ISSN : 1875-4120
Issue : Vol. 6, issue 1
Published : March 2009

Transnational Dispute Management
www.transnational-dispute-management.com

Recommended Strategy for Getting The Right International Arbitral Tribunal: A Practitioner's View

by C.R. Seppälä

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July 4, 2008

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Recommended Strategy For Getting The Right International Arbitral Tribunal: A Practitioner's View*

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I. INTRODUCTION

While much has been written on the selection of arbitrators,[1] few attempts have been made to set out a strategy designed to assist or enable a party to obtain an optimal or good tribunal for its case under the principal international arbitration rules.[2] Most writings on the subject tend to describe the procedure for the selection of arbitrators (appointment of arbitrators, their number and qualifications, the requirement of independence and impartiality, challenge and replacement of arbitrators) in dispassionate and objective terms, leaving it to the parties and their counsel to infer, as best they can, how they can use that procedure to their advantage.

The limited attention which has been given to strategy in this area, in particular, is surprising as arbitration specialists agree that few decisions are more important in an international arbitration than the selection of the arbitral tribunal. As Gerald Aksen, an eminent U.S. practitioner, has put it:

> "that selecting the tribunal is the most important decision to be made in any international arbitration (apart from the rendering

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* This article is a slightly modified version of a paper published in *The International Construction Law Review*, Vol. 25, Part 2, April 2008, p. 198. The author is grateful to Matthew Secomb, his colleague at White & Case LLP, Paris, for his comments on a draft of this paper, but the author assumes sole responsibility for its contents.

1 *See*, for example, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, Kluwer (2003) (hereinafter called "**Lew, Mistelis and Kröll**"), Chapter 10, 223-253; Redfern and Hunter, *Law and Practice of International Arbitration*, Sweet & Maxwell (Fourth Edition 2004) (hereinafter called "**Redfern and Hunter**"), paras. 4-21 to 4-50, and Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (edited by Gaillard and Savage), Kluwer (The Hague, 1999), 452-555.

2 There are, however, some articles which attempt to do this, at least as regards party-nominated arbitrators, *see* e.g. Carter, *The Selection of Arbitrators*, Am. Rev. of Int. Arb. (1994), 84, and Bishop and Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, Arb. Int.., Vol. 14, No. 4, 1998 (hereinafter called "**Bishop and Reed**"). Most other writings on the subject appear to be from the perspective of arbitrators or arbitral institutions or university professors rather than from the perspective of the parties.

> of the actual award) is, by now, a cliché. It also still happens to be true."[3]

This is, at least partly, because international arbitrators enjoy considerable power - in some important respects, more power than state court judges:

(1) The merits of an arbitral award[4] can ordinarily be challenged only in the relatively rare case where, under applicable law, the subject matter of the dispute is not capable of settlement by arbitration or the award is otherwise contrary to public policy.[5] Mere errors of fact or law are not grounds to challenge an arbitral award (absent, in the U.S., "manifest disregard of the law"). Thus, arbitrators have greater freedom to decide a dispute without fear of reversal than judges in state courts.[6]

(2) Assuming that the parties cannot agree on the procedure for an arbitration beyond the few matters regulated by an arbitral institution's rules, the arbitrators will decide the procedure. As every lawyer knows, how procedural issues are resolved (*e.g.* whether there is discovery and its scope, how witnesses of fact are examined and cross-examined, how expert witnesses are selected and heard and the weight to be given to oral versus written evidence) may have a decisive impact on the outcome of any legal proceeding, arbitral or other.

Accordingly, if the arbitrators have not been well selected, a case which might have been won may be lost or one which might have proceeded fairly and efficiently may do so only after much delay and result in a bad award. Put another way, if arbitrators are selected with no attention to their particular qualifications, their doctrinal views, their ways of thinking or to their characters or personalities, a party can have no way of knowing how they are likely to decide the dispute or to receive the party's evidence or arguments, or to react to the particular lawyers it has chosen to represent it.

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3 Gerald Aksen, *The Tribunal's Appointment*, a paper in *The Leading Arbitrators' Guide to International Arbitration* (edited by Newman and Hill), Juris Publishing (New York, 2004) (hereinafter called "**Newman and Hill**"), 31. *See also, e.g.*, Lew, Mistelis and Kröll, para. 10-30 and Redfern and Hunter, para. 1-15, to similar effect.

4 Putting aside procedural objections.

5 *See, e.g.*, the UNCITRAL Model Law on International Commercial Arbitration, Art. 34. Legislation based on the Model Law has been enacted in 59 countries or jurisdictions. *See Status of Conventions and Model Laws* published by the United Nations (A/CN.9/626) and distributed on May 25, 2007.

6 Consistent with the UNCITRAL Model Law, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which preceded the Model Law) provides that assuming there are no procedural objections to the arbitration (*see* Article V.I of the Convention), recognition and enforcement of an award may only be refused where, under the law of the country of enforcement, the subject matter of the dispute is not capable of settlement by arbitration or the award would be contrary to public policy (*see* Article V.2 of the Convention).

Moreover, while a good selection of arbitrators can improve one's chances of prevailing, a poor one can prove to be a grave set-back, if not worse. Different tribunals can and will decide differently, just as different judges in state courts do so. But, as has just been explained, there is much less scope for correcting errors by arbitrators than by state courts.

Given this reality, it is evidently the duty of every lawyer to his or her client to do his or her best, consistent with the relevant arbitration law and rules, to select, or (where this is not possible) to influence the selection of, the arbitrators so as to obtain the best or optimal tribunal for his or her client's case. A lawyer wants a tribunal which will "give him and his client the greatest assurance that their viewpoint will be understood, appreciated and, ultimately, will prevail".[7]

How then should a party go about selecting arbitrators? For the purposes of this paper, it shall be assumed that any arbitral tribunal will consist of three arbitrators as there will generally be three in any major case.[8] Furthermore, the principles to be applied or conduct to be observed, when there is a sole arbitrator can be readily derived, the author believes, from the principles or conduct which shall be described where there are three arbitrators.[9]

In the case of a three-person tribunal, a party's goal should not be simply to nominate the best party-nominated arbitrator it can (having the qualifications and other attributes described below[10]) although this is certainly important. A party's goal should be the appointment of an arbitral tribunal, a majority (at least) of whose members, while being independent and impartial as regards the parties (as required by the relevant arbitration rules

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7 Wangelin, *Effective Selection of Arbitrators in International Arbitration*, Mealey's Int.. Arb. Rep., Vol. 14, No. 11, November 1999, 69, 70.

8 As regards ICC arbitrations, it is stated that:

> "[f]or arbitrations where the amount in dispute is over US$ 10 million, one would generally expect the ICC Court to decide that there should be a tribunal of three arbitrators."

Bühler and Webster, *Handbook of ICC Arbitration*, Sweet & Maxwell (London 2005) (hereinafter called "**Bühler and Webster**"), 130.

