THE GUIDE TO INVESTMENT TREATY PROTECTION AND ENFORCEMENT

SECOND EDITION

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Publisher's Note

Global Arbitration Review is delighted to publish the second edition of *The Guide to Investment Treaty Protection and Enforcement*.

For newcomers, GAR is the online home for international arbitration specialists. We tell them all they need to know about everything that matters in their chosen professional niche.

We are perhaps best known for our news. But we also have a growing range of in-depth content, including books such as this one, retrospective regional reviews, conferences with a bit of flair, and time-saving workflow tools such as our database of arbitrators full of information nobody else has and our collection of arbitral awards. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we sometimes spot gaps in the literature before others. Some time ago it dawned on us that, despite the number of books on investment law, there was nothing focused resolutely on the practical side of those disputes. So we decided to make one.

The book you are reading – *The Guide to Investment Treaty Protection and Enforcement* – is the result. It follows the concept of investment protection through its whole life cycle – from treaty negotiation to conclusion of a dispute. It aims to tell the reader what to do, or think about, at every stage along the way, with an emphasis, for readers who counsel or clients in investment matters, on what 'works'.

We trust you will find it useful. If you do, you may be interested in the other books in the GAR Guides series. They cover energy, construction, IP disputes, mining, M&A, challenging and enforcing awards, telecoms and evidence in the same practical way. We also have a book on advocacy in arbitration and how to become better at thinking about damages, as well as a handy citation manual (*Universal Citation in International Arbitration*).

We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you, all – especially the various arbitrators who supplied boxes for us at short notice. We are in your debt.

And last, special thanks to our two editors – Mark Mangan and Noah Rubins – who went above and beyond, somehow finding time in their busy lives not only to devise the original concept with us but also to shape it with detailed chapter outlines and personal review of chapters as they were submitted, and to my Law Business Research colleagues in production for creating such a polished work.

David Samuels
Publisher, GAR
December 2023

CHAPTER 6

Constitution of the Tribunal

Rebeca E Mosquera[1]

The arbitrator is the sine qua non of the arbitral process.
The process cannot rise above the quality of the arbitrator.[2]

Introduction

It is unquestionable that the ability to select an arbitrator is one of the foundations of international arbitration.[3] The selection process is the first procedural step in any arbitration. The parties go to great lengths to research and try to predict whether the person they are choosing as their party-appointed arbitrator will in fact be receptive to their position. A great many strategic decisions are made by counsel at this procedural stage. Given its potential importance to the outcome of a dispute, the selection of the arbitrator or arbitrators is something counsel could evaluate when first assessing whether to bring a claim. This chapter examines the constitution of tribunals in investor–state dispute settlement (ISDS). First, the key factors counsel may wish to consider when nominating an arbitrator are addressed. Second, the chapter analyses how to break a deadlock in appointing a presiding arbitrator. Third, the duties of arbitrators in international arbitration are

1 Rebeca E Mosquera is a senior associate at Reed Smith LLP.

2 George von Mehren, 'Concluding Remarks', in *The Status of the Arbitrator* (ICC, 1995), 126, 129.

3 Gary Born, *International Commercial Arbitration* (3rd edition, Wolters Kluwer, 2021), 1765 ('The need, and opportunity, to select the arbitrators for each dispute that arises is an historical, and distinguishing, feature of international arbitration . . . the existence of this opportunity is one of the principal reasons that both states and commercial parties have, over the centuries, chosen the arbitral process to resolve their international disputes.').

examined. Fourth, the chapter considers challenges to an arbitrator, including a discussion on recent case law. Finally, the chapter concludes with a discussion of the procedures to replace an arbitrator.

In defence of party appointment

The principle of party autonomy is fundamental to arbitration in general and to international arbitration in particular.

In view of recent developments, particularly on investment arbitration, let me stress here that for me it is a fundamental aspect of party autonomy that the parties have the right to appoint one member of the tribunal. If all three members are appointed by an institution or by parties on one side, a fundamental advantage and a fundamental quality of arbitration over domestic courts is lost, in my view. Therefore, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and other recent agreements negotiated by the EU that provide that only the governments involved appoint the judges of the standing investment court, provide their salaries and decide on their re-appointment without any involvement of the investors, in my view lack a fundamental aspect of neutrality and due process.

– Karl-Heinz Böckstiegel, independent arbitrator (retired)

Factors to consider when nominating an arbitrator

When researching potential arbitrators, the first step should always be to consult the arbitration clause[4] for any specifications. Should none be present, which, with some exceptions, is usually the case in ISDS,[5] one must investigate the type of dispute at hand to decide on the factors to consider.

The 2021 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules have detailed guidelines and procedures on how to nominate a party-appointed arbitrator.[6] However,

4 Generally speaking, in investor–state dispute settlement (ISDS), the settlement dispute resolution clause is often found in the applicable treaty. However, there are instances in which the settlement dispute mechanism is contained in a contract. See, e.g., *Elsamex v. Honduras*, ICSID Case No. ARB/09/4, Award, 16 November 2012, ¶ 120.

