CHAPTER 3

The Ins and Outs of Arbitrator Selection

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§3.01 INTRODUCTION

When preparing for the filing of a request for arbitration (or the answer thereto), the representatives of the party and outside counsel are focused on collecting facts, developing legal arguments, and considering potential witness and expert evidence they will be able to use in the arbitration. During that already busy period, the selection of the party-appointed arbitrator or the process for selecting a sole arbitrator or presiding arbitrator is also underway. As with all the other preparatory work, the arbitrator selection is geared at winning the case or, to put it more objectively, to secure an optimal outcome of the case under the given circumstances. The following remarks might sound trivial for a lawyer who is already involved in arbitration proceedings for a long time; to those colleagues, I apologize. However, many in-house counsel and/or lawyers who are not regularly involved in arbitral proceedings might find these comments and suggestions helpful.

It is by now a standard feature of all major arbitration rules that parties have an almost unrestricted freedom to not only appoint one of the members of the arbitral tribunal (the so-called party-appointed arbitrator), and can jointly nominate a sole arbitrator as the case may be; also, they are empowered to nominate or select, if they can agree with the opposing party, the president of the tribunal. This is in contrast to older solutions in several institutions, where there was a closed list of arbitrators or where the institution insisted on making appointments themselves. Such situations, to the extent that they still exist, are not of interest for this chapter, and will thus no longer be discussed here.

For the purposes of this chapter, I will only refer to two sets of rules as examples, namely the Arbitration Rules of the Stockholm Chamber of Commerce ("SCC Rules")[1] and the Arbitration Rules of the International Chamber of Commerce ("ICC Rules," jointly referred to as "the Rules").[2] The regulations found in those rules are quite similar; for the appointment of a sole arbitrator, they say the following:

> Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall be given ten days to jointly appoint the arbitrator. If the parties fail to appoint the arbitrator within this time, the Board shall make the appointment:[3]
>
> Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party or parties, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.[4]

For arbitral tribunals consisting of more than one arbitrator (typically three, but at least theoretically also another uneven number), the Rules state the following:

> Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Board shall appoint the chairperson. Where a party fails to appoint any arbitrator within the stipulated time period, the Board shall make the appointment.[5]
>
> Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.[6]

In addition, for the president of the arbitral tribunal, the ICC Rules contain the following provision:

> Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.[7]

When an arbitration starts, each party therefore has to make an early and far-reaching decision, namely who it appoints to be a member of the tribunal and (in case of a sole arbitrator and/or a president) how it wants to influence the selection of

1. SCC Arbitration Rules 2023 (sccarbitrationinstitute.se).
2. ICC Arbitration Rules 2021 (iccwbo.org).
3. SCC Rules Art. 17(3).
4. ICC Rules Art. 12(3).
5. SCC Rules Art. 17(4).
6. ICC Rules Art. 12(4).
7. ICC Rules Art. 12(5).

that person. As this chapter shows, this in fact entails a multitude of decisions on a variety of qualities of the selected person.

As a side remark, I would like to mention here that there is a rather well-established practice where the two co-arbitrators are asked to nominate the president of the tribunal, and the arbitrators are consulting with counsel of the party who appointed them. Normally, and in order to avoid difficulties and frustration, such a procedure will be agreed upon by the two co-arbitrators so that both sides have a level playing field. In such discussions, the co-arbitrator in question and appointing counsel try to define the profile of the desired chairperson, and quite often also discuss specific names that would be considered acceptable or not. Once the arbitrator and counsel have agreed on a profile and/or specific names, such information is exchanged with the other side. The arbitrators then, based on the feedback they have received, create a list of names, which the parties are allowed to rank and/or to strike in case there are conflicts or other situations that render a candidate unacceptable.

The following is a discussion of the many parameters to be taken into account when selecting an arbitrator. Not all of them will be relevant in every case, but some will always be important and should not be neglected when taking a decision. Obviously, these are subjective comments based on my experience and might not be in line with the experience other arbitration specialists have made; in that sense, they are not intended to be guidelines to be followed strictly, but rather suggestions and ideas on how to tackle an important task.

§3.02 OBJECTIVE CRITERIA

The following is the first of two lists dealing with what I would call "objective criteria," although one can, in some instances, argue whether they are truly objective, or do not also have a subjective side. The two first are independence and impartiality, which are required explicitly or implicitly by all arbitration rules from an arbitrator. No longer relevant is the old principle according to which only the president of a tribunal would be truly independent and impartial (at the time, sometimes referred to as the "umpire" or "neutral"), whereas the party-appointed arbitrators had more the role of representatives of the appointing party in the tribunal.

According to the SCC Rules, the following applies:

> Every arbitrator must be impartial and independent.[8]
>
> Before being appointed, a prospective arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence.[9]

While independence and impartiality are always mentioned as a pair, they are different and thus will be treated separately.