9 Numerous lists of international arbitrators are available. Some examples are the following, which include arbitrators' CVs:

(1) Smit and Pechota, *The Roster of International Arbitrators*, a loose-leaf book published by Juris Publishing (this lists arbitrators not just by name but also by nationality, language and area of specialization),

(2) the *Swiss Arbitration Association ("**ASA**") Profiles of ASA Members 2007* and updated every two years (available to members of ASA and which includes a photograph of each member), and

(3) the list of the *International Arbitration Institute* ("**IAI**"), Paris, available at http://www.iaiparis.com/drm_search.asp.

10 *See* Section III.A. below.

and law), will at the same time be well disposed towards, or sympathetic to, or at the very least receptive to, that party's position. All other decisions, including a party's decision about who to nominate as its own arbitrator, should be subordinate to the goal of trying to get a majority of arbitrators who, in addition to being otherwise qualified, are likely to be sympathetic or at least receptive to its case.

The reason for this is that, as decisions are typically taken by a majority vote in the case of a tribunal consisting of three arbitrators, the views of the third arbitrator are especially important because, where the other two arbitrators cannot agree, the third arbitrator's views will be decisive. Moreover, under the ICC and LCIA Rules, where there is no majority, the chairperson decides alone.[11] Thus, under those rules, where there are three arbitrators, the chairperson has practically the same power, ultimately, as a sole arbitrator. Furthermore, under the ICC and LCIA Rules, the chairperson will normally manage the conduct of the proceedings[12] and, under the LCIA Rules, may, with the consent of the other two arbitrators, make procedural rulings alone.[13]

Accordingly, when selecting arbitrators a party's objective should be, from the beginning, to obtain the majority of arbitrators which it wants.

When the goal involved in the selection of arbitrators is seen in this way, then the process - the tactics or strategy to be employed - in nominating arbitrators is more challenging and complex than may first appear. Indeed, the process may take considerable time, which is not necessarily an obstacle for a party which does not wish to see a matter move swiftly. On the other hand, a party should approach the process of selecting arbitrators in this way rather than simply nominating one good arbitrator to a three-person tribunal, important though that action is.

How then should a party go about enhancing its chances of obtaining a good tribunal for its case? Before addressing this question, it is first necessary to recall the prevailing pattern or procedure for appointing arbitrators under the main international arbitration rules.

II. THE PREVAILING PATTERN FOR THE APPOINTMENT OF INTERNATIONAL ARBITRATORS

The prevailing pattern in international arbitration, at least under the ICC, LCIA and UNCITRAL Arbitration Rules,[14] is for there to be:

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11 ICC Rules, Art. 25.1 and LCIA Rules, Art. 26.3. Under the UNCITRAL Rules, the presiding arbitrator is only authorized to decide alone in the case of questions of procedure, *see* Art. 31(2).

12 In the case of ICC arbitrations, this is reflected in the higher fees generally paid to the chairperson.

13 LCIA Rules, Art. 14.3. In the case of ICC arbitrations, Terms of Reference provided for by the ICC Rules, which are signed by the arbitrators and the parties, may so provide.

14 However, the AAA International Arbitration Rules (amended and effective May 1, 2006), for example, are different, *see* Art. 6.

(1) one or three arbitrators,

(2) if one, and the parties cannot agree, he or she is chosen by the relevant arbitration institution (or appointing authority, in the case of the UNCITRAL Rules), and

(3) if three, the claimant nominates[15] one in its request for arbitration,[16] the respondent nominates one in its answer or response (both being subject to confirmation or appointment by the arbitral institution in the case of the ICC and LCIA Rules) and the third is chosen by the arbitral institution or by the two party-nominated arbitrators, unless the parties agree otherwise.[17]

It is a further requirement of the main international arbitration rules that each arbitrator must be, and remain, independent of, and (at least under some rules) impartial to, the parties.[18]

In light of the foregoing considerations, how then should a party go about the nomination of arbitrators?

III. RECOMMENDATIONS TO PARTIES FOR THE SELECTION OF INTERNATIONAL ARBITRATORS

In Section A below, the author shall discuss the method for nominating or selecting one's own arbitrator and then in Section B below, the author recommends how one should go about the selection of the chairperson.

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15 Under the ICC and LCIA Rules, the parties do not actually appoint the arbitrators but just nominate them for confirmation or appointment by the relevant institution. Though the institution will usually follow the nomination of the parties, it is not required to do so, *see* ICC Rules, Art. 9 and LCIA Rules, Art. 5.5.

16 Under the UNCITRAL Rules, an arbitration is commenced by a "notice of arbitration" rather than a request for arbitration which may, but does not have to, include the name of the claimant's nominee, *see* Art. 3.

17 ICC Rules, Arts. 4, 5, 8 and 9; LCIA Rules, Arts. 1, 2 and 5; UNCITRAL Rules, Arts. 5, 6, 7 and 8.

18 ICC Rules, Art. 7.1 ("independent"); LCIA Rules, Art. 5.2 ("impartial and independent"); UNCITRAL Rules, Art. 10.1 (can challenge if justifiable doubts as to "impartiality" or "independence"). Before being confirmed or appointed as an ICC arbitrator, every arbitrator has to complete and send to the ICC a form entitled "Arbitrator's Declaration of Acceptance and Statement of Independence". This requires an arbitrator to take into account, when completing the form, the arbitrator's relations with counsel of the parties as well.

A. SELECTION OF A PARTY-NOMINATED ARBITRATOR

The factors to be taken into account in the selection of a party-nominated arbitrator are potentially wide-ranging and will vary depending on the facts and circumstances of each case. As these factors have been discussed extensively elsewhere,[19] discussion here will be limited to those which are generally the most important.

As a practical matter, in international arbitration, an arbitrator will usually, but not always, be a lawyer. This is because arbitration regularly requires the resolution of important legal issues, such as: whether the arbitrators have jurisdiction over the dispute in the first place; how to interpret a contract whose meaning is disputed; whether there has been a breach of contract; or what damages, if any, may be payable in the case of a breach. A suitable lawyer will also be well-equipped to evaluate factual issues, as he or she will be able to consider the relevance and weight to be given to evidence, oral or written. In addition, an arbitration normally results in a written award, which must be reasoned[20] and be capable of withstanding judicial scrutiny. An appropriate lawyer is normally able, by training, to draft such a document.

If specialized technical or industry expertise, which a lawyer may not have, is desirable in any given case, this can be furnished to lawyer-arbitrators by party-appointed or tribunal-appointed expert witnesses.[21]

Obviously, it is also essential for the arbitrator to be capable of working in the language of the arbitration and desirable for him or her to be familiar with the law governing the contract or, at least, the same family of law (civil law, common law or Islamic law) as that of the law governing the contract, *e.g.* if the law governing the contract is that of France, to be familiar with the principles of the civil law system.

