows the appointing power on the parties who in turn confer or delegate such power on the appointing authority to exercise on their behalf. The appointing authority would be acting as an agent of a disclosed principal (the parties) in making the appointments. It does not act in its name but in the name of the parties. The appointing authority’s mandate is to appoint the arbitrators. Its mandate terminates once it has made the appointments.³¹ The parties and the appointees then agree terms of the appointment. Thus the appointing authority would not incur any personal liabilities either to the parties nor the arbitrators. However under Section 2GN of Part 1A of the Hong Kong Ordinance, an appointing authority may incur liabilities where it performs (or omits to perform) an act dishonestly.³²

Where there is no appointing authority, the parties can adopt the List system in making the appointment. Article 6(3) of the UNCITRAL Rules gives a description of the List system to be adopted by an appointing authority. The only difference when there is no appointing authority is that the List is exchanged directly between the parties (or more appropriately between their lawyers). In the List procedure, the parties exchange either simultaneously or concurrently, a list containing different names ranked in order of preference. Where there is an appointing authority, it would send out an identical list to the parties. The parties then choose the proposed appointees in order of preference. Where an appointing authority is involved, the parties will delete the names they object to and number the other names in order of preference. They would then return the amended list to the appointing authority. The appointing authority would appoint one of the arbitrators from the ranked lists. There may usually be some recurring names on both lists that the appointing authority may select, depending on the ranking of the names on the lists. It is quite possible where one party is uncooperative for the diligent party to appoint the sole arbitrator. This appointment will be binding on the other party.³³

³¹ This mandate can be revived when a challenge (and replacement) to the appointee(s) is made. See Articles 12 & 13 UNCITRAL Rules

³² This Part of the HKAO applies to both domestic and international arbitration in HK

³³ See S. 9 (b) of Part II HKAO (applicable only to domestic arbitration); S. 17 (1) EAA

Panel of Three Arbitrators

In a panel of three or more arbitrators, the laws make subtle differences regarding appointment of arbitrators. Generally, it is acknowledged that in a panel of uneven number of arbitrators, each party appoints one arbitrator and the two party-appointed arbitrators would jointly appoint the third arbitrator to act as chairman.³⁴ Some laws require the parties to appoint the chairman while some require the two party appointed arbitrators to make the appointment. In practice, it is admitted that generally, the party appointed arbitrators consult the appointing parties on the appointment of the chairman.

This becomes an issue because in international arbitration the party-appointed arbitrators do not act and are not perceived to act as agents or representatives of the appointing parties. Why then refer to the appointing party? The issue here might be the juggling of two very important principles of international arbitration: the fundamental right of the parties to appoint the arbitrators against the independence and neutrality of the party-appointed arbitrators. This does not seem to currently present insurmountable problems in international arbitral practice. However, where the party-appointed arbitrator believes that its appointing party is being unreasonable in its conditions or rejection of candidates nominated for appointment as chairman, the options open to him will be dependent on the provisions of such applicable laws.

In this scenario, the provisions of the relevant law become important. Where the law does not require an input from the parties, then the party-appointed arbitrator can disregard consulting the appointing party (or its opinion). However, where the law provides or alludes to the appointing party's ability or right to make inputs or make the appointment, then the party-appointed arbitrator cannot disregard the appointing party's input (or opinion). This became a real issue where in *Tackaberry v Phaidon Navegacion S.A.*,³⁵ the party-appointed arbitrators agreed fees with the umpire nominated by them (the nomination was with the approval of the parties) which the parties refused to pay. The judge held that by authorizing the party-appointed arbitrators to appoint the umpire (in this case) the parties by implication authorized them to agree his fees to which they are bound and should pay.

Where the parties entrust the appointment of the chairman to a third party, for example an appointing authority,³⁶ the parties appoint the two party-appointed arbitrators while the appointing authority appoints the chairman on behalf of the parties. The appointing authority can also be empowered to appoint all members of the arbitral tribunal on behalf of the parties. Whatever the final appointment procedure, the appointment of the arbitrators is deemed made by the parties, directly or indirectly.