8. SCC Rules Art. 18(1).
9. SCC Rules Art. 18(2).

[A] Independence

Independence is defined to mean "that there are no current or past relationships between the parties and the arbitrators which may compromise or may seem to compromise the arbitrator's freedom to rule on the matter in dispute. Independence is amenable to an objective test in that it does not involve an arbitrator's state of mind."[10]

The IBA Guidelines on Conflicts of Interest in International Arbitration[11] list in their "non-waivable red list"[12] situations which clearly are not reconcilable with an independent arbitrator: The arbitrator is either a legal representative, member of the board, shareholder, or otherwise financially interested in one of the parties, or regularly advises the party or an affiliate of the appointing party, or, the arbitrator or his/her firm derive a significant financial income therefrom. Equally problematic are the circumstances described in the "waivable red list,"[13] namely shareholding of the arbitrator in a party, representation of a party, prior involvement in the case, or regular advising of a party.

Institutions will not confirm an arbitrator who does not fulfill the independence requirement, and if circumstances that question the arbitrator's independence are discovered at a later stage, this can lead to a challenge and disqualification of the arbitrator.

For the appointment process, it is very important that any circumstances that are known to counsel which are a violation of the independence requirement are taken seriously and investigated thoroughly. If it should indeed turn out that the independence of the arbitrator, for whatever reason, is questionable, one should refrain from appointing such a candidate. It will not benefit the party choosing such an arbitrator in the long run if that arbitrator becomes an active member of the tribunal for many reasons. The first is that if the circumstances are discovered later, the arbitrator would be disqualified, and if it should even be revealed that the appointing party actually knew about the lack of independence, this will reflect badly on the party (and counsel), and might well have a negative impact on the outcome of the case. Second, even if that does not happen, the other arbitrators might become aware of the problem, which might well lead to that arbitrator being isolated or not taken seriously by his fellow arbitrators, which also might have a rather negative effect on the outcome of the case for the party who has appointed that person.

[B] Impartiality

Impartiality has to be distinguished from independence because it not so much focuses on a particular factual situation but rather on the attitude or mindset of the arbitrator. It is usually defined, in a general manner, "that an arbitrator does not favor one party over the other and is unbiased with respect to the matter in dispute. It is a subjective

10. Girsberger/Voser, International Arbitration, 3rd Edition, para. 654, with further references.
11. https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918.
12. Lists 1.1 to 1.4.
13. Lists 2.2.1 to 2.7.

concept in that it primarily involves the arbitrator's state of mind. Accordingly, impartiality is much harder to prove than independence."[14]

While the appointment of a non-independent arbitrator might easily be recognized and excluded, impartiality is more tricky because it is not readily recognizable. In any case, a potential arbitrator has to make disclosures which allow the parties to make a determination as to whether the arbitrator fulfills the impartiality obligation:

> Before being appointed, a prospective arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence.[15]

The formulation "any circumstances that may give rise to justifiable doubts" is of course rather vague. In particular, it does not define any threshold as to what could potentially trigger such doubts and results in a slippery slope, which can easily cause arbitrators to stumble. The recent practice of arbitral institutions, particularly the ICC Court, leads to the recommendation that the disclosure obligation be exercised in a broad manner. Arbitrators are well advised to disclose everything that could potentially be seen as problematic, even if, from a purely objective point of view, it could be considered unproblematic. The risk of not doing so is that not only the undisclosed fact may lead to a disqualification of the arbitrator, but the fact of the non-disclosure as such could also be seen as problematic.

[C] Nationality

Commercial arbitration is often international, i.e., the parties are from different countries, and so are other players involved. Frequently, counsel are chosen by the parties not from their own home country but rather from the country of the seat of the tribunal, or the country of the applicable law. Quite often, one also sees a combination of counsel from various jurisdictions in the team representing a party. Similarly, arbitral tribunals are in many (if not most) cases composed of people of different nationality. Historically, parties tended to appoint an arbitrator from their own home country. This continues to be seen and is, as a matter of principle, considered absolutely unproblematic.

Where it gets more interesting is either with the president of the tribunal or a sole arbitrator. There, most arbitration rules have a clear view:

> If the parties are of different nationalities, the sole arbitrator or the chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise, or the Board otherwise deems it appropriate.[16]
>
> Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the

14. Girsberger/Voser, International Arbitration, 3rd Edition, para. 653, with further references.
15. SCC Rules Art. 18(2).
16. SCC Rules Art. 17(6).

> Secretariat, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.[17]

As regards the party appointment, one can question whether it really is helpful or has any relevance if one chooses an arbitrator from the same country as the party. This might have the effect that the appointing party has more comfort in the ability of the tribunal to understand its position because it trusts that an arbitrator from its own country will be sensitive to that party's situation. However, this could be counterproductive if the two other arbitrators, who might be from neutral countries, would view their colleague critically because he would be considered not entirely impartial because of his nationality. More important is, however, and this will be a recurring theme of this chapter, that the person nominated is somebody who has the necessary skills to act in the matter, regardless of what country he or she is from.

It is a clear advantage and to be preferred if the sole arbitrator or president of the tribunal is from a neutral country. While exceptions might be made (and are admissible according to the quoted provisions of the SCC and ICC Rules), one should be reluctant to make such exceptions. Depending on how the arbitration develops, this issue might pop up, and then it might be too late to fix it. Thus, the objective criteria of the neutral nationality of the sole arbitrator and the president of the tribunal should generally not be violated.