It can also be desirable for the arbitrator to be familiar with the relevant field or industry involved in the dispute. If an arbitrator already knows the specialized vocabulary, the ways or modes of doing business and the standard forms of contract, if any, used in a particular industry (*e.g.* construction,[22] computer technology, oil and gas), this is likely to

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19 De Fina, *The Party Appointed Arbitrator in International Arbitration – Role and Selection*, Arb. Int., Vol. 15, No. 4, 1999, 381-392; Grigera Naón, *Factors to Consider in Choosing an Efficient Arbitrator*, ICAA Congress Series, No. 9 (1999), Kluwer, 286, 307-308; Bishop and Reed, 395-430; Lew, Mistelis and Kröll, paras. 10-38 to 10-44; Redfern and Hunter, paras. 4-39 to 4-49.

20 *See* ICC Rules Art. 25.2 and LCIA Rules 26.1.

21 This often has a number of advantages over nominating an arbitrator who has the relevant expertise. Among other things, a lawyer arbitrator can, to some extent, control the presentation of expert evidence from a party-appointed expert witness. The situation is different in the case of an arbitrator having the relevant expertise. Expert witnesses will, of course, also be subject to cross-examination by opposing counsel. *See* the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Arts. 5 and 8.

22 *See*, paragraphs 14 to 19 of Bunni and Lloyd, *Final Report on Construction Industry Arbitrations* [2001] ICLR 644, for a discussion of the selection of arbitrators for construction arbitrations.

make for a more efficient proceeding, as it should then be unnecessary to have to educate the arbitrator about the industry concerned or its particular vocabulary or way of doing business.

He or she should, ideally, already be familiar with international arbitration practice and procedure. His or her professional standing may also be important as it can enhance respect for his or her opinions. Finally, it is essential that he or she will have the time available to work on the arbitration.

Just as important as an arbitrator's "external" attributes, are the arbitrator's personal attributes. In fact, an arbitrator's external attributes will be unavailing if the arbitrator is not, for example, a person of complete integrity and professionalism, with good powers of analysis and persuasion and, ideally, a congenial colleague (which will be important for his relations within the tribunal).[23]

However, apart from his or her external and personal attributes, there are two particular characteristics which the author would especially stress that any party-nominated arbitrator should have:

(1) He or she should be, and be seen to be, completely independent of the party naming him or her. That is to say that he or she must not merely be formally independent (as required by international arbitration rules, as mentioned above) but also someone who, because of his or her reputation or stature in the legal community or for other reasons, is not subservient, or seen to be subservient, in any way to the party who nominates him or her.

(2) While it may appear almost inconsistent with the first attribute, he or she should also ideally, at the same time, be someone who is likely to be ready to consider favorably or be sympathetic or receptive to, the case or position of the party nominating him or her, in relation to the anticipated issues to be arbitrated between the parties. He or she should be sympathetic to such party's case not merely because it has nominated him or her but because taking such a position is simply consistent with his or her professional outlook or doctrinal views, if any, or view on life.

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[23] In this connection, lawyers from different legal systems tend to favor arbitrators with particular qualifications. In civil law countries, like France, Germany and Switzerland, law professors enjoy particular favor whereas in England (and in countries which have a similar legal system, like most of Canada, South Africa, Hong Kong, Singapore, Australia and New Zealand) leading barristers (Queen's Counsel or their equivalent) are favored. U.S. litigators, on the other hand, may prefer retired U.S. federal judges or other esteemed U.S. litigators. The tendency of lawyers from common law jurisdictions to favor litigators or judges (who are often former litigators) as arbitrators, whereas lawyers from civil law jurisdictions tend to favor law professors, may be explained by the greater prestige of professors in the civil law system and by the fact that the province of fact in common law litigation (which will typically include the results of discovery and the direct and cross-examination of witnesses by counsel) is larger than it is in litigation in civil law countries, such as France (where the aforementioned procedures do not exist). *See, e.g.*, Beardsley, *Proof of Fact in French Civil Procedure*, 34 Am. J. of Comp. L. 459 (1986), a fine article which should be better known.

These two matters will now be addressed separately and in more detail:

(1) The desirability to be, and appear to be, wholly independent

The most important qualification of all for a party-nominated arbitrator is that he or she is someone who has the capacity and the ability to persuade the chairperson (who, at the time a party nominates its arbitrator, will still be unknown, as he or she will not be appointed until after the parties have nominated arbitrators). As we have seen, the key decision-maker on any arbitral tribunal is the chairperson. Therefore, the most effective role that a party-nominated arbitrator can play is as someone who can persuade the chairperson to support a party's view (if, and to the extent that, a party has been able, in the first instance, to persuade its own nominated arbitrator to accept its position).

To have this ability to influence the chairperson, a party's arbitrator must not only be independent of the party nominating him or her (a basic requirement for any arbitrator, as we have seen), but he or she must also be seen by the chairperson to be independent and as someone who will exercise his or her best professional and impartial judgment on the matter, just as the chairperson is himself or herself obliged to do. Only if a party's arbitrator is seen in this way by the chairperson can the chairperson be expected to have confidence in a party's arbitrator and, therefore, can such arbitrator be expected to be in a position to influence the chairperson.[24]

Obviously, the more experienced in, or knowledgeable about, the legal and factual issues involved in the particular dispute and/or in international arbitration the party-nominated arbitrator may also be, the greater the likelihood that, other things being equal, the chairperson will give weight to his or her views. Also important will be a party-nominated arbitrator's integrity, persuasive skills and professional standing, as all these things are likely to enhance his or her credibility and command respect with the chairperson.

If a party is, for example, from the United States, should it select a U.S. arbitrator so that there is someone on the tribunal who shares and may better understand the party's background and culture? Certainly, it should do so if it wants to. Indeed, a party's ability to nominate as arbitrator someone of its own nationality and culture is one of the justifications for the existence in international arbitration of the right of each party to nominate its own arbitrator.

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[24] In this context, Professor Andreas F. Rosenfeld notes:

> "In my experience, the openly partisan arbitrator is rare and easily dealt with. The chairman will disregard the advocate/arbitrator's opinion, and unless that arbitrator's side is clearly the party with the stronger case the chairman will abandon the goal of reaching a unanimous decision."

Rosenfeld, *The Party-Appointed Arbitrator: Further Reflections*, a paper in Newman and Hill, 43.

In fact, it is common practice for U.S. parties to nominate U.S. arbitrators, for English parties to nominate English arbitrators, and for French parties to nominate French arbitrators. In addition to taking special pride, perhaps, in its own legal system, a party (or often, more accurately, its lawyer) frequently feels more comfortable with an arbitrator of its own nationality and culture. It may consider, with justification, that it will be better able to communicate with the arbitral tribunal, to understand its approach and to enlist its sympathy, if the tribunal includes someone of its own background.

However, while it is understandable - and common practice in international arbitration - for a party to want to nominate an arbitrator of its own nationality, if a party's national preferences are put aside, it may have nothing to gain by doing so. Indeed, doing so may even be disadvantageous. The chairperson may be inclined to think, initially at least, that such an arbitrator may, naturally, be somewhat inclined to favor that party and, therefore, not look at the issues completely disinterestedly, as the chairperson is obliged to do and as the chairperson would like his or her fellow arbitrators to do. Consequently, this might undercut somewhat that arbitrator's credibility in the eyes of the chairperson.