5 See, e.g., Australia–China Free Trade Agreement, Chapter 9, Article 9.14(8).

6 See International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, Chapter I, 'Establishment of the Tribunal'; see also 2021 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, Section II, 'Composition of the arbitral tribunal'.

sometimes the applicable treaty would override or modify the applicable rules. For instance, the United States–Peru Trade Promotion Agreement states that '[t]he arbitration rules applicable . . . and in effect on the date the claim or claims were submitted to arbitration . . . shall govern the arbitration except to the extent modified by this Agreement'.[7] One such modification is that, with its notice of arbitration, the claimant shall provide the name of its party-appointed arbitrator.[8]

Usually, the parties assemble a list of prospective party-appointed arbitrators and they may communicate with them to help narrow down the list. It is important to consider whether the arbitrator has the desired knowledge of the procedure, the applicable law and the subject matter of the dispute. Another subject that counsel often takes into account is how often the arbitrator has been appointed by a state or by an investor. Considerations such as these should help the parties get a better idea of who to appoint.

With respect to 'pre-appointment communications', previous versions of the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes stated that the discussion must be limited to the prospective co-arbitrator's experience, availability, expertise and the absence of any conflict of interest.[9] In turn, Article 7 of version three of the Draft Code of Conduct restricted the language stating that there shall be no *ex parte* communication with a prospective arbitrator except:

> *(a) to determine a Candidate's expertise, experience, ability, availability, and the existence of any potential conflicts of interest; (b) to determine the expertise, experience, ability, availability, and the existence of any potential conflicts of interest of a Candidate for Presiding Adjudicator, if both disputing parties so agree; (c) as otherwise permitted by the applicable rules or treaty or agreed by the disputing parties.*[10]

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7 The United States–Peru Trade Promotion Agreement, Chapter 10, 'Investment', Article 10.16.5.

8 id., at Article 10.16.6.

9 Draft Code of Conduct for Adjudicators in International Investment Disputes, April 2021, Article 7; see also 2013 International Bar Association (IBA) Guidelines on Party Representation, Guideline 8(a) ('A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.').

10 Draft Code of Conduct for Adjudicators in International Investment Disputes, September 2021, Article 7.1.

The Draft Code of Conduct further proposes that the permitted communications under Article 7.1 'shall not address any issues pertaining to [the merits of the case, including] jurisdictional, procedural, or substantive issues that the Candidate or Adjudicator reasonably anticipates could arise in the [international investment dispute]'.[11]

A further point for consideration might be the language in which the arbitration will be held. It is possible to appoint any given arbitrator to a case that is to be in a language foreign to that of the arbitrator. However, there is a certain cost associated with translating entire proceedings. For transparency purposes, it is not unusual to conduct hearings in investor–state cases in two or more languages and for the tribunal to be fluent in only one of those languages.

Virtual hearings have made internationally located arbitrators more accessible, but depending on how the arbitration will be conducted, the arbitrator's location remains another considerable factor. Furthermore, counsel could be located in different time zones; as such, restricting the arbitrator selection to time zones acceptable to all parties may be a reasonable approach. For example, in an arbitration where counsel is in Paris and one of the arbitrators is in New York, it would become difficult to schedule a virtual hearing before noon in Paris. And, where counsel is located in New York and one of the arbitrators is located in Singapore, the time allocated for hearings may be substantially reduced.

Most of the information available to parties to make an educated selection of an arbitrator is drawn from, but not limited to, CVs, information available online, publications and speeches held. However, when wishing to know more about the procedural or soft skills of an arbitrator, parties often rely on word of mouth.[12] As such, some commentators consider that the process of selecting an arbitrator remains 'a painfully inexact process'.[13]

In addition, there is no question that there is a transparency and diversity hurdle to overcome in international arbitration. Therefore, initiatives such as Arbitrator Intelligence, ArbitralWomen, the Equal Representation in Arbitration Pledge and REAL (Racial Equality for Arbitration Lawyers), among others,

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11 id., at 7.2.

12 Catherine Rogers, 'A window into the soul of international arbitration: arbitrator selection, transparency and stakeholder interests', *Victoria University of Wellington Law Review*, Vol. 46, Issue 4, 1180 (2015).

13 Michael McIlwrath, Lucy Greenwood and Ema Vidak-Gojkovic, 'Chapter II: The Arbitrator and the Arbitration Procedure, Puppies or Kittens? How to Better Match Arbitrators to Party Expectations', in Christian Klausegger, et al. (eds), *Austrian Yearbook on International Arbitration*, 62 (2016).

How to choose your arbitrator

How to get a 'good' tribunal

A party's choice of arbitrator is perhaps the most important decision that a party makes in an arbitration. It is often said that it is better to have a bad counsel and a good arbitrator than the reverse. That raises the question: what is meant by a 'good' arbitrator?