[D] Qualifications

From time to time, parties who decide to—instead of relying on the model clause of the arbitration institution they choose—draft their own clause, establish requirements to be fulfilled by the prospective arbitrators. For example, they state that an arbitrator needs to have technical expertise (instead of being a lawyer), or experience as a business person in a particular field, such as pharmaceutical business. The author considers such clauses to be unfortunate. When concluding a contract, it is difficult or almost impossible to predict what a potential future dispute will be about. It could revolve around technical issues, legal issues, quantum questions, or others. Thus, the criteria established for the perspective arbitrators might not be a good match at all, and one would then wish to be able to appoint somebody with different qualifications or qualities.

However, if the clause has been concluded that way, to the extent it is at all possible, the criteria in the clause should be respected if possible (there have been examples where impossible conditions were set, for example, that the arbitrator be fluent in the Bulgarian language, but could not be a citizen of that country—to find such a person with the necessary arbitration and legal experience turned out to be impossible). Not adhering to conditions will create discussions and difficulties at the outset of the case, which will delay the adjudication of the matter. In any case, it is of considerable importance that at least one of the arbitrators, ideally the chair, has a legal

17. ICC Rules Art. 13(5).

background and experience in conducting arbitration. Otherwise, the proceedings could turn into a nightmare.

[E] Language

An arbitration proceeding will be conducted in one (or in rare instances in two) language, which is determined as follows:

> Unless agreed upon by the parties, the Arbitral Tribunal shall determine the language(s) of the arbitration. In so determining, the Arbitral Tribunal shall have due regard to all relevant circumstances and shall give the parties an opportunity to submit comments.[18]
>
> In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.[19]

The definition of the language of the proceedings should be one of the essential elements of any arbitration agreement. Even if that has not been done, the Rules quoted above provide for a mechanism to determine it. The most obvious is the language of the contract, which often also coincides with the language in which the parties communicated prior to concluding the contract (and thereafter). In rare instances, a bilingual contract is concluded (often this is found in contracts involving Russian or Chinese parties), with the typical layout that the contractual document is split in the middle, with the Russian/Chinese version on the right and the English version on the left, or vice versa. Quite rarely, one then actually sees proceedings where the parties submit their submissions in two languages—certainly not ideal from any perspective.

For the topic of this chapter, the language in which the arbitration will be conducted is very important for the selection of an arbitrator. It is absolutely crucial that the arbitrator is sufficiently fluent, in writing and orally, to deal with the proceedings in that particular language. An arbitrator who is limited in that regard will suffer severe disadvantages both for the arbitrator himself and for the party who nominated him. First and foremost, his understanding of the arguments might be hampered, and even more importantly, his influence on the decision-making will be limited due to his partial or total inability to communicate and discuss with his fellow tribunal members.

[F] Specific Requirements in Arbitration Clause

As already mentioned briefly, there are basically two primary ways an arbitral tribunal can be constituted: Either by the parties themselves selecting a co-arbitrator each, and those two then (with or without consulting with the party) agreeing on a president. The other one is that this is largely done by the institution itself, either *ab initio* or if one

18. SCC Rules Art. 26(1).
19. ICC Rules Art. 20.

party fails to nominate an arbitrator or if the co-arbitrators are unable to agree on a president. In those instances, the institution fills the gap and makes sure that an arbitral tribunal can be confirmed.

There are, however, cases where the parties themselves in their arbitration clause agree on a more elaborate mechanism to end up with an arbitral tribunal. This is permissible, which is explicitly stated in the SCC Rules:

> The parties may agree on a procedure for appointment of the Arbitral Tribunal.[20]

I can present here an example of a very detailed agreement on the appointment process I encountered recently:

1. The two co-arbitrators will appoint the president of the tribunal on the following terms:
2. The president of the tribunal shall not be a national of country A, B, or C.
3. Each co-arbitrator shall propose the names of three candidates after having consulted his/her appointing party, within 14 calendar days from the last of the co-arbitrators' acknowledgment of this appointment process.
4. Once the list of six candidates is established, the candidates will be immediately contacted by the co-arbitrators (without disclosing which party proposed their names) to check their availability and absence of conflict of interest. If a candidate(s) is unable to proceed due to availability or conflict, the proposing co-arbitrator shall, after having consulted his/her appointing party and carrying out an availability and conflict check, put forward an alternative candidate(s). The list will then be amended accordingly, if needed. This step 4 shall take place within 14 calendar days from step 3.
5. The co-arbitrators will consolidate the list of six candidates, which will be issued to the Parties, within 3 calendar days from step 4.
6. Each of both Parties shall remove one name from the list of 6, leaving a list of four candidates, within 4 calendar days from step 5.
7. Each co-arbitrator shall, after carrying out an availability and conflict check and after having consulted his or her appointing Party, then include one candidate of his/her preference into the list of four candidates, thereby bringing the list to six candidates. The co-arbitrators shall circulate the list of six candidates to the Parties. This step 7 shall take place within 5 calendar days from step 6.
8. Each Party can vote for the candidates by order of preference (1 to 6, 1 being the most preferred to whom 6 preferential votes are assigned) and shall communicate its order of preference to its appointed co-arbitrator. To that end, Parties may consult with its appointed arbitrator. This step 8 shall take place within 7 calendar days from step 7.
9. Taking together the Parties' voting preferences, the co-arbitrators will circulate the results of the Parties' votes and appoint the most preferred candidate, within 3 calendar days from step 8.
10. In the event of deadlock (i.e., an equal number of preferential votes), the co-arbitrators will consult with counsel to seek to find consensus and agreement, within 7 calendar days from the circulation of the results of the Parties' votes in step 9.