Similarly, one should not assume that one should object to or challenge an arbitrator nominated by the other party who is obviously not completely independent, even though there may be a clear right to do so, *e.g.* because he or she is a former employee of the other party or is a partner in the same law firm as the other party's lawyers or otherwise may appear subservient to the other party.

So long as the link to the other party is manifest, it is likely to be harmless as it will be visible to every one and it is likely, consequently, to diminish the credibility of that arbitrator in the eyes of the chairperson. Therefore, when such a nomination is made, not only should one probably not object, but one may have reason to be gratified and to consider this a small victory for one's client.

Moreover, it may not be in the interest of a respondent who has already nominated an arbitrator to challenge (or object to the confirmation of) the claimant's nominee as, if the challenge is successful, it will afford the claimant the strategic advantage to re-nominate an arbitrator at a time when it knows the identity of the respondent's nominee.[25] Similarly, once the chairperson has been appointed, it may not be in the interest of either party to challenge the other party's nominated arbitrator as, if the challenge were successful, it would afford the other party the strategic advantage to re-nominate an arbitrator at a time when it knows the identity of the chairperson and can therefore re-nominate someone who may be persuasive with that particular chairperson.[26]

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[25] The author is grateful to Professor Thomas W. Wälde, Jean-Monnet Chair, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, for drawing the author's attention to the omission of this point in a previous version of this paper.

[26] However, in certain circumstances, a party who has already nominated an arbitrator and who challenges the arbitrator nominated by the other party may be able, if its challenge is successful and the other party re-nominates an arbitrator, to withdraw its original nominee and to nominate another

(to continue)

In fact, those parties who do nominate as arbitrators persons with manifest links to themselves tend to have little or no experience of international arbitration or (in the author's experience) to be certain states or state-owned bodies, where the nomination may simply be dictated by political considerations.

It is also crucially important that the party or, more accurately, the party's lawyer, is confident that he or she will be able, at hearings, to communicate effectively at least with the arbitrator it has nominated as this will provide it with some comfort that its arguments are understood by the tribunal. For this last reason, a party should almost never nominate an arbitrator except after consultation with the lawyer who will be representing it in its case.

(2) Being favorably disposed in relation to the issues to be arbitrated

The second essential attribute mentioned above is that the party-nominated arbitrator should - while being independent and impartial as required by the relevant arbitration rules - be believed to be prepared to consider favorably the case or position of the party nominating him or her.[27]

To be in a position to select such a person, a lawyer needs to be familiar, at least in a general way, with the main issues, be they substantive or procedural, to be submitted to

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(continued)

arbitrator. This may be possible, for example, in an ICC arbitration where the party objecting to the confirmation of the other party's nominee by the ICC Court has reserved its right to change its nomination if the other party's nominee is not confirmed.

[27] There is nothing unusual in this. As a well respected commentary on ICC arbitration provides:

> "Even in the usual case where the party-nominated arbitrator must be independent, the parties are still left with a large degree of discretion concerning their choice of the arbitrator. They are generally free to choose a person who is clearly sympathetic to their case.
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> * * *
>
> … A party is clearly entitled to (and often does) choose an arbitrator of its own nationality. The arbitrator may also come from a similar economic, political and social *milieu*, and may therefore be expected to be sympathetic to positions taken by that party. The arbitrator may also embrace legal doctrines that the nominating party feels are favorable to its case." [Emphasis added]

Craig, Park, Paulsson, *International Chamber of Commerce Arbitration* (Third Edition, 2000), Section 12.04. On the other hand, as Mr. Martin Hunter has properly noted "an impartial arbitrator will not allow this shared outlook to override his conscience and professional judgment". Hunter, *Ethics of an International Arbitrator*, Arbitration (November 1987) 219, 223. Thus, while a party-nominated arbitrator may be predisposed to the party which nominated it or to its positions, such arbitrator should ultimately decide the case – without partiality – in favor of the party with the better case. *See* Bishop and Reed, 395. For a lively critique of the role of the party-nominated arbitrator in international arbitration, *see* Rau, *Integrity in Private Judging*, 38 South Texas L. Rev. (1986) 485, 506-509.

arbitration and have a sense of how a prospective arbitrator is likely to view them. In addition, a lawyer needs to know or have become acquainted with a substantial number of prospective arbitrators, ideally coming from a variety of different backgrounds, nationalities and legal traditions.[28] Otherwise, a lawyer may be handicapped in selecting a suitable arbitrator for a given case.

While every lawyer is generally familiar with the range of different approaches to legal issues that may justifiably be taken by lawyers of his or her own legal system or tradition, he or she may be less familiar with the range of different approaches to legal issues that may be taken by lawyers from other legal systems or traditions. Yet, in international arbitration, it is often necessary or advisable for a lawyer to be able to evaluate and consider nominating an arbitrator or arbitrators from legal systems or traditions other than the lawyer's own.

At first sight, and unless one chooses someone from one's own legal culture or tradition or who one knows already, it may appear daunting to have to find a suitable international arbitrator. However, one can often tell something about a lawyer's likely predisposition to a case merely from his or her nationality and professional background.[29] In addition, many prospective arbitrators, most notably, law professors, are prolific writers and speakers at arbitration conferences and have published books or articles, or delivered papers, which one can consult or will have established reputations in the international arbitration community which one can investigate.

Accordingly, with a little study, as well as through the word-of-mouth of other arbitration practitioners, one may be able to get a general idea about the doctrinal views, if any, a lawyer may have or the kind of approach a lawyer might take, towards given legal or factual questions.

One example of how important the choice of an arbitrator with the right background can be is as follows:

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[28] In this connection, there is a practice for parties and their counsel to interview prospective arbitrators. Whether this is possible in any given case will depend upon the prospective arbitrators concerned. But, generally, this is considered acceptable subject to strict limits, *see* for a recent set of guidelines on this subject, The Chartered Institute of Arbitrators (in the U.K.) Practice Guideline 16: *The Interviewing of Prospective Arbitrators*, May 2007. *See also* Lew, Mistelis and Kröll, paras. 10-32 through 10-37 and Redfern and Hunter, para. 4-50.

[29] To take some concrete examples, English lawyers may tend to construe statutes or contracts more strictly than U.S. or civil law lawyers (reflecting the tendency to stricter construction of such documents in English law). U.S. lawyers will tend, in the author's experience, to be more "generous" (or "extravagant") in awarding damages than civil law lawyers. Lawyers from legal systems influenced by Islamic law may give greater weight to equity and fairness than either common law lawyers or civil law lawyers, reflecting the greater importance of equity and fairness in Islamic law. While there will always be exceptions, in the author's experience, these generalizations tend to be borne out in practice.