Quite often, parties believe that a good arbitrator is an arbitrator who would espouse their views. That in fact is not the case. Biased arbitrators or arbitrators that systematically agree with the parties that appointed them are unlikely to be the most efficient in an arbitral tribunal. Rather, arbitrators who know the facts of the cases in their most minute details and understand the legal issues at stake are far better, regardless of whether they are ultimately in agreement or not with the party appointing them.

A distinguishing feature of the choice of arbitrator is the extreme conservatism that the parties tend to adopt when choosing. When parties are presented with a choice of various profiles, the tendency is to choose the most senior candidate. This may be the best choice in some circumstances. It is not always the best choice. Some cases will require a significant investment of time by the arbitrators. If the case in question is such a case, it may be a good idea to appoint a less experienced arbitrator who has the capacity to devote enough time to the case and the drive to get to the bottom of the facts. This will give that arbitrator a premium in deliberations over the other members of the tribunal who may have had insufficient time to study the case in such detail.

The real question that each party should ask itself is not whether X or Y is a good arbitrator, but whether X or Y is a good arbitrator for this particular case. That is a very different question. Choosing the right person for any given case is more an art than a science.

In this respect, the use of the quantitative data available on the marketplace is of little assistance. First, the databases are frequently not up to date. Second, they may be inaccurate. Third, the most successful arbitrators do not update their profiles regularly and some of them have requested to be removed entirely.

Similarly, it is not particularly useful to scrutinise the various writings of any prospective arbitrator in an attempt to guess their position on any specific legal issue. While it is true that a party should not appoint an arbitrator who has repeatedly taken an opposite position to the one they intend to argue (for example, whether an arbitration agreement should be extended to non-signatories), this type of scenario is more the exception than the norm. This exercise helps to identify who should not be appointed, but it is of no assistance to identify who should be appointed. There is really no way to guess in advance what legal position an arbitrator will take in any given dispute.

For that purpose, there is no substitute for the judgement of experienced counsel. Only experienced counsel will have both the quantitative information and the human intelligence that is necessary to make the right choice for a given case. The

> added value seasoned counsel can bring is immeasurable. It results from their experience both as counsel and as arbitrator having sat with many potential candidates.
>
> – Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

coupled with data contained on online platforms such as the Global Arbitration Review Arbitrator Research Tool, Investor-State Law Guide, Jus Mundi and the Investment Arbitration Reporter, are crucial to increasing transparency and diversity in international arbitration.

How to break a deadlock in appointing a presiding arbitrator

Between 2018 and 2019, the number of ICSID-presiding arbitrator deadlocks ranged between 20 per cent and 35 per cent.[14] Generally, most, if not all, institutional rules provide for review of the parties' individual arbitrator nominations or joint proposals by the arbitral institution for adequacy, including an evaluation of impartiality and experience.[15] Nevertheless, as a matter of party autonomy, the vast majority of institutions pay substantial deference to the parties' joint selection of an individual as presiding or sole arbitrator.

In a typical procedure in international arbitration, each party usually selects an arbitrator, known as a 'party-appointed' or 'wing' arbitrator, with the 'presiding arbitrator' or 'chair' often being appointed by the two wing arbitrators, the opposing parties, an arbitral institution or third party. 'It is, however, a right of the parties to almost any arbitration to jointly nominate their preferred candidate for presiding arbitrator. Where a minimum level of co-operation remains, parties

14 Born (footnote 3), at 1795–96; 'ICSID, 2019 Annual Report 32 (2019) (between July 2018 and June 2019, parties or party-appointed arbitrators made 80% of all appointments to ICSID tribunals, while ICSID chose remaining 20%); ICSID, 2018 Annual Report 32 (2018) (between July 2017 and June 2018, parties or party-appointed arbitrators made 65.3% of all appointments to ICSID tribunals, while ICSID chose remaining 34.7%); ICSID, 2017 Annual Report, 35 (2017) (between July 2016 and June 2017, parties or party-appointed arbitrators made 71.5% of all appointments to ICSID tribunals, while ICSID chose remaining 28.5%); ICSID, 2016 Annual Report 35 (2016) (between July 2015 and June 2016, parties or party-appointed arbitrators made 73% of all appointments to ICSID tribunals, while ICSID chose remaining 27%); ICSID, 2015 Annual Report 27 (2015) (between July 2014 and June 2015, parties or party-appointed arbitrators made 73.3% of all appointments to ICSID tribunals, while ICSID chose remaining 26.7%.'

15 id., at 1788.

should make good use of this opportunity'[16] to avoid a deadlock in appointing a presiding arbitrator.