Institutional arbitration

The dynamics of the arbitration relationships change immediately upon the introduction of an active third party participant, the arbitration institution. The

³⁴ Article 7.1. UNCITRAL Rules. The rules also provide for the appointing authority to appoint the second party appointed arbitrator where the other party is in default to facilitate the appointment of the chairman by the two party-appointed arbitrators.

³⁵ [1992] *ADRLJ* 112

³⁶ Article 31 Arbitration Law, PRC

arbitration institution does not just act as an appointing authority as we have seen above. It does much more than that. Generally the depth of involvement of arbitration institutions in arbitrations they administer vary. Some do little more than appointing authorities by determining and paying the fees and expenses of the arbitrators and providing administrative assistance.³⁷ These institutions mostly administer their arbitrations under the UNCITRAL Arbitration Rules of 1976, which in some cases have been very slightly modified.³⁸ A majority of other arbitration institutions have adopted their own rules (though some are heavily influenced by the UNCITRAL Arbitration Rules). These rules are modified from time to time as the arbitration terrain changes.

The first major difference in this regard, is the fact that arbitration institution rules provide for party ‘nomination’ of arbitrators who would then be appointed by the institution in its name and on its terms. These terms would include any requirements contained in the arbitration agreement. Thus, it is the arbitration institution mandated by the arbitration agreement that appoints the arbitrators. Since the arbitration institution rules have been adopted as part of the parties’ arbitration agreement, the institution acts under instruction from the parties. Thus, unlike the appointing authority scenario in ad hoc arbitration, the arbitration institution makes the appointment, not on behalf of the parties, but for itself. The parties in their arbitration agreement have ‘contracted’ the arbitration institution to appoint the arbitrators. Thus even where the parties nominate arbitrators for appointment by the institution, the institution has the ultimate responsibility of appointing arbitrators in accordance with its rules. This in most cases would amount to the appointment of arbitrators assessed by the institution as being impartial, independent and suitable for the particular dispute. It can therefore be argued that the ultimate responsibility for the appointment of impartial, independent and suitable arbitrators, in accordance with its published rules, lie with the arbitration institutions.³⁹

Some arbitration institutions appoint the sole arbitrator and the chairman in a panel of arbitrators.⁴⁰ Some rules allow the parties to make recommendations from which the institution would choose. However, the rules provide that institutions are not bound to appoint the arbitrator nominated by the parties. This provision is further proof that the institutions appoint arbitrators in their own name. Whether the arbitration institution appoints the arbitrators independently or on recommendation or by nomination of the parties, the appointment is still traceable to the parties pursuant to the provisions of their arbitration agreement. The arbitration institution may act as another layer of insurance to ensure that the proper arbitrators are appointed.

³⁷ Examples include the AALCC Arbitration Centres in Cairo, Kuala Lumpur, Lagos; HKIAC

³⁸ An example is the Cairo Regional Centre for International Commercial Arbitration Rules.

³⁹ In the Australian case of *Road Rejuvenating & Repair Services v Mitchell*, 1 *ADRLJ* 46 (1992) where the arbitrator was removed, the court observed that, “the arbitrator was appointed (by) the President of the Institute of Arbitrators. That body is not before me, but it should stand behind its appointed officers as I would expect the Institute itself to bear the cost of all the parties to this dispute.”

⁴⁰ See Article 5.5 LCIA Rules; Article 24 CIETAC Rules, 2000; Article 9 (3) ICC Rules 1998; Article 16 (4) (5) SCC Rules 1999

Selection Criteria

The criteria parties would take into consideration in selecting arbitrators depend on what the goals of the selecting party are with regards to its participation in the arbitration. Where the party does not have any interests or incentives in pursuing the arbitration (typically assumed to be the position of most respondents) it might decide not to cooperate with the other party and frustrate the proceedings as much as is possible. It might refuse or fail to meet appointment deadlines as provided in the laws/rules or even refuse to make any appointments.⁴¹ It might delay the proceedings by repeatedly asking for extension of time very close to agreed deadlines. The arbitral tribunal would have to indulge such dilatory tactics (for some time) so as not to jeopardize its award for failing to give the party an opportunity to present its case and answer to that of its opponent.⁴² The tribunal would carefully document all such dilatory actions in its award to show that the party was actually given the opportunity to participate fully in the proceedings. In this case, the parties would need to appoint arbitrators who are flexible but firm enough to appreciate and provide for these dilatory tactics.