In an ICC arbitration in Paris a number of years ago, the details of which have been published[30], the author's firm was asked to defend a Pakistani company which had terminated a construction contract with a European contractor for the building of a cement plant in Pakistan. There were many complex issues involved in the case such as whether the termination of the contract was justified and, if so, whether damages were due and in what amount.

Strategically, it was decided to argue that the arbitral tribunal was without jurisdiction because (as was claimed) the contractor had waived the arbitration clause in the contract. It was an important issue as, if the contractor could not go to arbitration, it would be forced to pursue its claims in the Pakistani courts where the Pakistani respondent had no doubt that justice would prevail!

While there was a legitimate argument for claiming the arbitration clause had been waived (as it could be shown that the contractor had applied to a Pakistani court for a permanent injunction[31] to prevent the respondent from taking over the site), it was also appreciated that arbitrators are usually loathe to give up their jurisdiction. In fact, the possibility that an arbitral tribunal would declare itself without jurisdiction was considered so remote in France at the time that it was (and is still today) not listed in the French arbitration statute as a ground for the setting aside of an award, where the award is wrong.[32]

Accordingly, it was thought that a recently retired English High Court judge (the law in Pakistan being similar to that in England) would make an ideal chairperson for the respondent's case, as it was thought that such a person would not undervalue the role of state courts and, hence, would not be disinclined to give full effect to (an arguable) waiver of an arbitration clause. Surprisingly, the contractor agreed with the proposal and the recently retired High Court judge was appointed.

The tribunal duly heard the case and a majority (including the English judge) was satisfied that the respondent was right that the arbitration clause had been waived (there was a Pakistani court decision in its favor), considered there was nothing more to it and dismissed

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30 As the award was challenged in the French courts (unsuccessfully), the case (Uzinexportimport Romanian Co. v. Attock Cement Co.) was reported in the French *Revue de l'Arbitrage*, 1995, 107 note S. Jarvin. *See also Revue de l'Arbitrage* 1989, 97, note of P. Bellet.

31 Whereas an application for a preliminary injunction would clearly not, as interim relief, be incompatible with an arbitration clause, *see, e.g.*, ICC Rules, Art. 23.

32 *See* Article 1502 of the French New Code of Civil Procedure which only provides for the setting aside of an award "if the arbitrator has decided in the absence of an arbitration agreement or on the basis of an agreement which is void or has expired" (Article 1502(1)) and not where the arbitrator has wrongly declared himself without jurisdiction. It has required interpretation of the statute by case law to allow an award to be set aside where a tribunal has wrongly declared itself without jurisdiction. *See* Société Swiss Oil v. Société Petrogab et République de Gabon, *Revue de l'Arbitrage* 1989, 309, note of C. Jarrosson

the case, forcing the contractor (whose co-arbitrator issued a dissenting opinion) to resort to the Pakistani courts (effectively extinguishing the claim).[33]

The author believes other arbitrators, from different cultural and/or professional backgrounds, could have taken a different approach and sought to retain jurisdiction (and, indeed, as mentioned above, the respondent's co-arbitrator took such an approach).

In any event, the author believes that, in this case, the choice of arbitrator in relation to the specific issue at hand - whether the arbitral tribunal had jurisdiction - was an important factor leading to the dismissal of the arbitration (and the effective extinguishment of a claim). Thus, the choice of an arbitrator, especially of a sole arbitrator or chairperson, can alone decide a case.

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As has been stated earlier, in nominating arbitrators, a party's goal should be to obtain an arbitral tribunal a majority of whose members is prepared to be favourably disposed, or at least receptive, to such party's case.

In this connection, before nominating an arbitrator, a party should bear in mind that, under both the ICC and LCIA Rules, a chairperson (or sole arbitrator) which the ICC or LCIA appoints will normally be of a different nationality from the parties.[34] Furthermore, under the LCIA Rules, the nationality of parties is understood to include that of "controlling shareholders or interests".[35]

In addition, in practice, the ICC will not normally select as a chairperson someone who has the same nationality as either of the party-nominated arbitrators.[36]

The other important factors that the ICC Court will typically consider in appointing a chairperson, assuming the parties are unable to agree on one, are: the language and the law applicable to the arbitration (to the extent known); the place of arbitration; and "broader regional or geopolitical considerations", *e.g.* a U.S. chairperson is unlikely to be appointed in cases with parties from Iran, Iraq or Libya.[37] In addition, although not referred to in the ICC Rules, the ICC Court may sometimes also consider the nationality and/or location of counsel representing the respective parties.

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33 The tribunal also subsequently awarded the respondent its legal costs of the arbitration.

34 ICC Rules, Art. 9.5 and LCIA Rules, Art. 6.1.

35 LCIA Rules, Art. 6.2. The ICC has not adopted such a rule, *see* Derains & Schwartz, *A Guide to the New ICC Rules of Arbitration*, Kluwer Law (second edition, 2005) (hereinafter called "**Derains and Schwartz**"), 173.

36 *See* Art. 9.1 of the ICC Rules and Derains and Schwartz, 173. The LCIA does not appear to have a similar rule or policy.

37 Derains and Schwartz, 174-5. The LCIA appears to take account of similar criteria, *see* LCIA Rule, Art. 5.5.

While ICC arbitrators may, in theory, come from any country, in practice, roughly fifty per cent of them come from just five countries (roughly paralleling the importance of these countries as places of arbitration and/or as the main nationalities of the parties in ICC arbitrations). In 2006 (the last year for which statistics are available), the figures are, as follows:[38]

Arbitrators: Most Frequent Nationalities

Country	% of Total Number of Arbitrators
Switzerland	16.02
U.S.A.	11.17
Germany	10.12
United Kingdom	7.80
France	7.59
	52.70

As indicated above, the nationalities of the parties, the nationalities of the co-arbitrators, the language and the law applicable to the arbitration (to the extent known) the place of arbitration, "regional or geopolitical considerations", the nationality and/or location (sometimes) of parties' respective counsel and (possibly) the places from which most international arbitrators tend to come, will all be indicators, negative (at least in the case of the nationality of the parties) or positive (in the case of certain other factors), of the likely range of nationalities of the chairperson, if the matter is left to the ICC. In light of the foregoing, even before nominating an arbitrator, the claimant will know that, if selection of the chairperson is left to the ICC, the range of its choices of the nationality of the arbitrator will, as a practical matter, not be infinite and will likely be within a certain range.

When the claimant nominates an arbitrator, the nationality of the claimant's nominee will be another indicator (negative) of the possible nationalities of the chairperson if the decision were left to the ICC.

This gives an advantage to the respondent over the claimant, under the ICC and LCIA Rules, as not only will the respondent know the identity of the claimant's arbitrator before having to nominate an arbitrator (thereby, possibly, being able to "trump" somehow the claimant's arbitrator by its own choice of arbitrator) but it will know that, under the ICC Rules at least, the chairperson will not normally be of that nationality.[39] As the range of possible nationalities of the chairperson is not unlimited (as has been explained) and the

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38 ICC ICArb. Bull. Vol. 18, no. 1-2007.