Pursuant to the 2013 UNCITRAL Arbitration Rules:

> *Article 11 allows the court or other competent authority designated in Article 6 to intervene to ensure that deadlocks in the appointment procedure will not prevent the arbitration from going forward. The court or competent authority may also intervene when a deadlock occurs in an appointment procedure agreed to by the parties (a party fails to act as required under such procedure, the parties or the arbitrators are unable to reach an agreement expected of them under such procedure, or a third party fails to perform a function entrusted to it under such procedure).*[17]

The Australian courts have created something similar. In *Tulip Bay Pty Ltd v. Structural Monitoring Systems Ltd*,[18] the Supreme Court of Western Australia was able to exercise its power to appoint arbitrators under the Commercial Arbitration Act 2012 (WA), where the parties were unable to agree on a single arbitrator. There, each party was to appoint a single arbitrator, who could then jointly appoint a third arbitrator. If the two arbitrators were unable to select a third, the president of the Australian Institute of Arbitration would be requested to make the appointment. The Court evaluated the reasons that led to the deadlock in appointing the presiding arbitrator, and ultimately found that the bases were unfounded. Accordingly, the Court exercised its powers under Section 11(4)(a) of the Commercial Arbitration Act 2012 (WA) and appointed an arbitrator on behalf of the party refusing to make the appointment.

In some instances, the applicable treaty may state that the presiding arbitrator has to be appointed by agreement of the disputing parties.[19] As such, the party-appointed arbitrators can invite the parties to inform them of any agreement that the parties may reach. The parties can agree to submit a list of candidates for presiding arbitrator to each other. In turn, each party would rank or comment on

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16 Freshfields Bruckhaus Deringer, 'Selecting presiding arbitrators: how parties can seek to agree on a mutually acceptable candidate', 8 June 2021, available at https://riskandcompliance.freshfields.com/post/102gzw0/selecting-presiding-arbitrators-how-parties-can-seek-to-agree-on-a-mutually-acce (last accessed on 15 September 2021).

17 Born (footnote 3), at 1842.

18 [2019] WASC 223.

19 See, e.g., the United States–Peru Free Trade Agreement, Chapter 10, 'Investment', Article 10.19.1 ('Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.').

any of the candidates included on the opposing party's list. After intense research on both ends, the parties can inform the institutional administrator that they have agreed on the chairperson. The parties can further request that the administrator be the one to reach out to the selected presiding arbitrator to notify and appoint them as president of the tribunal.[20]

Parties unable to agree on the selection of a presiding arbitrator could seek the assistance of the wing arbitrators and develop creative solutions to avoid a deadlock in the appointment of the presiding arbitrator.

For example, the parties could agree that the presiding arbitrator shall be appointed by the co-arbitrators instead of the appointing authority. The co-arbitrators could provide the parties with detailed instructions to be followed, which might include submissions of lists of a maximum of five candidates who the parties believe meet the requirements to be presiding arbitrators. The lists should not be binding but considered by the co-arbitrators when nominating the chairperson. The co-arbitrators may also have full discretion to consider any candidate even if not included in the parties' lists of proposed arbitrators. A shortened list of candidates, created by the co-arbitrators, would then be shared with the parties.

The parties would be given a deadline to submit a final rank list of their preferred candidates, and they would then convey their preferences via email to both co-arbitrators, not copying the opposing party. The co-arbitrators would consider both parties' preferences but retain discretion to make an appointment, based on their own order of preference. The co-arbitrators would then proceed to contact the candidates in accordance with their preferred order, to determine their availability, interest and absence of conflicts, after which they could proceed to make the nomination of the chairperson by mutual agreement.[21]

The duties of the arbitrators

It is generally accepted that arbitrators have a number of obligations and duties with respect to the parties to an arbitration and to the arbitral proceeding per se. The most common duties include the obligation to be impartial and independent, to conduct the arbitration in accordance with the arbitration agreement, to make appropriate disclosures and to comply with their ethical obligation in keeping information confidential. These duties, and their compliance thereto, protect the integrity of the arbitral proceeding and instil confidence in its users.

20 This was the selection procedure adopted in an ISDS where the author acted as counsel.

21 This was the selection procedure adopted in an ISDS where the author acted as counsel.

How to break deadlock over the chair

The difficulties associated with the choice of arbitrator are worse when it comes to choosing the chair.

Both parties will have their own views as to the chair's profile and these views will rarely coincide. This may often lead to a deadlock. Yet, the parties themselves may not want to go to the appointing authority or the institution.

There are different ways of breaking the deadlock, but they all revolve around the same principle: the choice of the chair has to be made in a mechanical fashion that will produce a name, regardless of respective views of the parties.

If that is what the parties want, the best system is a list system where the number of strikes is such that there will be at least one common choice. For example, the arbitrators can give the parties five names with the possibility of striking only two of them and the obligation to rank the others. Mechanically, this will produce a common name. Of course, the arbitrators should retain their discretion here and not be bound by this mechanical choice. The reason for this is that if, in our example, the common name is ranked third by both parties, it may be worth renewing the exercise.