A party might seek to wear the other party out by a long drawn out arbitral process. This is especially true where the other party's financial position is suspected of being unstable or on shaky grounds. The arbitrator must be able to identify this and deal with it appropriately. This calls for experience on the part of the sole arbitrator or chairman of the arbitral tribunal. The experience gained from past involvement in international arbitrations would assist the arbitrator in identifying these measures and taking necessary steps within applicable rules and laws.

In a panel of three arbitrators, the arbitrators are a team and so each arbitrator must be a team player. He must be capable of working with the other members of the tribunal, especially where they are of different nationalities and legal backgrounds with the variable legal and socio-cultural differences. It is not enough (and may even be unnecessary) for the party-appointed arbitrators to each seek to ally with the chairman. Most rules require an award by a majority and not necessarily one in which the chairman concurred. It is important to select a team player with good marketing skills. This of course depends on the appointing party's good faith in participating in the arbitration. It is submitted that the good (or bad) faith of a party to an international arbitration should be an inconsequential and irrelevant point once it has appointed its arbitrator. This is for the simple reason that an international arbitrator once appointed (whether by a party or otherwise) does not act as a representative or agent of the appointing party. He is (or at least ought to be) completely neutral, owing duties to all parties involved in the dispute.

The professional qualification or expertise of the arbitrator would be dependent on the requirements of the parties (as provided in the arbitration agreement) and on the exegesis of the dispute. The need for the arbitrator to equally be an expert in the relevant field may be unnecessary. This is because international arbitral tribunals have access to expert witnesses. However, the nature of the dispute might require persons with technical knowledge in the requisite field. In this case, a sole arbitrator with

⁴¹ Libya in the Oil Concession cases referred to above refused to appoint arbitrators or participate in the arbitration proceedings.

⁴² See Article V. 1 (b) NYC; Article 34 (2) (a) (ii) Model Law; S. 33 (1) EAA

expertise in the relevant field and international arbitration experience might meet the needs of the parties. It is however, suggested that in such technically complex disputes, a panel of arbitrators may be most suitable. This would again depend on proportionality of value and complexity of the dispute. However, in a panel of arbitrators, it may suffice if the chairman is a lawyer with arbitral expertise while the party appointees are both experts in the relevant field.⁴³ This is especially useful where the issues are open to different technical interpretations. The additional requirement for each of the party-appointed arbitrators would then be their abilities of persuasion and team spirit. It must be mentioned that young aspiring arbitrators can be very useful in panels of arbitrators, especially in disputes in their particular areas of specialization. They would bring their expertise, enthusiasm and fresh ideas to the tribunal. They would usually have the time to give to the proceedings.

The arbitrator must be available. It is not cost effective and can be quite frustrating to appoint arbitrators who just cannot devote the time needed to the proceedings, regardless of how experienced they are perceived to be. This is especially true of the very big names in international arbitration who, possibly may be constrained to take on more disputes than they can effectively and efficiently deal with. To achieve this and also help arbitrators determine if they have the time, the parties (or more particularly their lawyers) should have a reasonably good idea of how much time the whole proceeding from the filing of case statements to the close of hearings would take. Such projections would assist arbitrators when approached in determining their availability.