39 *See* Derains and Schwartz, 173 ("Parties should therefore bear in mind that the nationality of the co-arbitrator whom they select is likely to have a bearing on the nationality of the chairman appointed by the court.") and Bühler and Webster, 133 ("in choosing an arbitrator one is affecting the appointment of a chairman").

chairperson (under the ICC Rules at least) is also unlikely to be of the nationality of its own arbitrator, the respondent can have a not insignificant ability to influence the likely choice of nationality of the chairperson (should the choice of the chairperson be left to the ICC).

It would, of course, be a mistake to ascribe excessive importance to the nationality of the chairperson by assuming that arbitrators of any given nationality would decide a case in the same way. There can be wide differences in the conduct and behavior of arbitrators of any given nationality. Moreover, there is an increasing trend for international arbitrators to adhere to international standards in conducting international arbitrations,[40] thereby reducing the importance of national differences in this respect. At the same time, national characteristics or styles of behavior have not disappeared and no party can afford to ignore, when nominating an arbitrator, the factors an arbitral institution takes into account in selecting the nationality of a chairperson, and hence the implications that such party's nomination of an arbitrator may have on that decision, assuming it is left to the institution.

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To conclude on the question of selection of a party-nominated arbitrator, one may ask the following question: of the two attributes mentioned (complete and evident independence and a tendency to be favorably disposed to, or sympathetic to, a party's case), which is the more important characteristic? The author believes that complete and apparent independence is the more important as nothing is more important than the credibility of your arbitrator in the eyes of the chairperson.

The duty of any party-nominated arbitrator should be to ensure that all of the arguments made by the party who nominates him or her are fully considered, properly weighed and taken into account by the tribunal in making its decisions.[41] This is probably all that a party may reasonably require from a party-nominated arbitrator. So long as he or she fulfills this duty, he or she should be, and must be (if they are to be considered independent and impartial under international arbitration rules), entirely free to decide the dispute in whatever manner he or she thinks fit.

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40 As evidenced by the growing acceptance of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* of 1999 as a guide in relation to evidentiary matters.

41 Lew, Mistelis and Kröll put this point well in their book at para. 11-48:

> "The party appointed arbitrator provides the appointing party with confidence that its case and arguments will be fully considered by the tribunal. This is particularly important in arbitrations where the parties come from different cultural and legal backgrounds. In such cases a party may have the legitimate concern that due to its cultural and legal background the tribunal will not properly understand or appreciate its case and will not give sufficient weight to its arguments. By working as a cultural interpreter the party appointed arbitrator can and should help to ensure that the arguments will be properly appreciated and considered during the tribunal's deliberations."

B. SELECTION OF THE CHAIRPERSON OF THE ARBITRAL TRIBUNAL

(1) A critique of current practice

As has been seen, the chairperson of the tribunal is the most important arbitrator as his or her decision will effectively decide the case. It is therefore vital for any party to obtain a satisfactory chairperson.

Ideally, a party would wish to have as chairperson someone having the same basic qualities (described above) as its party-nominated arbitrator, that is, a chairperson who is independent and impartial but, at the same time, sympathetic to, or open to consider favorably, that party's case.

Given that the chairperson is the most powerful arbitrator, it is surprising that some of the main international arbitration rules continue to provide, and apparently many legal practitioners continue to believe, that he or she should, as a general rule, be appointed by someone other than the parties themselves.[42] For example:

(1) the ICC Rules provide that he or she shall be appointed by the ICC Court, unless the parties agree otherwise,[43]

(2) the LCIA Rules provide that he or she "shall be appointed by the LCIA Court",[44]

(3) the UNCITRAL Rules provide that he or she shall be chosen by the two party-appointed arbitrators,[45] unless the parties agree otherwise,[46]

(4) the Stockholm Chamber of Commerce ("**SCC**") Rules provide that he or she shall be appointed by the SCC Institute, unless otherwise agreed by the parties,[47] and

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42 There are, however, some exceptions, for example, Article 37 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (the ICSID Convention) and the rules of the China International Economic and Trade Arbitration Commission (CIETAC), *see* Art. 22(2).

43 ICC Rules, Art. 8(4).

44 LCIA Rules, Art. 5(6).

45 UNCITRAL Rules, Art. 7(1).

46 UNCITRAL Rules, Art. 1.1.

47 SCC Rules (effective January 1, 2007), Art. 13(1) and 13(3). When revising the SCC Rules recently, the committee discussed changing this practice to providing that the co-arbitrators should appoint the chairperson but as this method can lead to delays it decided to maintain the existing practice. Annette

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(5) the Singapore International Arbitration Centre ("**SIAC**") Rules provide that he or she shall be appointed by the SIAC Centre, unless the parties agree otherwise.[48]

Thus, in each of these cases (except under the UNCITRAL Rules, where there is no administering institution), the administering institution appoints the chairperson unless the parties agree otherwise.[49] Thus, to prevent the administering institution from making the appointment (which, as the author maintains below, the parties should do, if possible) the parties must act affirmatively themselves by "agreeing otherwise".

Where the appointment is to be made by the ICC Court, the LCIA Court, the SCC Institute or the SIAC, no consultation of the parties about the choice of chairperson is envisaged by the relevant rules.[50]

ICC statistics regarding the manner in which the chairperson is usually selected are – perhaps not surprisingly – consistent with the above Rules. They show the chairperson being appointed, overwhelmingly, either by the ICC Court or on the basis of a nomination by the co-arbitrators rather than on the basis of the parties' nomination.[51]

Appointment of Chairperson in ICC Arbitrations

	2004	2005	2006
Nomination by Parties	11.7%	8%	8.1%
Nominated by Co-Arbitrators	43.2%	45.8%	57.1%
Appointed by Court	45.1%	46.2%	34.8%

(continued)

Magnusson and Patricia Shanghnessy, *The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, Stockholm Int. Arb. Rev., Vol. 3, 2006, 33, 40.

48 SIAC Rules, Art. 7(3).

49 Although the LCIA Rules do not state that the appointment of the chairperson is subject to the parties' or co-arbitrators' agreement otherwise, the current Director General confirmed that the LCIA Court will and frequently does appoint a chairperson who the parties or the co-arbitrators have agreed and nominated amongst themselves.

50 While Art. 7(1) of the UNCITRAL Rules does not require the two party-nominated arbitrators to consult the parties about the choice of chairperson, it does not exclude them from doing so either.

51 Statistical Reports for 2004, 2005 and 2006 published in the first issue of the ICC ICArb. Bull. for 2005, 2006 and 2007, respectively. While not revealed by the ICC statistics, in many cases it may be assumed that the co-arbitrators will have consulted the parties who have nominated them, about the choice of chairperson.