There are variations around the systems available but they all have the same ingredients. The first ingredient is a system that mechanically produces a choice or choices. The second ingredient is the ability of the arbitrators to exercise some discretion, regardless of that mechanical choice, including by going back to the parties where the mechanical exercise is judged as having produced an unsatisfactory result.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

The International Bar Association (IBA) Rules of Ethics for International Arbitrators provide that '[i]nternational arbitrators should be impartial, independent, competent, diligent and discreet' and that '[a]rbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias'.[22]

Under the ICSID Arbitration Rules, an arbitrator who has accepted the appointment (1) shall keep all information confidential that comes to their knowledge as a result of their participation in the arbitral proceedings, (2) shall keep confidential the contents of any award made by the tribunal, (3) shall judge

22 IBA Rules of Ethics for International Arbitrators, Introductory Note and Fundamental Rule (1987).

fairly, and (4) shall make appropriate disclosures.[23] In addition, arbitrators under the ICSID Arbitration Rules must render a reasoned award and in writing.[24]

Similarly, under the 2021 UNCITRAL Arbitration Rules, the potential appointed arbitrator shall disclose any circumstances that could give rise to doubts as to their impartiality or independence, and their duty to disclose is continuous throughout the arbitral proceedings.[25] Under these Rules, the arbitral tribunal is also required to conduct the proceedings without delay and in a fair and efficient manner,[26] and to render an award in writing, stating the reasons upon which the award is based, unless the parties agreed otherwise.[27]

Version three of the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes makes clear that the obligation of an arbitrator to be impartial and independent 'encompasses the obligation not to':

> *[(a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamour]; (b) be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the IID; (c) take instruction from any organization, government or individual regarding the matters addressed in the IID; (d) allow any past or present financial, business, professional or personal relationship to influence their conduct or judgement; (e) use their position to advance any personal or private interest; or (f) assume an obligation or accept a benefit that could interfere with the performance of their duties.*[28]

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23 ICSID Arbitration Rules, Rule 6.

24 ICSID Arbitration Rules, Rule 47 ('(1) The award shall be in writing and shall contain: (a) a precise designation of each party; (b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution; (c) the name of each member of the Tribunal, and an identification of the appointing authority of each; (d) the names of the agents, counsel and advocates of the parties; (e) the dates and place of the sittings of the Tribunal; (f) a summary of the proceeding; (g) a statement of the facts as found by the Tribunal; (h) the submissions of the parties; (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and (j) any decision of the Tribunal regarding the cost of the proceeding.').

25 2021 UNCITRAL Arbitration Rules, Article 11.

26 id., Article 17(1).

27 id., Article 34, 3-2.

28 Draft Code of Conduct for Adjudicators in International Investment Disputes, September 2021, Article 3.

It is a fundamental expectation of the parties that the individuals adjudicating their dispute be independent and impartial. Although often used interchangeably in practice, the standard of independence and impartiality are distinct standards. 'Independence is concerned with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is considered to be an objective test, mainly because it has nothing to do with an arbitrator's state of mind.'[29] This standard requires that 'there should be no actual or past dependent relationship between the parties that may, or at least appear, to affect the arbitrator's freedom of judgment'.[30] Impartiality, on the other hand, goes to a person's state of mind.[31] It implies an 'absence of external control' and 'bias and predisposition towards a party'.[32] ICSID tribunals have identified independence and impartiality as the two 'key qualifications of arbitrators'.[33]

The IBA Guidelines on Conflicts of Interest in International Arbitration are frequently applied when assessing the impartiality and independence of arbitrators. The Guidelines consist of a traffic light colour-coded list that provides non-exhaustive examples of potential conflicts that may arise. Conflicts on the green list should not lead to disqualification under the objective test discussed

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29 Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edition, Oxford University Press, 2009), 267.

30 Pedro Sousa Uva, 'A Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence', 20 *Am. Rev. Int'l Arb.*, 479, 485 (2009).

31 Alan Redfern and Martin Hunter, *The Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 1999); *National Grid PLC v. The Argentine Republic*, Case No. UN 7949, Decision of the LCIA on the Challenge to Mr Judd L Kessler.

32 Loretta Malintoppi, 'Part III Procedural Issues, Chapter 20 – Independence, Impartiality, and Duty of Disclosure of Arbitrators', *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 807; see also *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014; *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decision on the Proposal to Disqualify Professor Brigitte Stern, 9 June 2015; see also *Mr. Bob Meijer v. Georgia*, ICSID Case No. ARB/20/28, Decision on the Proposal to Disqualify Professor Dr Klaus Sachs, 15 July 2020.

33 See, e.g., *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Decision on the Proposal to Disqualify Mr Gabriel Bottini, 29 October 2019; see also *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov, 17 May 2018; see also *VM Solar Jerez GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify Professor Dr Guido Santiago Tawil, 24 July 2020.

above and need not necessarily be disclosed. Conflicts on the orange list should be disclosed and, depending on the facts of a given case, may or may not give rise to doubts as to the arbitrator's impartiality or independence. Circumstances that appear on the red list indicate conflicts of interest and require strict disclosure requirements and express waivers by the parties, or, alternatively, these situations result in a potential arbitrator's inability to accept an appointment.[34]

Another important duty of an arbitrator, connected to the arbitrator's independence and impartiality, is the duty to disclose. The arbitrator should disclose any relationship that could give rise to justifiable doubts.

