CHICAGO INTERNATIONAL ARBITRATION CENTER

Who are the arbitrators and how are they selected?

By Kristen Hudson

1. *How are the arbitrators selected?*

Because arbitration is a creature of contract and the parties are free to craft their own dispute resolution procedures, the first source for understanding who will arbitrate the dispute is the parties' agreement. The arbitration clause will often provide guidance on both the number of arbitrators and method of selection of arbitrators. While the parties are free to craft the arbitrator selection process to meet their specific needs, a typical international arbitration has three arbitrators. In such cases, each party selects a party-appointed arbitrator, and the two party-appointed arbitrators select a third arbitrator to serve as chairperson.

Another source of guidance as to the number and method of selection of arbitrators is the rules of the arbitral institution or guidelines the parties agree to govern the arbitration. As set forth in the UNCITRAL Rules, Article 7[1], for example, in the absence of agreement by the parties to have a sole arbitrator, three arbitrators is the default choice. By contrast, both the International Chamber of Commerce (ICC) rules and the American Arbitration Association's International Dispute Resolution Procedures provide for a sole arbitrator as the default choice, unless other factors are present that warrant the appointment of three arbitrators.[2]

In addition to the parties' contract and the arbitral rules, there are other sources of law to look to for guidance on arbitrator selection that may impact the ultimate enforcement of the arbitral award. Article V(1)(d) of the New York Convention allows for the refusal of an arbitration award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[3] If the seat of the arbitration is located in the United States,

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[1] *See, e.g.,* https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration

[2] *See, e.g.,* ICC Article 12 https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_12; *see also* Article 11 of the AAA's IDRP, https://www.adr.org/sites/default/files/ICDR_Rules.pdf.

[3] *See* https://www.newyorkconvention.org/english

for example, the Federal Arbitration Act provides guidance for the selection of arbitrators. Section 5 of the Act provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.[4]

So the question of selection of the arbitrators is important not only to compliance with the terms of the parties' agreement, but may also impact enforcement of that award at the conclusion of the process. As discussed further below, selection of arbitrators is important to ensuring that an efficient and appropriate remedy resolves the merits of the parties' dispute.

2. *Who are the arbitrators?*

Understanding and maximizing the process of selection of the arbitrators is important because arbitrators are key to the success of the arbitration. The quality of the arbitrators is critical because arbitrators make binding decisions and have broad discretion to fashion remedies. And the parties have a limited ability to challenge or appeal an arbitration decision if the arbitrators do not do their jobs well. An arbitrator's credibility is therefore crucial to maintaining the parties' faith in the overall arbitration process and to securing those benefits that make arbitration attractive as a method of dispute resolution, such as efficiency and enforceability.

At a minimum, arbitrators must be impartial and independent. In this context, impartiality means that the arbitrator is not biased in favor of or against any party to

[4] 9 U.S.C. § 5.

the case or towards any particular issue in the case. In this regard, there is a tension between the concept of a party-appointed arbitrator – in the sense that the party selects the arbitrator it believes will best understand and support that party's legal position – and the requirement that the arbitrator not be obviously biased in favor of that party. To balance these tensions, an arbitrator is required under arbitration and ethical rules to disclose any circumstances that may give rise to justifiable doubts[5] concerning their impartiality.[6] These disclosures include any past or present relationships with any of the parties. This duty is continuing, arising when a new witness, party or issue is introduced to the proceedings.

Independence refers to the financial dependence of the arbitrator. Notwithstanding the compensation received for the arbitrator's services, the arbitrator must be free from any financial stake in the outcome or any financial stake in any of the parties and not professionally tied to the outcome of the proceeding. This would include obvious situations where the arbitrator is a legal representative or executive level manager of the party or would profit from the outcome of the arbitration, and also less direct situations where the arbitrator provides legal advice to an affiliate of the party or is associated with a law firm who does so. An arbitrator also has a continuing duty to disclose all such financial circumstances at all stages of the arbitration.

Impartial and independent arbitrators are important to the validity of the process. One reason for this is because bias of an arbitrator may be grounds to refuse enforcement of the arbitration award under Article V(1)(d) of the New York Convention. That section allows for refusal of enforcement of an award where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." Therefore, the award could be

[5] The International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, although non-binding, offer widely accepted guidance on conflict of interest situations. As defined by the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, "Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."

[6] *See* https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918. The IBA Guidelines provide helpful definitions and explanations of impartiality and independence, and specific lists of situations that may give rise to justifiable doubts. The guidelines describe "red" list situations most likely to lead to a conflict, "orange" list situations where, depending on a the facts, may give rise to justifiable doubts requiring disclosure, and "green' light situations that do not objectively lead to a conflict of interest situation.

challenged if bias of an arbitrator is grounds for vacatur of an award under the law where the arbitration took place. Under section 10 of the U.S. Federal Arbitration Act, for example, a court may vacate an arbitral award where there was "evident partiality or corruption in the arbitrators."[7] Short of challenge to an award, parties should take care to avoid challenges to and disqualification of arbitrators as it is costly and delays an ultimate resolution on the merits.

Impartiality and independence are the minimum requirements for arbitrators, however. The following is a non-exclusive list of arbitrator qualities that in addition to impartiality and independence contribute to the success of an arbitration:

1. Nationality: Many parties and arbitral institutions require that the presiding arbitrator be of a different nationality than the parties. This is because nationality provides one easy and effective litmus test for measuring and preventing bias.