20. SCC Rules Art. 17(1).

11. If no consensus/agreement can be reached within the aforesaid 7 calendar days, the Parties will request the ICC to make an appointment under Article 12.5 of the Rules.

If such a procedure has been contractually agreed, it amounts to an objective criterion, and I would strongly advise against not respecting it. Otherwise, again, the risk might arise that a later award can be subject to criticism and even invalidation.

[G] Importance of Objective Criteria

The above criteria for selecting an arbitrator, which I describe as objective, are of a nature which makes them mandatory to be observed and respected. It is simply not advisable to violate any of those criteria when picking an arbitrator because this will almost inevitably lead to problems one later wishes would have been avoided.

§3.03 SUBJECTIVE CRITERIA

[A] Nationality

In addition to mandatory rules governing the nationality of arbitrators (*see* above, **§3.02[C],** there are, of course, other considerations that must be taken into account when selecting an arbitrator. Traditionally, parties had a tendency to nominate as their arbitrator a national of their own country. This attitude was more prevalent in non-western countries, where the choice of a compatriot was considered to be a safeguard that there would be somebody on the tribunal taking the position of that party fairly into account and making sure that the arguments of that party were not overlooked in the tribunal. Sometimes, this went even further; there are anecdotal examples of arbitrators who were far too close to the nominating party, which was outwardly reflected in joint traveling to hearings, staying at the same hotel, providing hints on how to plead the case, and sometimes even providing information out of the deliberations of the arbitral tribunal. All of this was of course not permitted, but it did happen. Such behavior has become increasingly rare in recent years, and arbitrators are much more aware and respectful of their impartiality and independence obligations than they were in the past.

In my view, the qualities of an arbitrator in terms of experience, knowledge of the applicable law, language skills and personality are far more important than nationality. The bigger the case, the more important it is to have an arbitrator who possesses the necessary qualities to be a non-negligible factor within the arbitral tribunal.

Sometimes, specific constellations might prompt the selection of somebody from a specific country. For example, if counsel consider intimate familiarity with the applicable substantive law to be important for the case, it certainly makes sense to choose an arbitrator of the nationality of that legal system. At the same time, if one would rather stay away from black-letter law (and focus more on the contract or oral agreements made by the parties), the opposite might apply. For the respondent,

sometimes it might, as the case may be, be better to have a national from the same or from a different country than the co-arbitrator nominated by the claimant.

As far as sole arbitrators or presidents of the tribunal are concerned, neutrality requirements have already been mentioned. In addition, it often makes sense to have somebody who is familiar with the governing legal system in the narrow sense (national law) or a wider sense (common law/civil law) in order to guarantee a proper adjudication. Finally, a certain familiarity with the local law governing the procedure at the seat of the tribunal can be an advantage. Parties sometimes invoke local rules and argue that those rules are mandatory in order to influence procedural decisions to be taken by the tribunal. It is certainly helpful if at least one member of the arbitral tribunal is able to express an informed view on the merits of such an argument.

[B] Knowledge of Applicable Law

The advantage of arbitrators who know the applicable law has already been mentioned; this is inevitably a factor when taking decisions. However, as mentioned above, sometimes one considers the case to be quite independent of the applicable law, for example, in cases where a sophisticated contract has been concluded, and any reference to a possible applicable statutory provision might be undesired, or where the case is totally fact driven, and the law will not play a role at all.

[C] Expert in Specific Area of Law

More relevant than the national law might be the area of law. There are quite a lot of cases where experience with the practices of a specific sort of transaction is key—examples are post-M&A disputes, cases involving competition law, licensing agreements, IP disputes, complex construction cases, or gas price disputes.

Particularly, if there is an imbalance of the knowledge in the particular field between the arbitrators, it is conceivable that the arbitrator who has more specific knowledge will play a dominating role. The party who has appointed an arbitrator who cannot discuss on the same level as one or both co-arbitrators will be at a disadvantage.

Many arbitration practitioners have published articles or even books on arbitration or other legal topics, which reflect their views on specific issues. Parties are well advised to review such publications before they consider a candidate for an appointment. Particularly if debates on procedural questions are foreseeable, prudence dictates to make sure that the potential arbitrator has not formulated opinions on those issues which run counter to the interests of the party in question. Sometimes, interviews with an arbitrator (*see* below, **§3.04[D]**) are used to get an understanding of the candidates' views on legal issues. Such discussions are, in my view, already borderline, even if they remain at the surface of the legal issue because they might be perceived as an attempt to predetermine the arbitrator's view on legal questions that will become relevant in the framework of the arbitral decision.