For the most part, institutions provide guidelines and templates to facilitate the conflicts check and the arbitrator's declaration, which enables the arbitrator to disclose any past and present relationships that may give rise to justifiable doubts regarding their independence and impartiality. The Guidelines state 'that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the arbitrator'.[35]

Rule 6 of the ICSID Arbitration Rules states, in relevant part, that appointed arbitrators must submit a statement declaring '(a) [their] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party'.[36] They are also required to acknowledge a continuous obligation to promptly disclose any such relationship or circumstance that may arise during the arbitral proceedings.[37]

As such, it is highly recommended to err on the side of caution and make complete disclosures to maintain the integrity of the arbitration proceedings and the award. In *Eiser Infrastructure Ltd et al v. Kingdom of Spain*, the tribunal issued an arbitral award against Spain and in favour of the claimant investors of over US$140 million in damages, coupled with interest.[38] The award was based on an Energy Charter Treaty dispute and rested on a finding that Spain wrongfully revoked the renewable energy investors' subsidies and financial inducements under Spain's legislation enacted in 2007. Subsequently, Spain petitioned for the annulment of the award based upon an allegation that the claimants' party-appointed arbitrator had a conflict of interest because of a failure

34 See generally IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

35 id., Preamble (2014).

36 ICSID Arbitration Rules, Rule 6.

37 ibid.

38 *Eiser Infrastructure Ltd. et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, ¶ 486.

to disclose a business relationship with the claimants' damages expert. An ICSID committee was established for purposes of deciding the annulment petition. This committee unanimously decided to annul the award due to 'a manifest appearance of bias'.[39] The committee ordered the claimants to pay the fees and expenses of the members of the committee, the charges for the use of the ICSID facilities and the fees and expenses incurred by Spain in pursuing its annulment application.[40]

Usually, after an arbitrator makes a disclosure and the parties do not object immediately or within the time limit established to do so, the party is deemed to have waived any challenge in connection with the disclosure.

Apart from these duties and obligations, arbitrators are prohibited from delegating 'their decision-making function to an Assistant or to any other person'.[41] Furthermore, the arbitrator needs to dispose of all relevant issues. Courts have held that the parties also have a similar obligation to raise issues as they arise.[42]

In US domestic arbitration, unless requested otherwise by the parties, an arbitrator may issue an award that 'merely declares a winner and a loser'.[43] However, even when not required, a reasoned award is preferred for enforcement purposes.[44] This is not the case in international arbitration, where institutions require awards to be reasoned.[45] In some cases, the institution provides the arbitrator with a checklist and request to review the award before submitting it to the parties.[46]

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39 ibid. Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, ¶¶ 219–20.

40 id., at ¶ 270.

41 Draft Code of Conduct for Adjudicators in International Investment Disputes, September 2021, Article 5.1.

42 *Loren Imhoff Homebuilder, Inc. v. Lisa Taylor, et al.*, No. 2019AP2205, 2020 WL 6495102 (Wis. Ct. App. 5 November 2020).

43 See, e.g., *Cat Chater LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011).

44 See, e.g., *Tools, Inc. v. Chongqing SENCI Import & Export Trade Co.*, 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. 26 March 2019); see also *Leeward Const. Co., Ltd. v. Am. Univ. of Antigua-College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016).

45 ICSID Additional Facility Rules, Article 52; London Court of International Arbitration, Arbitration Rules, Article 26.2; International Chamber of Commerce, Arbitration Rules, Article 32(2); Singapore International Arbitration Centre, Arbitration Rule 32.4.

46 ICC Award Checklist, available at https://iccwbo.org/content/uploads/sites/3/2016/04/ICC-Award-Checklist-English.pdf (last accessed 22 September 2021); AAA-ICDR Award Checklist, available at www.icdr.org/sites/default/files/document_repository/AAA_ICDR_Award_Checklist_3.pdf (last accessed 22 September 2021).

Choosing 'your' arbitrator – in praise of neutrality

Not infrequently, a party to an investor–state proceeding will search for and then appoint a co-arbitrator who, the appointing party feels confident, will support the position of their appointer. That this is contrary to the ethos of international arbitration is undoubted. In the international sphere, the quintessence of dispute resolution by arbitration is an independent and neutral tribunal.

What may not be appreciated by those who seek partiality in their appointees is that the appointment of a partial arbitrator is unlikely to be of assistance and is more likely to backfire. Time and again, neutral co-arbitrators cringe when their partisan colleague pulls on the team-sweater of their appointer. The partial arbitrator irritates the rest of the tribunal and, as any sensible counsel knows, it seldom pays to irritate the minds of those whose job it is to decide the case.