There is hardly any international arbitration proceeding that comes as a surprise to any party these days. This is for the simple reason that most arbitration agreements are pre-dispute; the parties are fully aware when the breakdown in their relationship occurs; parties seem to increasingly try settlement (even if it is just negotiation) before commencing arbitration proceedings. The fact that there is an arbitration agreement between the parties puts them on notice once a dispute that appears to defy settlement arises. Thus, parties (their lawyers) can be expected to reasonably have an indication of the time scale for the proceeding. This would greatly assist prospective arbitrators in declining or accepting offers to arbitrate disputes from parties.

The arbitrator must be reasonably familiar with the language(s) of the arbitration proceedings. Each language has connotations and anecdotes, the understanding of which comes with familiarity. This would help the arbitrator understand the dispute and the position of the parties. It of course is cost effective, as the additional costs (as per additional expenses and billable time) of interpretation would be avoided.

Nationality of parties and arbitrators is a prominent factor in international arbitration.⁴⁴ A major factor of its internationality is the fact that in most cases, the parties have different nationalities. The ICC Court takes the nationality of the parties into consideration in appointing sole arbitrators or chairmen of panel of arbitrators.⁴⁵

⁴³ See the mandatory requirements of article 13 Arbitration Law PRC; Wendy Miles, "Practical Issues for Appointment of Arbitrators: Lawyer vs Non-Lawyer and Sole Arbitrator vs Panel of Three (or More)," 20(3) *JIA* 219 (2003)

⁴⁴ See *Andersen Consulting v Arthur Andersen & Andersen Worldwide*, 10(4) *Am. Rev. Int. Arb.* 437 (1999)

⁴⁵ Article 9.5 ICC Rules

This is particularly important in arbitrations involving State parties.⁴⁶ In nationality-sensitive disputes, e.g. foreign direct investment disputes, appointing nationals of other States, not implicated in the dispute, may increase the confidence of the parties in the process and its outcome.

Choosing the chairman or presiding arbitrator raises some additional issues. The parties may make contributions to the person to be appointed.⁴⁷ In practice, the parties are consulted either through the party-appointed arbitrators or directly. This all depends on who nominates or appoints the presiding arbitrator. The parties may in addition consider, the nominees managerial abilities. This would include his ability to manage fellow arbitrators, parties and their lawyers, administrative personnel, the dispute and the procedure.⁴⁸

Selection Process

Interviewing prospective arbitrators is practically becoming a principle of customary international arbitral practice. The parties and/or their lawyers conduct such interviews. What happens in these interviews? To answer this question, we must start from the motivating factors for such interview in the first place. We have given a very broad and general description of attributes parties need to look out for in prospective arbitrators for appointment. It is to be safely assumed that most of these attributes are confirmed satisfactorily present before prospective arbitrators are short-listed for the interview stage. These might include attributes such as language skill, expertise, past arbitration experience and personality. This narrows down the number of interviewees.

It would be expected that at the interview stage, the availability, chemistry, relationships (for independence of the candidates) and any other particular issues maybe reviewed.⁴⁹ Lew, Mistelis and Kroll give a further insight in stating that, “It is essential that arbitrators remember they are being paid for their services which include not only professional skill and judgment, but also independence and impartiality, efficiency and expedition. By meeting and talking to potential arbitrators before nomination or appointment parties have an opportunity to appraise the arbitrators approach to these issues.”⁵⁰

However, views apparently differ. Professor Martin Hunter speaking for himself says, “Where I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.”⁵¹ This seems to be the standard applied by appointors of arbitrators.⁵² Doak Bishop and Lucy Reed see this as, “a

⁴⁶ See Article 39 ICSID Convention and Rule 1.3 ICSID Arbitration Rules

⁴⁷ Article 6.4. AAA IA Rules requires the administrator to invite consultations from the parties in making such appointments.