For the sake of completeness, one should also mention that an arbitrator who has publicly advocated a specific position regarding the case that is being arbitrated,

whether in a public paper or speech or otherwise, might also be subject to challenge, according to the IBA Guidelines.[21] This has to be distinguished from the publication of a general opinion (such as in a Law Review article or public lecture) concerning an issue which also arises in the arbitration if this opinion is not focused on the specific case, according to the IBA Guidelines.[22]

[D] Experience in Specific Types of Cases or Fields of Business

An example of cases where specific experience is helpful are, for example, gas-price or similar cases, complex construction disputes, M&A disputes, license and patent disputes and others.

The best evidence for such specific experience is if one has direct information about the candidate's involvement in arbitrations in the specific field, either from clients or trusted colleagues in one's own or a different law firm. Sometimes, however, such direct information is not available regarding a possible appointee who fulfills the other criteria discussed in this chapter.

Here is the place where one should mention tools that have appeared more recently on the market, namely the selection of data on arbitrators. One of the well known is Arbitrator Intelligence, a platform which describes its purpose as "enabling parties and counsel to share information and feedback about arbitrators."[23] The purpose of that organization's reports is to make arbitrator appointments more predictable and, thus, the arbitral process more effective by offering insights about arbitrators who might otherwise not be known, thus adding diversity, certainty and wisdom to the process of selection of arbitrators.[24] The database is still in the process of being built up, but it certainly has the potential to be an important and valuable tool when taking the decision on an arbitrator. For the time being, the information found in the database seems incomplete, and its use is rather expensive. The publishing house Kluwer also offers similar tools, such as "Profile Navigator and Relationship Indicator Tools," which provide access to profiles of arbitrators, expert witnesses and counsel.[25]

Moreover, there is a concern that some of the information provided might not always be fully reliable. There is a tendency to overstate one's experience in marketing materials, which is, for example, reflected in the description of a lawyer's background on his or her website. Therefore, such resources must be used with a grain of salt and should, in any case, be verified independently, for example, by counterchecking with colleagues who have worked with the particular individual, or by conducting an interview with the candidate (*see* below, E.4).

21. List 3.5.2.
22. List 4.1.1.
23. https://arbitratorintelligence.com.
24. As described by Gary Born, Chiann Bao and Mohamed S. Abdel Wahab in quotes on the above website of Arbitrator Intelligence.
25. https://www.wolterskluwer.com/en/solutions/kluwerarbitration/practical-tools.

[E] Reputation and Standing in the Arbitration Community

Arbitration is a field where there is a growing (but still rather limited) group of specialists who enjoy a good or excellent reputation as arbitrators. Ranking organizations such as Chambers, Legal500 and WWL add to the notoriety of leading specialists. While those well-known arbitrators used to be domiciled mainly at the places known as arbitration hubs, the geographical reach has expanded exponentially in recent years. The number of those people is still larger in places with a lively arbitration scene, such as London, Paris, Switzerland, Sweden, Singapore and others, and rather small in countries where arbitration is less prevalent. If one wants to have an arbitrator who plays a strong role within the tribunal, the choice of somebody with a strong reputation might be a risk-free decision.

[F] Age and Gender

Arbitration used to be the playing field for highly experienced, white-haired gentlemen. These times are definitely over, and gender diversity is probably greater than in most other fields of the law. Many highly reputed arbitrators are in their forties or early fifties, while, of course, there is still the occasional septuagenarian or even octogenarian who enjoys a lively practice. And certainly, age per se is no advantage or disadvantage, one way or the other. In any case, one might take into account that complex cases often go on for three or more years, and the biological clock is ticking. The practice of arbitration institutions shows that there is a non-negligible number of elderly arbitrators who, in the course of a case, have to be replaced for health reasons or even death. Therefore, it is prudent to at least mention to the client at the appointment stage that age might be something to consider.

Diversity is an important target for arbitral institutions, and the ratio of female arbitrators is regularly published by such institutions. Institutions are under pressure to contribute to diversity by taking into account not only gender but also geographical elements when making appointments. Whether and to what extent parties and counsel also have an obligation in that regard is open for debate. At the end of the day, what really counts for counsel is to find the best arbitrator for the case, whether male or female.

[G] Availability and Interest

Not only at the beginning of the case, but also during the document production phase, the time of the hearing, and when the award needs to be drafted, an arbitrator needs to devote considerable amounts of time to the case. Only an arbitrator who has the time necessary to fulfill these tasks will actually have an influence on the outcome of the case. As with all lawyers (and humans in general), there sometimes is the tendency for people to shoulder more than they can actually carry. From time to time, one hears about arbitrators who are in terrible delay with delivering awards and fulfilling their tasks, sometimes leading to sanctions and (as one hears) blacklisting of arbitrators by

specific institutions. While such instances are rare, availability is definitely a factor to be considered. Thus, choosing the busiest arbitrator is not always the wisest decision. Particularly if the amount in dispute in a matter is not huge, there might be a danger that an arbitrator neglects the case and devotes his time to more lucrative work. This must be avoided. For smaller cases, it is thus recommendable to focus on younger arbitrators, who will make sure that they do a good job when they have an opportunity to prove themselves in one of their earlier appointments.