If a party has the better side of a dispute, a properly chosen tribunal will almost always decide in its favour, regardless of the make-up of the tribunal. In investor–state disputes, where stakes can be high, the integrity and acceptability of dispute resolution by arbitration can only be assured by independent and unbiased appointees.

– J William Rowley KC, Twenty Essex

These duties and obligations are critical, as a mere appearance of one party not having had a fair proceeding could lead to the award being challenged.[47]

Challenges to arbitrators

The IBA Guidelines on Conflicts of Interest in International Arbitration apply to arbitrators and thus prove to be a practical starting point for understanding challenges to arbitrators regarding conflicts of interest. The Guidelines are organised in two parts: one addressing general standards concerning impartiality, independence and disclosure; and another illustrating the practical application of the general standards. The Guidelines reiterate the international arbitration community's effort to avoid unsubstantiated challenges, levied by opposing parties as delay tactics or to interfere with a party's appointed arbitrator.

47 See, e.g., ICSID Convention, Article 52; see also ICSID Arbitration Rules, Rule 50; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, Article V.

The 2021 UNCITRAL Arbitration Rules address challenges to arbitrators in Articles 11 to 13.[48] Article 12(1) provides that '[a]ny arbitrator may be challenged if circumstances exist that give rise to *justifiable* doubts as to the arbitrator's impartiality or independence'.[49] Article 12(2) elaborates that '[a] party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made'.[50] Article 12(3) explains that '[i]n the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in Article 13 shall apply'.[51]

The addition of 'justifiable' in the 2013 UNCITRAL Arbitration Rules qualified the type of doubt required to sustain a challenge. Similarly, per the IBA Guidelines, a challenge and subsequent disqualification of an arbitrator should only be successful if an objective test is met.[52] In other words, a doubt is 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'.[53]

In *Halliburton Company v. Chubb Bermuda Insurance Ltd*, the Supreme Court of the United Kingdom addressed an arbitrator's duty to disclose in an ad hoc arbitration seated in London and governed by New York law. There, the Court had to determine whether an arbitrator's failure to disclose appointments across multiple arbitrations with overlapping subject matter and one common party gave

48 This standard for arbitrator challenges is similarly addressed by the UNCITRAL Arbitration Rules of 1976, 2010 and 2013, with some distinctions. See, e.g., ICSID World Bank Group, available at https://icsid.worldbank.org/services/arbitration/uncitral/challenge-arbitrators (last accessed on 9 September 2021).

49 2021 UNCITRAL Arbitration Rules, Article 12 (emphasis added); see also id., at Article 11, which establishes the arbitrator's duty to disclose as an ongoing duty throughout the proceeding ('When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by her of these circumstances.'). The 'without delay' requirement was not included in the 1976 Rules. The UNCITRAL Rules even provide model statements of independence pursuant to Article 11 in the annex to the Rules.

50 ibid.

51 ibid.

52 IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2(c), and Explanation to General Standard 2.

53 ibid.

The sine qua non when appointing 'your' arbitrator

Both as an advocate and international arbitrator, I always have believed that the fundamental criterion for a party and its counsel in choosing a party-appointed arbitrator is someone who, for whatever reason or on whatever basis, automatically will be respected by the other co-arbitrator and the eventual president, chairperson or presiding arbitrator. In other words, choose someone to whom the other two are bound to listen and take seriously.

That means, first, to rule out anyone whose independence or impartiality inherently is in doubt, such as (1) where a respondent state appoints a national of that state who is paid by the state (even a university professor), (2) where a respondent state has such a character that, objectively speaking, if it appoints one of its nationals, their fellow arbitrators will assume that that person 'cannot safely return home unless it supports that state's position', or (3) where either the investor appoints someone notorious for being pro-investor or the state appoints someone notorious for being pro-state. I recall being appointed some years ago as judge ad hoc of the Inter-American Court of Human Rights because counsel for the appointing South American state advised it: 'Don't appoint a national. Don't even appoint any Latin American. Appoint instead someone from outside that world.'

Second, the factor of being 'automatically respected' may be influenced by the nature of the arbitration. For example, the required respect in a big construction arbitration may be gained by appointing an icon of that field. I recall sitting in a very complex construction arbitration (*not* an area of my expertise) chaired by an English QC from a leading set of chambers who also had a PhD in the relevant branch of engineering and who was serving on every conceivable board, society or other speciality group for construction disputes. My co-arbitrator also was not an expert in construction matters, so the chairman necessarily dominated the proceedings, which ended with a unanimous award.

So remember, the arbitral corollary to 'Trust is the coin of the realm' is 'automatic respect for your party's appointee is the sine qua non'.