⁴⁸ See Thomas Webster, *op. cit.*

⁴⁹ See Article 5.1 IBA Rules of Ethics for International Arbitrators

⁵⁰ Lew, Mistelis & Kroll, at para.10-31

⁵¹ Martin Hunter, “Ethics of the International Arbitrator,” 53 *Arb* 219 at 223 (1987)

⁵² Doak Bishop & Lucy Reed, “Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration,” 14 (4) *Arb Int* 395 (1998) where they said, “It is also a truism that a party will strive to select an arbitrator who has some inclination or

natural and unexceptional aspect of the party appointment system in international arbitration.”⁵³ This implies there is a relationship between predisposition and appearance of bias. So, what does it mean to be ‘predisposed’? Black’s Law Dictionary defines disposition with respect to a mental state as, “an attitude, prevailing tendency or inclination.”⁵⁴ Thus predisposition may mean a focus on the arbitrator’s state of mind (which is inclined towards the appointing party) before he enters into the dispute. The natural follow on question becomes, is it possible for an arbitrator to be ‘predisposed’ and yet not be positively biased such as to raise a ‘justifiable doubt’⁵⁵ in the ‘eyes of the (other) party’?⁵⁶ Opinions on this question apparently differ. No answer is proffered in this article. It therefore requires further investigation and empirical research.⁵⁷

The ICC court does not disclose the criteria it adopts in selecting arbitrators. It has been noted that when the ICC has to appoint arbitrators, “the Court asks one of the 60 National Committees of the ICC to propose an arbitrator.”⁵⁸ The Court takes the provisions of its rules into account in nominating the National Committee that would propose the arbitrator for appointment.⁵⁹ However, the very process of selecting one arbitrator above others for appointment is not disclosed. It must be mentioned that all institutions take cognisance of the provisions of their rules, the arbitration agreement and any peculiarities of the particular dispute in selecting arbitrators for appointment.

Arbitration commentators all generally agree on the need for very limited communication on the case itself between the interviewing parties and the prospective arbitrators.⁶⁰ Various codes of ethics also deal expressly with these matters. A description of the various methods adopted by arbitrators and parties is summarised, “Some arbitrators refuse to communicate *ex parte* with the parties beyond supplying certain relevant information such as their curriculum vitae, fees and availability. They do however seek from the parties information about the case so that they can determine conflict of interests, their own suitability and availability, ... Others agree to be interviewed and be informed about the case in greater detail as long as a transcript of the interview is made available to the other side and the co-arbitrators.”⁶¹

Rule 5 of the IBA Rules of Ethics require a prospective arbitrator to make ‘sufficient enquiries’ so that s/he can make informed decision regarding her/his impartiality, independence, disclosure, competence and availability. The arbitrator can also

predisposition to favour that party’s side of the case such as by sharing the appointing party’s legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party’s case.”

⁵³ Doak Bishop & Lucy Reed, *ibid* at 396

⁵⁴ Black’s Law Dictionary at 471 (6th ed. West Publ. 1990)

⁵⁵ The Model Law test under article 12

⁵⁶ The ICC subjective standard under article 7 (2) and General Standard 3 (a) of Part 1 of the Second Draft of the proposed IBA Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration, of August 22 2003

⁵⁷ Doak Bishop & Lucy Reed, *op. cit.* at 424, produced a list of matters to be discussed at such interviews and not be in breach of any rules, codes of ethics or arbitration practice.

⁵⁸ Christophe Imhoos, “The ICC Arbitral Process: Constituting the Arbitral Tribunal”, 2 (2) *ICC Bulletin* 3 at 5 (1991). There are currently national committees in 80 Countries <http://www.iccwbo.org/court/english/arbitration/introduction.asp> last visited 3 December 2004.

⁵⁹ See, Grigera Naon, *op. cit.* at 309

⁶⁰ The question of *ex parte* communications and/or discussions on the merits (to safeguard prejudging the case with implications for imputation of bias) seem to dominate issues of selection of arbitrators.