Positive are examples of arbitrators who decline appointments when they see that their calendar is already full and anticipate that they will not be able to devote sufficient time to a matter. While, as an immediate reaction, a party proposing somebody who then refuses the appointment for lack of time might be disappointed, this attitude is actually commendable.

Generally, the more interest an arbitrator has in a case, the better for the parties.

[H] Efficiency

Surveys among users of arbitration regularly show that one of the most important expectations is that a decision be rendered swiftly and without undue delay. Institutions therefore put particular focus on the requirement of efficiency. It is an important goal that cases are dealt with quickly, and thus, the Rules make this very clear:

> In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient, and expeditious manner, giving each party an equal and reasonable opportunity to present its case.[26]
>
> The final award shall be made no later than six months from the date the case was referred to the Arbitral Tribunal pursuant to Article 22. The Board may extend this time limit upon a reasoned request from the Arbitral Tribunal or if otherwise deemed necessary.[27]
>
> The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.[28]
>
> The time limit within which the arbitral tribunal must render its final award is six months. … The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.[29]

One of the most important requirements for an arbitrator is that he or she actually has time to deal with the case. This is of particular importance for the chair or sole arbitrator because they are in charge of the most time-consuming tasks, namely the drafting of procedural orders and, ultimately, the final award. There is nothing more frustrating for parties who have conducted a case diligently than to wait for six or nine months, or even a year until they obtain a decision from the tribunal. Quite rightly,

26. SCC Rules Art. 23(2).
27. SCC Rules Art. 43.
28. ICC Rules Art. 22(1).
29. ICC Rules Art 31(1).

institutions are concerned about such situations. The ICC, for example, has developed a practice according to which fees of the tribunal are reduced by at least 5% or 10% if the deadline of three months to submit an award to the ICC Court for scrutiny is not respected. The reduction is adjusted depending on the amount of delay, taking into account not only the delay but also possible special circumstances.[30]

[I] Prior Experience

The best basis to appoint a particular arbitrator is of course if one has prior experience with the colleague in an earlier case, be it as counsel before the arbitrator or sitting together on a panel. To see an arbitrator dealing with a case will provide you with a firsthand impression of how that person works and handles a case and is a very reliable basis to make a recommendation to the client.

If one does not have direct experience with somebody, professional colleagues might be a valid source for descriptions of firsthand experiences. Colleagues are usually more than willing to share experiences, certainly, if they were particularly good or particularly bad. "Blind" appointments of somebody one has never heard about, but is recommended by the client or somebody else whose judgment one does not trust, is rather dangerous and normally not to be recommended.

§3.04 SOLE ARBITRATOR AND PRESIDENT OF THE ARBITRAL TRIBUNAL

[A] Specific Profile

Sole arbitrators and presidents of the arbitral tribunal require specific qualities. They are the ones leading the arbitration; in the case of a sole arbitrator, he or she will be the sole decider of the matter, and in the case of the president, the swing vote creates a majority.

To illustrate the multiple tasks of the presiding arbitrator or sole arbitrator, reference can be made to a recent LinkedIn post of Finnish arbitrator Gisela Knuts after a hearing, describing the tasks she had to tackle during that hearing: Instruct the witness on the procedure during the examination; follow the examination and take notes of potential questions; examine the exhibits shown to the witness and take notes of points made; rule on objections raised by counsel; follow live notes on the screen in front of you; manage potential questions from the co-arbitrators; keep track of the time; and doing all of this while the witness might be speaking in a language you do not understand with the simultaneous translation in your other ear.[31]

30. For details, *see* https://iccwbo.org/news-publications/news/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/#: ~ :text = for%20draft%20awards%20submitted%20for,reduced%20by%205%20to%2010%25.
31. https://www.linkedin.com/feed/update/urn:li:activity:7057755665452171265?updateEntityUrn = urn%3Ali%3Afs_feedUpdate%3A%28V2%2Curn%3Ali%3Aactivity%3A7057755665452171265%29.

In order to end up with a chair or sole arbitrator who is up for the job, the following are a few points to be considered.

[B] Heightened Expectation of Neutrality

It has already been mentioned that, as a matter of principle, the neutrality requirement is the same for all arbitrators—independence and impartiality are expected, and there is no tolerance in that regard for the party-appointed arbitrator.

However, strict neutrality is of course even more important for the arbitrator who might turn out to be the decider, not only when it comes to taking a decision but also in procedural matters. The sole arbitrator or president is expected to have no tendency towards one or the other party whatsoever.