2. Subject matter expertise: At a minimum, the arbitrator should be familiar with international law and procedure and have experience in managing or litigating complex commercial disputes. Depending on the nature of the dispute, it may be important to have experience in a particular industry, for example, in cases involving construction or investment disputes. While legal experience is not a requirement to serve as an arbitrator, as noted below regarding case management skills, it is often preferred to ensure an orderly efficient arbitration procedure.

3. Language capability: Obviously, it is important for the arbitrator to have the capability to read documents relevant to the proceeding, to effectively communicate with counsel and the parties, witnesses and experts, and to write reasons for decisions and awards. Thus, language fluency based on the needs of the case is an important quality.

4. Case management skills: To achieve two of the goals of arbitration – time and cost efficiency – the importance of the case management skills of the arbitrators cannot be overstated. This is where a skillful and experienced legal practitioner can make a difference. Lawyers experienced in complex

[7] 9 U.S.C. § 10(a)(2).

commercial litigation and arbitration have the skill set necessary to streamline the pre-hearing phase of the case, to quickly resolve pre-hearing and discovery disputes, to set the case on a timeline that allows for parties to adequately prepare their case for presentation while maximizing efficiency, and to allow for the orderly introduction of evidence. With the rise in popularity of virtual hearings and electronic discovery, proficiency with technology is an equally important characteristic.

5. Diversity: Diversity of perspectives in the constitution of the arbitral tribunal is valuable as it is in most human endeavors. It appears to be settled as a principle that diverse bodies make better decisions than non-diverse ones. Scholars agree that "[d]iversity in arbitration serves an important role in enhancing the quality of the substantive decision-making in the arbitration process."[8] Diverse arbitrators bring fresh and unique cultural perspectives to the fact-finding process. In addition to enriching the quality of the legal analysis, diversity is intrinsically valuable to the system of arbitration in providing equal access and equal treatment for all participants, reflecting the global economies that international arbitration serves.

6. Availability: Scheduling conflicts and the availability of an arbitrator for a timely hearing is critical to achieving the efficiency goal of arbitration. Until more diversity (as noted above) is achieved in the composition of arbitral tribunals, arbitrators are often selected from the same small pool of candidates, which result in long-lead times for scheduling a hearing. It is important to find the best arbitrator with the earliest and most flexible availability. If travel is necessary, it is important to ensure that the arbitrator you are considering is able to do so.

[8] For a discussion of diversity in arbitration, *see* Naimeh Masumy, "Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?" Fordham International Law Journal, blog post, available at https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity. For a discussion of recent survey results on diversity in arbitration and efforts to improve diversity, *see* *https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/diversity-arbitral-tribunals*

A. Tips for Researching Potential Arbitrators.

Key to party autonomy in arbitration is the ability to select the fact finder before the dispute resolution process begins in earnest. This is not a luxury afforded to parties and their counsel when working within a national court system, and care should be taken in researching and making the selection.

Parties should consider a variety of sources when selecting a potential arbitrator. These include the arbitrator's curriculum vitae, which should be made available through the arbitral institution or upon request. Of particular interest on the CV is the arbitrator's work experience and education; focusing on the qualities noted above and specialized training and experience in arbitration, complex commercial litigation, and case management technology. Although not always available publicly because of the private nature of arbitration, if possible, parties should try to find extracts or copies of decisions and awards issued by the arbitrator. This will give the party insight into the arbitrator's fact-finding approach and legal reasoning. Publications authored by the arbitrator and presentations given by the arbitrator offer further insight into both the arbitrator's experience and expertise, as well as their scholarly leanings. It is important to know whether the arbitrator has expressed a view on the industry or issues in the arbitration. Do the key issues in the arbitration turn on a particular interpretation of a legal principle, for example? It is important to know in advance whether your arbitrator candidates have expressed any relevant views. If you don't know or cannot find information important to your selection process, ask the questions directly of the arbitrator candidate. Many arbitral tribunals will facilitate the exchange of interview questions for potential arbitrator candidates, which may be preferred to directly interviewing the candidate so as not to create an appearance of bias where none existed previously.

Last but not least, word of mouth is important. Poll your colleagues about the skill and temperament of arbitrators under consideration. This is often the most important source of information available in making an arbitrator selection. In doing so, however, keep in mind the key qualities noted above and be cognizant of confirmation bias and the bias inherent in solicited feedback. Like your arbitrator, you want your research and selection of an arbitrator to be free from partiality and dependence.

B. Conclusion

In sum, the quality of the arbitrators and the composition of the arbitral tribunal are crucial to the success of the arbitration, and critical to ensuring confidence in the private system of adjudication. Selection of the arbitrators begins with the arbitration clause itself. Examine what your arbitration provision says about arbitrator selection and see if there are ways to shore it up in a way that makes the most sense for your business and the qualities you are seeking. Care should also be taken in selecting an arbitral institution to govern the procedural aspects of the arbitration to ensure that the procedure selected in the arbitration clause is in harmony with the rules of the chosen arbitral institution, and that the selected institution places a premium on transparency and diversity in the selection of arbitrators and the on-going disclosure obligations of the arbitrators to ensure that conflicts of interest do not interfere with the timely and fair adjudication of the merits of the dispute. While there is a global push to increase transparency and diversity, some institutions are further along in their development of these processes. Finally, don't skimp on researching potential arbitrator candidates; the selection of the arbitrators could be the most important strategic decision you make in the arbitration.