⁶¹ Lew, Mistelis & Kroll, at para.10-34

respond to questions from the parties aimed at determining her/his 'suitability and availability'. All such communication is dependent on the merits of the case not being discussed. This is irrespective of a transcript of the discussions being made available.⁶²

Appointment Procedures

Ad Hoc Arbitration

After the interviews of various prospective arbitrators, parties choose one to be appointed. In ad hoc arbitration, the nominee will simply be informed of his nomination. Once the nominee accepts, the appointment will be concluded and the other party notified of the names and details of the appointee. The other party would possibly go through the same process to appoint its arbitrator and give necessary notifications. The two party-appointed arbitrators would then meet to appoint the chairman.

In ad hoc arbitrations the relevance of the law of the seat of arbitration cannot be overemphasized. The non-mandatory provisions of the relevant law act as gap-fillers and make default provisions. These provisions would therefore apply in circumstances where the parties have not either made any provisions or provided otherwise. The parties cannot contract out of the mandatory provisions of the relevant law. This is regardless of the arbitration being ad hoc or institutional. The rationale being that the provisions of the arbitration agreement, to the extent that it conflicts with the mandatory provisions of the relevant law, would be invalid and have no legal effect. Thus since the rules of the relevant institution is part of the arbitration agreement, it shares this same fate with it.

In most jurisdictions, the provisions of arbitration laws regarding the constitution of the arbitral tribunal are not couched in mandatory terms. This is to accord recognition and acceptance of the principle of party autonomy. It also exemplifies the importance States attach to parties choosing their arbitrators. It must be acknowledged that most laws do not make provisions detailing how parties may select the arbitrators. The uniform thread is to provide for a default number of arbitrators and how the arbitral tribunal may be constituted. The Model Law in chapter III provides for the composition of the arbitral tribunal. It recognizes the primacy of the freedom of the parties to determine the number of arbitrators and the appointment procedure. Where the parties fail to make this determination, the tribunal would then be composed of three arbitrators.⁶³ Some laws make a default provision for a sole arbitrator;⁶⁴ some refer to an uneven number of arbitrators⁶⁵ while others refer the matter to a court to decide.⁶⁶

⁶² See also Rule 4.1 & 4.2 SIAC Code of Ethics for Arbitrators where arbitrators can only enquire as to the general nature of the case, names of the parties and expected time period for the proceeding, before accepting appointment.

⁶³ Article 10 Model Law; Article 1681 Judicial Code 1998, Belgium; Article 1034 (1) Arbitration Law 1998, Germany; Article 10 (2) Law 5338-1 of 1993, Russia

⁶⁴ See S. 15 (3) EAA; S. 10(2) Arbitration and Conciliation Act, India.

⁶⁵ See Article 30 Arbitration Law, PR China; Article 1026 (1) Arbitration Act, The Netherlands 1986; Article 1453 NCPC, France; S.10 (2) India; S. 15 (2) EAA

⁶⁶ See article 1026 (2) The Netherlands; Article 179 (2) PIL, Switzerland 1990; S.5 FAA, USA 1925

On procedure for composition of the arbitral tribunal, the default provisions of the laws also vary. The Model Law expects the parties to agree on the sole arbitrator, failing which the appointment will be made by the appointing authority (if any) or the court.⁶⁷ In a panel of arbitrators, “each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; - - -.”⁶⁸ This is a mandatory provision of the Model Law in recognition of the freedom of the parties to choose their arbitrators. The party-appointed arbitrators (acting for the parties) choose the presiding arbitrator.

At this stage the arbitral tribunal is not yet composed. The party appointees can therefore validly act for the appointing parties in constituting the tribunal.⁶⁹ The party appointee would be acting within its mandate if he consults with the appointing party or its counsel in the choice of candidate for the position of presiding arbitrator. The two party-appointed arbitrators would therefore jointly interview any candidates for the position. They would be acting in furtherance of their mandate and on behalf of their individual appointor. Once a choice is agreed upon and the appointment made, the arbitral tribunal would be constituted. The arbitral tribunal is constituted after the last arbitrator has accepted appointment.⁷⁰ It is at this point, that the party-appointed arbitrators and the presiding arbitrator become an arbitral tribunal fully independent and separate from the parties. The fact that the parties directly appointed some members of the arbitral tribunal becomes moot. The parties have directly and/or indirectly appointed the members of the arbitral tribunal.⁷¹