[C] Experience

The sole arbitrator and president of the tribunal will be the ones drafting the decision. An arbitral award has to fulfill certain expectations:

> The Arbitral Tribunal shall make its award in writing, and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based.[32]
>
> The award shall state the reasons upon which it is based.[33]

Drafting of arbitral awards is a difficult task and requires some experience. Since the quality of the award might be the factor determining whether it withstands scrutiny (of the arbitral institution, of courts to which one can appeal, or at the enforcement stage), both in terms of language, structure, and stringency of the reasoning. Only arbitrators whom one can expect will be able to discharge that task are good choices for sole arbitrators or presidents.

[D] Case Management Abilities

To run an arbitration can be as easy as a walk in the park—if the counsel are constructive and experienced, parties sincerely interested in a speedy resolution of the case, the co-arbitrators interested, diligent and easy to get along with, and the case neither factually nor legally overly complex. Those cases are the exception. Proceedings get more and more complex, parties and counsel create difficulties where there should not be any, production of documents, challenges, counsel changes, COVID-19 pandemic, remote hearings, sanctions—all of these factors contribute to an impression that there are no easy cases anymore.

In order to deal with those difficulties, something that you might simply summarize as experience is crucial. Some arbitrators have a natural ability to deal with

32. SCC Rules Art. 42(1).
33. ICC Rules Art. 32(2).

the procedural intricacies of a case, and others have it less. Clearly, the sole arbitrator or president is the person who has to manage the case and bring it forward and do everything to lead it to an efficient end.

If the parties have an influence, they should do everything to make sure that whoever ends up in the driver's seat knows what he or she is doing. This is one of the many reasons why it is sometimes risky to leave the choice of arbitrator to an institution instead of trying hard to agree with the other side on somebody both sides trust.

[E] Personality and Social Competence and Leadership Qualities

Everybody who has to lead a group of people, in every walk of life, is better at doing so if he or she has leadership skills and an impressive personality to establish him or herself as a natural leader. Social competence will help in dealing with difficult situations in the proceedings, of which there are usually quite a few, not only during case management conferences and hearings, but also within the arbitral tribunal, where the struggle to come to a decision can result in a burden on the relationships of the arbitrators.

[F] Infrastructure and Resources

There are two elements here that need to be considered. The first one is the technical infrastructure and the second are resources to deal with a case. An arbitrator who can use a secretary or assistant to the tribunal will be able to react quicker than somebody who types procedural orders himself. To have an office where one can hold case management conferences (or even hearings) is also helpful. This is not so important for the party-appointed arbitrator, but might be a factor when choosing a chair or sole arbitrator. In the old days, sometimes university professors were notoriously un-derequipped in that regard. Nowadays, this seems to be less of an issue.

§3.05 ETHICAL ISSUES

[A] Arbitrator from Country of a Party

It has already been mentioned that there are instances where the identity of the origin of a party and the arbitrator has turned out to be problematic. Far be it for the author to generalize here.

[B] Relationships with Arbitrator

One of the most frequent bases for a (successful) challenge is that an arbitrator had a too close relationship with counsel or the appointing party. Therefore, it might not be advisable to appoint the best friend or a former attorney of a party, even if one

considers that not to be a problematic relationship. A challenge where more comes to light than what was anticipated is unpleasant and might derail the whole proceedings.

[C] Multiple Appointments

The same applies to multiple appointments. Rules are quite restrictive; for example, the already mentioned IBA Guidelines consider problematic if the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties;[34] the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties,[35] and the arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.[36] It is shocking that sometimes arbitrators are quite reluctant to be transparent as regards multiple appointments and provide incomplete information; this is unacceptable and has, in recent times, led to the disqualification of arbitrators who were overly restrictive in disclosing circumstances of this kind.

[D] Interviews with Potential Arbitrator?

In some cases, parties wish to conduct an interview with a potential arbitrator. This is an area where one should tread carefully. While a 30- to 60-minute conversation about the experience of the potential arbitrator is acceptable, any direct discussion of the case is not. The Chartered Institute of Arbitrators has developed an enlightening guideline entitled "Interviews for Prospective Arbitrators."[37] It emphasizes that while "Interviews with prospective arbitrators prior to appointments allow parties to obtain a more complete picture of candidates," an interview also "carries risks that may be perceived as undermining the arbitrators' impartiality and independence."[38]

Matters that can be discussed, according to the Guideline, are past experience and attitudes to the conduct of arbitral proceedings; expertise in the subject matter of the dispute; availability; and (in cases of ad hoc arbitrations) the prospective arbitrator's fees and other terms of appointment.[39] What should not be discussed, however, are specific facts or circumstances of the dispute; positions or arguments of the parties; the merits of the case; and/or the prospective arbitrator's views on the merits, arguments and claims.[40] The Guideline also makes clear that interviews with

34. List 3.1.3.
35. List 3.1.5.
36. List 3.3.7.
37. https://www.ciarb.org/media/4185/guideline-1-interviews-for-prospective-arbitrators-2015.pdf, with interesting commentaries.
38. Guideline, p. 14.
39. Guideline, Art. 2.
40. Guideline, Art. 3.

prospective sole or presiding arbitrators are subject to specific restrictions, in particular, that they should be interviewed by parties jointly.[41]

[E] Chemistry Between Arbitrators

A good tribunal is one where an open and constructive discussion is possible. Arbitrators who like and respect each other are more likely to come up with a wise and balanced decision than a fractioned tribunal that is barely on speaking terms. Therefore, it is quite appropriate to inquire with a potential arbitrator about his or her experience with colleagues who are already on the tribunal. At the same time, the president of a tribunal will certainly take into account, when considering whether to accept an appointment, if he can imagine working with the two co-arbitrators based on prior experience.