Furthermore, arbitration literature refers to the party-nominated arbitrators selecting the presiding arbitrator as "perhaps the most satisfactory"[52] or as "the common international scenario"[53] or that "it is typical that the party-nominated arbitrators select the chairperson or presiding arbitrator"[54] or that "[g]enerally, it is acknowledged that… the two party-appointed arbitrators would jointly appoint the third arbitrator to act as chairman".[55]

It is understandable that arbitral institutions have been granted the power to appoint the chairperson. The parties may be unable to agree upon one and a decision by a third party will allow the proceedings to proceed without delay. For the same reason, it is also understandable that co-arbitrators may be empowered to appoint the chairperson.

However, the author seriously questions whether allowing a third party or parties to choose the chairperson is necessarily in the interests of the parties, as the kind of a chairperson such a third party or parties might choose may result in a chairperson who either one party does not want or neither party wants.[56] Apart from the fact that well-advised parties should be in the best position to select a chairperson appropriate to their case, there are inherent limitations on the ability of arbitral institutions, or party-nominated arbitrators, to choose a suitable chairperson. First, compared to the parties, they can have only a limited knowledge of the facts of a case, at best. Second, while they may (especially arbitral institutions) be very well-qualified to choose experienced arbitrators, in the case of arbitral institutions at least, they will not necessarily be expert in, or have direct knowledge of, many fields or businesses other than arbitration and, therefore, may not be well equipped to choose a suitable arbitrator where some specialized industry expertise may be required. Third, a party can have no assurance that there will be a good "personal chemistry" or, at least, no specific biases, or cultural or other problems or issues, between the party and its lawyer, on the one hand, and the chairperson chosen by the third party or parties, on the other.

Further, while party-nominated arbitrators (if not arbitral institutions) might be prepared to consult with the parties beforehand about their choice of chairperson,[57] it can be

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52 Redfern and Hunter, para. 4-28.

53 Bishop and Reed, 395.

54 Wangelin, *Effective Selection of Arbitrators in International Arbitration*, Mealey's Int. Arb. Rep., Nov. 1999, 69, 72.

55 Onyema, *Selection of Arbitrators in International Commercial Arbitration* [2005] Int. A.L.R. 45, 48.

56 This appears to be well recognized by Lew, Mistelis and Kröll (para. 10-47):

> "Appointment by the parties is invariably the best method of appointment."

57 Some distinguished arbitrators will not do so:

> "My chairman selection procedure contains one significant omission that will raise an eyebrow (well, maybe more than one): Nothing is said about consultation between the co-arbitrators and counsel of the parties that appointed them. That is because my preference is not to consult with, let alone take instructions from, counsel. I will also encourage my co-arbitrator to follow the same course."

Aksen, *The Tribunal's Appointment* (*see* note 3 above), 38.

(to continue)

awkward, at least, for a party to refuse as chairperson someone who is being advocated by the two party-nominated arbitrators and supported by its adverse party. It will not wish to alienate the two party-nominated arbitrators. Moreover, once the chairperson has been appointed by an arbitral institution (or, in the case of an UNCITRAL arbitration, agreed to by co-arbitrators), there will be no going back, as it will be practically impossible for him or her to be replaced.[58]

Accordingly, unless there is no way for the parties to agree on a suitable chairperson within a reasonable time, one should never allow the chairperson to be selected by an arbitral institution or by the two co-arbitrators.

(2) The recommended method

Now, one might think, upon first impression (and it appears to be the common assumption of many arbitration institutions and legal practitioners, as described above), that parties who are already in such dispute with each other that they have to go to arbitration would have difficulty agreeing on the chairperson. Nevertheless, however intense their dispute, because of the considerable powers of the chairperson (described above) they still have a common interest in agreeing on that person rather than allowing this decision to be made for them by a third party, or parties, and result in someone who, possibly, neither party wants.

How then should the parties go about trying to agree on the chairperson?

In the author's view, a party is usually ill-advised to propose the names of candidates for chairperson directly to the other party, as the other party will tend, quite naturally, to assume that the proposing party has an ulterior motive in proposing those particular names. Those names (other, perhaps, than the names of the very best known and most prominent arbitrators whose integrity and independence from any compromising relationship is considered beyond dispute) are, therefore, likely to be received skeptically at best, if not rejected outright. Proposing individual names is, in the author's experience, typically, the "kiss of death" for them.

As the parties will usually be unable to agree on a chairperson simply by proposing names to each other, it is best to invite some neutral, qualified and unimpeachable source,

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Views such as the foregoing only re-enforce the author's belief that co-arbitrators should, if possible, be excluded from the selection of the chairperson (though they should be consulted to ensure they have no objection to any chairperson the parties and their counsel may be prepared to agree upon).

[58] An arbitrator may be challenged or replaced by the relevant administrating body only in exceptional circumstances, such as where he or she lacks independence or is not fulfilling his or her functions in accordance with the relevant rules, *e.g.*, *see* ICC Rules, Articles 10 and 11. In the case of ICC arbitrations, on average, only about one in twenty challenges has been successful. *See* the Statistical Reports for 2004, 2005 and 2006 published in the first issue of the *ICC ICArb. Bull.* for 2005, 2006 and 2007, respectively.

such as the ICC International Court of Arbitration, to propose the names of candidates for chairperson to the parties. While the neutral source may propose some of the very same names which a party or its counsel might propose, nevertheless, as they derive from an independent source, they will be untainted by association with that party and, therefore, will not be suspect on that ground.

In this connection, the author's recommendation of what to do is as follows:

(1) Instead of exchanging names, the parties should try, in the first instance, to agree on a profile for the chairperson, *e.g.* on his or her nationality or nationalities, profession, language abilities, general field of expertise, if any, and other appropriate individual characteristics. In the author's experience, there are always some characteristics which, in any given case, are so anodyne or innocuous that the parties can, at a minimum, agree upon them.

(2) Having agreed on a profile, the parties should then submit it to the relevant arbitral institution or appointing authority with the request that it provide the parties with a list of five to ten names of candidates conforming to this profile.[59] In the author's experience, arbitral institutions or appointing authorities will agree to such a request, even though it may not be provided for in their rules, will ascertain that potential candidates have no conflict of interest[60] and will provide a list to the parties[61]. The parties may wish, at the same time, to request the institution or appointing authority to exclude from consideration any candidates whom the parties may already have discussed.

(3) Once the arbitral institution or appointing authority submits such a list of candidates to the parties, the parties should try to agree upon one of them (or, if not, on someone else), perhaps within a 20- or 30-day time limit, failing

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59 This list procedure is to be distinguished from the different list procedures provided for by the UNCITRAL Rules (Art. 6(3)), the AAA Commercial Arbitration Rules (R11-13) and the WIPO Arbitration Rules (Article 19(b)).

60 While arbitral institutions and appointing authorities are in no way bound by them, and may not apply them, the International Bar Association ("**IBA**") has issued guidelines on this subject. *See* the *IBA Guidelines on Conflicts of Interest in International Arbitration*, 2004.