Institutional Arbitration

Arbitration institution rules make different provisions regarding this. The common thread is that the parties can agree on the appointment procedure. Under the ICC Rules where the parties have agreed an appointment procedure, they may nominate the sole arbitrator for confirmation by the Secretary General of the ICC.⁷² Under CIETAC, the parties may jointly authorize the Chairman of the Arbitration Commission to appoint a sole arbitrator.⁷³ The Rules of the Arbitration Court attached to the Hungarian Chamber of Commerce, requires the claimant to designate the sole arbitrator in its statement of claim and the respondent to accept such designation.⁷⁴ The LCIA appoints the sole arbitrator.⁷⁵

The rules make default provisions where the appointing procedure provided by the parties fail or is frustrated by one party, The ICC court will make the appointment⁷⁶;

⁶⁷ Article 11 (3) (b) Model Law; Article 1682, Belgium; Article 31, PRC

⁶⁸ Article 11 (3) (a) Model Law

⁶⁹ See Article 5.2 IBA Rules of Ethics

⁷⁰ Article 1452 NCCP France

⁷¹ Some laws provide for the parties or appointing authority or the court to appoint the presiding arbitrator. Regardless of who makes the appointment, the same result should be achieved.

⁷² Article 8 (3) ICC Rules; Under article 6.1 AAA IA Rules, the parties agree on the procedure for the appointment of the sole arbitrator; Article 2 (1) Cairo RCICA Rules also mandate the parties to nominate the sole arbitrator. Article 5 (2) Milan CNIA IA Rules provide for the parties to jointly designate the sole arbitrator.

⁷³ Article 25 CIETAC Rules

⁷⁴ Article 18 (6) Hungary CC Rules

⁷⁵ Article 5.4 LCIA Rules

⁷⁶ Article 8 (3) ICC Rules

the Chairman of the Arbitration Commission under CIETAC will appoint⁷⁷; the Arbitration Court of the Hungary Chamber of Commerce will make the default appointment.⁷⁸ In Milan, The Arbitral Council will appoint⁷⁹ while in Tunis the Center's Scientific Council will make the appointment.⁸⁰ The Administrator of the AAA will only make a default appointment if so requested by a party.⁸¹ The SCC Institute would appoint the sole arbitrator.⁸²

Some institutions reserve the right to confirm an appointee of the parties. This ensures the institution retains control over the quality of arbitrators sitting under its rules. It has implications for the reputation of the institutions but more importantly has contractual implications. The arbitration institution has contracted with the parties to appoint on their behalf arbitrators in accordance with its rules. The parties are given the opportunity of nominating arbitrators of their choice. However, the choice of the parties is subject to approval by the institution. The parties have contracted out the administration and management of the arbitration to the institution who then becomes contractually bound to the parties to comply with its own rules. Not even the parties can then turn around and nominate for appointment arbitrators who do not meet the basic requirements of the rules of the relevant institution.⁸³

An example of such control by institutions is article 7.1 LCIA Rules. It provides, "If the parties have agreed that any arbitrator is to be appointed by one or more of them or by a third person, that agreement shall be treated as an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator subject to his prior compliance with Article 5.3 (perquisites to be fulfilled). The LCIA Court may refuse to appoint any such nominee if it determines that he is not suitable or independent or impartial."⁸⁴

Other rules control the quality of party-appointed arbitrators by providing and maintaining a List or Panel of Arbitrators from which the parties may choose.⁸⁵

There is therefore a practical difference between the parties 'appointing' the arbitrators and 'nominating' arbitrators for appointment by institutions.⁸⁶ The appointment of the party-nominated arbitrator must be confirmed by the institution before it becomes effective.⁸⁷ This does not infringe on party autonomy. To the contrary it depicts party autonomy in all its glory. The Parties by their arbitration agreement have appointed the arbitration institution to administer the dispute in accordance with its rules. These rules, the parties adopt as part and parcel of their arbitration agreement. In honour of this, the rules allow the parties to make

⁷⁷ Article 25 para.2 CIETAC Rules

⁷⁸ Article 18 (7) HCCI Rules

⁷⁹ Article 5.2 CNIA Milan Rules

⁸⁰ Article 2.2 TCCA Rules

⁸¹ Article 6.3 AAA IA Rules

⁸² Article 16 (5) SCC Rules

⁸³ Such an action would amount to a breach of the terms of the arbitration agreement.