[F] High Profile Arbitrators

Clients sometimes want the best-known and famous arbitrator for their case because they consider that this will be helpful for their position. For reasons already briefly mentioned earlier, this might not always be the best approach. An arbitrator who is sufficiently experienced for a specific case and has enough time and interest to devote to the matter is better than a high-profile arbitrator who does not devote sufficient time. Therefore, one should always look at the case and determine what level of experience and reputation of the arbitrator is really required and appropriate.

[G] Institutional Support for Diversity and Youth

The ICC states the following:

> Increasing diversity and inclusion has been a key priority for ICC Court President Claudia Salomon since she took over the leadership position in 2021, Ms Salomon said 'Arbitrator diversity in all forms is essential to the legitimacy of international arbitration by ensuring that the arbitrators represented in cases reflect the diversity—and values—of the global business community.' […] 'In house counsel, outside counsel and co-arbitrators all have a crucial role to play if we are able to see a sizable increase in the diversity of arbitrators,' Ms Salomon said.[42]

There is not much to add here; the goal of broadening the diversity base for arbitrators goes in the right direction, and the already successful attempt to open up arbitrator positions for younger practitioners is positive.

Whether and under what circumstances counsel follow the guidance given by the ICC is a decision to be taken on a case-by-case basis. Ultimately, it is the decision of the client who is chosen as party-appointed arbitrator, taking into account all the

41. Guideline, Art. 4.
42. https://iccwbo.org/news-publications/news/icc-acts-to-encourage-diversity-in-selection-of-arbitrators/.

parameters discussed in this chapter. I would certainly support that when discussing potential candidates, counsel who advise clients present a broad range of potential arbitrators, ranging from diverse backgrounds and do not focus on a narrow group of people from the outset.

[H] UK-Specific: Arbitrators from the Same Chambers

While it is hardly conceivable that parties would choose or an institution would confirm a tribunal where two of the arbitrators are from the same law firm (at least, I have never seen something like that in practice), it is not unusual that arbitrators from one of the London chambers act in cases where other barristers from the same chambers act as counsel, for example. Interestingly, such a situation is accepted based on the argument that chambers are not law firms, and members of the same chambers do not share income. This view raises certain questions, to say the least. In particular, the historical setup of chambers, where indeed the various barristers operating from the same building shared nothing but paid for their room and the work of the clerk but were otherwise totally independent, is hardly reflective of the actual situation. Nowadays, leading chambers have a homepage where all the barristers are listed and where they praise their collective experience, very similar to law firms. Thus, at least in my view, one can hardly maintain the fiction of total independence. Whether and to what extent the choice of an arbitrator from the same chambers as counsel is advisable or not is open for debate. One could at least imagine that, in the enforcement stage, such a setting would raise some serious eyebrows.

§3.06 SUMMARY AND RECOMMENDATION

As this chapter has tried to demonstrate, there is a multitude of parameters that can and should be taken into account when exercising a party's right to appoint an arbitrator or to participate in the discussion regarding a president or sole arbitrator. This task must be taken seriously, and tackled without delay once a case starts, because deadlines are running, and inquiries with potential candidates may take time to conduct conflict checks and examine the candidates in detail.

I would suggest the following procedure to find a party-appointed arbitrator:

- Starting point is a careful analysis of the case regarding the parameters discussed in this contribution (subject matter of the actual dispute, amount in dispute, applicable law, venue, nationality of the parties, arbitrator appointed by the other party).
- Preliminary definition of a profile of the candidates.
- Discussion and alignment with the client on the profile.
- Establish a long list of candidates fitting the profile (at least ten).
- Conduct research on the candidates from publicly available sources.
- Narrow down the list of candidates to five, always in consultation with the client.

- Contact the candidates with a view to their availability for the case.
- Further research on the candidates on the short list, contacting colleagues to get feedback, and possibly conduct interviews.
- Decision on candidate and appointment.

If a sole arbitrator or president needs to be found, it is crucial to start the process with a discussion between counsel (for a sole arbitrator) or the two co-arbitrators. The aim is to agree on a fair and transparent process, which allows both sides to end up being comfortable with the arbitrator ultimately chosen. As mentioned above, it is always preferable to agree on an acceptable sole arbitrator or chair than to insist on a particular type of candidate, not to come to an agreement and then to delegate the decision to the institution. This does not mean, however, that one should simply accept a candidate proposed by the other side if that proposal is unreasonable and unacceptable.