While the ICC Court and the LCIA Court, in the author's experience, normally ascertain that none of the potential candidates has a conflict of interest before proposing them, those institutions should not have to do so and considerable time can be saved if they do not (it can take several weeks or more to clear conflicts in the case of five to ten candidates). What the parties need merely is a list from a reputable, expert, neutral and unimpeachable source. If the parties can agree on a candidate on that list, they can then ascertain for themselves that he or she has no conflict of interest. Indeed, this would be a more efficient way for arbitral institutions to proceed in this type of situation.

61 In the author's experience, both the ICC Court and LCIA will agree to this procedure in the case of arbitrations under their respective rules (and may do so for a fee in other cases, such as in UNCITRAL or other *ad hoc* arbitrations or where the relevant arbitral institution is not believed to have the necessary expertise in appointing international arbitrators, *see* the Rules of ICC as Appointing Authority in UNCITRAL or Other Ad Hoc Arbitration Proceedings in force as from 1 January 2004).

which (and unless the parties request a further list from the same body) the appointment of the chairperson would be made by the arbitral institution.

(4) Before agreeing on any candidate for chairperson, the candidate should be cleared with the party-nominated arbitrators as there would be no point agreeing on a chairperson to whom a party-nominated arbitrator might have a reasonable objection. On the contrary, it is desirable that the members of the tribunal will have a good working relationship.

The advantage of this list procedure is that:

(a) it allows the parties to benefit from both the arbitral institution's neutrality as a source of arbitrators and its expertise in selecting them, and

(b) it facilitates agreement by the parties on the chairperson.[62]

While this procedure may take longer than having the chairperson selected by an arbitral institution (or an appointing authority) or by the co-arbitrators, the parties can (as suggested above) agree on time limits.[63] Moreover, if either party feels, at any stage, that the procedure is taking too long then such party is free to announce that it will discontinue with the procedure and refer the selection of the chairperson to whatever other procedure is provided for (selection by an arbitral institution or an appointing authority or the co-arbitrators).

In the author's experience, the procedure described above is usually successful,[64] except where one party and its counsel are wholly unfamiliar with international arbitration and international arbitrators and, thus, take solace in an institutional appointment. If the parties cannot agree within any 20- or 30-day time limit, then this time limit can be extended by agreement of the parties. Each party's lawyer generally makes every effort to agree on one of the names on such a list (or on another name, as parties should not be bound solely to that list) as it does not want the selection of the chairperson, which is so important to the outcome of an arbitration (as discussed above), to fall outside of his or her control or, at least,

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62 As Lew, Mistelis and Kröll put it :

> "Appointment of the chairman by the parties has the advantage of ensuring the greatest possible influence of the parties on the composition of the tribunal." (Para. 10-19).

63 They can also agree to instruct the institution providing the list – if it will agree – not to ascertain that potential arbitrators have no conflict of interest but leave that to the parties, assuming that they can agree upon a candidate on such list, *see* note 60 above.

64 While Redfern and Hunter, para. 4-23, claim that it is "rare" for parties to agree on all members of an arbitral tribunal, this has not been the author's experience. Where the method for selecting a chairperson described in this article has been employed, in the author's experience, the parties have almost always been able to agree on the chairperson.

ability to influence.[65] As the old expression goes, "better the devil you know than the devil you don't!".

James Carter has put the case for party selection of all the arbitrators well:

> "…, in international matters in particular, there often is a fear of the unknown and a corresponding tendency for each party to seek as much predictability as possible in the constitution of the tribunal. If each party has the right to select one of the three arbitrators, and some role in the selection of the third, this builds party confidence in the integrity of the process."[66] [Emphasis added]

Messrs. Lew, Mistelis and Kröll have also described well why it is best that the parties select all of the arbitrators:

> "Appointment by the parties is invariably the best method. It ensures that the tribunal will be composed of persons who have the confidence of the parties. This increases the likelihood of co-operation during the proceedings as well as the voluntary enforcement of the award rendered, ..."[67] [Emphasis added]

However, if, despite the procedure described above, the parties are still unable to agree on a chairperson, on the basis of such a list or otherwise, then, as a compromise, the parties might agree either to allow the two arbitrators nominated by the parties (subject to the veto power preferably, or at least the input, of each party) or an arbitral institution to make the decision.

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[65] As Bühler and Webster rightly state:

> "The appointment of the chairman by the ICC Court usually involves an element of surprise for both the parties and the [party-nominated] arbitrators. The main incentive for the parties to agree on the chairman is a concern about the unknown." (Bühler and Webster, 135)

Derains and Schwartz rightly note:

> "… parties increasingly realize that there is no more important choice in connection with an arbitration than the choice of arbitrators, and, to the extent possible, this is therefore not a choice that should be allowed to escape the parties' control." (Derains and Schwartz, 154)

[66] Carter, *The Selection of Arbitrators* (*see* note 2 above), 84.

[67] Lew, Mistelis and Kröll, para. 10-47.

How would an arbitral institution make the decision? How the ICC and LCIA will appoint the chairperson has already been described in Section III.B above and, therefore, will not be repeated here.

Even if the ICC Court were deciding who the chairperson would be, a party might still not be without some ability to influence that decision. Thus, the ICC would not necessarily ignore any comments that either of the parties may give it regarding the selection of a chairperson, such as an objection by a party to an arbitrator of a particular nationality or having a particular characteristic, if a plausible reason for the objection could be given.

Above all, arbitral institutions, like the ICC, which have knowledge of numerous experienced arbitrators, will try to appoint as chairperson someone having a profile which is perceived as "neutral" as between the parties and the party-nominated arbitrators while, at the same time, taking account of other relevant factors.[68] As Messrs. Bühler and Webster have stated:

> "The ICC Court will generally seek to have a balanced Tribunal taking into consideration the nationality and the status of the parties, the other arbitrators, and to a certain extent, the parties' lawyers."[69]

IV. CONCLUSION

A party should take a pro-active approach not only to the nomination of its own arbitrator but to the selection of the chairperson. As to its own arbitrator, it should normally select a suitable party-nominated arbitrator combining (a) the reality and appearance of independence and impartiality with (b) a disposition favorable to its case.

As to the chairperson, a party should not be persuaded to think that, because it is in dispute with its adversary about everything else, that it will be unable to agree with it on the selection of the chairperson. In particular, a party should not be misled by the wording of an arbitral institution's rules, doctrinal writings, or the co-arbitrators in the case, into passively allowing this decision to be made by an arbitral institution or the co-arbitrators. As the chairperson is the most powerful arbitrator, the parties have a strong common interest in agreeing upon him or her themselves and, in the author's experience, should often be able to do so if a procedure such as the one recommended in this article is followed.

If more parties took a pro-active approach to this important issue, arbitral institutions and professional arbitrators would have to concede more explicit recognition to the parties' right to agree upon the chairperson. Greater involvement of the parties in the selection of the

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[68] Derains and Schwartz, 171-75.

[69] Bühler and Webster, 142.

entire tribunal should, in turn, increase their confidence in the arbitral process, thereby benefiting arbitral institutions and professional arbitrators as well.

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