⁸⁴ See also Article 9 (2) ICC Rules; Article 5. 3 (c) Milan CNIA Rules

⁸⁵ Article 10 CIETAC Rules; Articles 12 – 16 ICSID Convention

⁸⁶ Article 5 (1) Swiss Rules prefer the word 'designation' which are still subject to confirmation by the relevant Chambers.

⁸⁷ The Swiss Rules expressly provide that the appointment becomes effective when confirmed by the relevant Chambers. See Article 5 (1)

nominations, thus participating in performing one of the major functions they contracted out to the institution.

It can therefore be concluded that in institutional arbitration, the particular institution retains ultimate control over who is appointed arbitrator, irrespective of how predisposed and not overtly biased a party nominee may be. This is further confirmed by the fact that in challenge proceedings, the rules provide that the arbitration institution's decision is final and even in some cases without reasons given.⁸⁸ The above sampling of rules show that in institutional arbitration, party autonomy prevails in the selection and appointment of arbitrators. The fundamental right of parties to appoint arbitrators is balanced with the need to prevent the frustration of the arbitration process by the inactivity or lack of cooperation of one party.

UNCITRAL in its 'Notes on Organizing Arbitral Proceedings' does not give any guidance on the different modes that can be employed in the selection of arbitrators. It was designed to, "assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful."⁸⁹ The very important question of *how* to select arbitrators ought to be one of those timed decisions. The Notes deal with practical issues that would make for smoother arbitral proceedings. UNCITRAL may need to consider looking at the proposition of drafting guidelines on the selection process adopted for international arbitrators itself. The IBA Rules of Ethics for International Arbitrators, as other rules on ethics, deals with questions of impartiality, independence and disclosure (and related issues) by arbitrators. It does not deal directly with questions regarding the selection process of arbitrators. There is an obvious gap in this area that needs to be filled.

Conclusion

It has been shown that parties (and their lawyers) involved in international arbitration, increasingly interview prospective arbitrators as part of the selection process. There is no uniform practice in this area and arbitration laws, rules or codes do not directly regulate such matters. Arbitration laws and rules give the parties the freedom of deciding the number and appointment procedure of the arbitrators. The procedures parties adopt in effecting such appointment (or nomination) are not mentioned. This it is suggested may be to keep flexible the fundamental right of the parties to choose their arbitrators, directly or indirectly. Parties choosing arbitrators, is an internationally recognized right and power of the parties. Arbitration laws and rules make default provisions regulating this issue where parties have failed to make any express provisions. All arbitration laws and rules make detailed default provisions for the appointment of arbitrators.

⁸⁸ See the various rules. It is quite clear that challenge decisions of arbitration institutions can be challenged before the relevant national court. This is usually the court of the seat of arbitration. An example is *AT&T & Lucent Technologies Inc. v Saudi Cable Co.* The Times, 23 May (2000) the challenge had been decided by the ICC Court. In the USA the courts have clearly stated that they would defer to the decision of the arbitral institution in such matters. See *York Hannover Holding A.G. v AAA & ors* XX YBCA 856 (1995)

⁸⁹ Introduction to the Notes available at www.uncitral.org

An international standard for the selection process of arbitrators is yet to be found. It is suggested that some empirical research into how international arbitrators are currently selected by parties, appointing authorities, arbitration institutions and courts, would assist in the formulation of any guidelines on this practice. Such a guideline is necessary to maintain and enhance the transparency of arbitral practice.