– Charles N Brower, Twenty Essex

rise to justifiable doubts as to the arbitrator's impartiality to warrant removal. In short, the Supreme Court found that to determine whether there is an appearance of bias such that removal of an arbitrator is required, English law will apply the objective test of whether an informed, fair-minded observer would conclude that there is a real possibility of bias. Consequently, the Court dismissed the challenge based upon a finding that the relevant question in the removal proceeding was whether at the date of the hearing for removal, a fair-minded and informed observer would have concluded that there was a real possibility of unconscious bias on behalf of the challenged arbitrator. Further, the Court explained that such an observer would not have made that conclusion because the challenged

arbitrator had already provided an explanation for the arbitrator's failure to disclose the appointment in question, at the time of removal, and this explanation was not challenged.[54]

Article 57 of the ICSID Convention provides two core grounds for arbitrator disqualification: (1) the arbitrator manifestly lacks the qualities required by Article 14(1) of the ICSID Convention;[55] or (2) the arbitrator is ineligible for appointment under Articles 37 to 40 of the ICSID Convention.[56] Article 14(1) establishes the requirement of independence and impartiality, the lack of which forms the basis for an arbitrator challenge or disqualification.

In *Suez et al v. Argentina*, the tribunal clarified that:

> *[i]mplicit in Article 57 and its requirement for a challenger to allege a fact indicating a manifest lack of the qualities required of an arbitrator by Article 14, is the requirement that such lack be proven by objective evidence and that the mere belief by the challenge of the contest arbitrator's lack of independence or impartiality is not sufficient to disqualify the contested arbitrator.*[57]

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54 *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 4; see also J Rich, 'U.K. Supreme Court Rules on Arbitrator Bias in Halliburton v. Chubb', *Kluwer Arbitration Blog*, 1 December 2020, available at http://arbitrationblog.kluwerarbitration.com/2020/12/01/u-k-supreme-court-rules-on-arbitrator-bias-in-halliburton-v-chubb/ (last accessed 15 September 2021). It is important to note that, here, the Supreme Court found that the challenged arbitrator breached the duty to disclose later appointments. However, the Court did not find bias on the part of the challenged arbitrator on the date of the removal hearings. In the opinion of the author, to judge an arbitrator's conduct regarding their duty to disclose on the date of the hearing, as opposed to the date when the arbitrator accepted the appointment or when they became aware of the potential conflict, may result in peculiar outcomes with respect to an arbitrator's duty to disclose under English arbitration law.

55 ICSID Convention, Article 57; see, e.g., *EDF International S.A., SAUR International S.A. & Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008, ¶ 68 ('Professor Schreuer indicates that the proposed test for what is "manifest" relates not to the seriousness of the allegation, but to the ease with which it may be perceived. Something is "manifest" if it can be "discerned with little effort and without deeper analysis".').

56 ICSID Convention, Section 2, Constitution of the Tribunal.

57 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, ¶ 40.

Commentators have explained that challenges to arbitrators in international arbitration have risen in past years. In part, this is due to an increase in selecting arbitration as a preferred mechanism of dispute resolution.[58] Sometimes parties use challenges to delay the proceedings. As such, arbitrators or committees deciding on challenges to arbitrators, and parties opposing them, should be keen in determining whether elements or facts exist that could reveal the true purpose of the challenge. Regardless of whether the challenge is unmeritorious, 'the right to challenge an arbitrator is one of the most effective mechanisms to protect the integrity of the arbitration process'.[59]

Replacement of arbitrators

The replacement of an arbitrator may be necessary for a myriad of reasons, including death, a successful challenge and the resignation of a duly appointed arbitrator. The latter was the case for an arbitrator appointed to an ICSID tribunal, only to then be challenged over appointments received in other arbitrations against the same nation-state of Bangladesh. In that case, Bangladesh proffered that the appointments of the arbitrator signalled that he could not be neutral and unbiased as some of his decisions in earlier arbitrations meant that he may have prejudged important aspects of the case. The resignation tendered by the arbitrator to avoid delaying the proceedings was accepted by the co-arbitrators.[60]

ICSID Arbitration Rule 7 provides that '[a]t any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.'[61]

Moreover, the replacement or removal of an arbitrator during an ongoing arbitration proceeding will raise the question as to whether any part of the arbitral process has to be repeated, partially or wholly.[62] For example, Article 15 of the 2021 UNCITRAL Arbitration Rules provides that '[i]f an arbitrator is

58 Christian Albanesi, 'Unmeritorious Challenges – Is it time to say enough?', in Carlos Gonzalez-Bueno (ed.), *40 Under 40: International Arbitration* (Dykinson SL, 2019), 23–24.

59 id., at 29.

60 Cosmo Sanderson, 'Paulsson resigns after challenge over parallel appointments', Global Arbitration Review, 31 August 2021, available at https://globalarbitrationreview.com/paulsson-resigns-after-challenge-over-other-appointments (last accessed 15 September 2021).

61 ICSID Arbitration Rules, Rule 7.

62 Born (footnote 3), at 2094.

Have you ever thought of appointing the president first?

A simple way around the commonplace deadlock over president

With critics of the present system proposing such things as 'blind appointments' of arbitrators to minimise 'unconscious bias', particularly in party-appointed members of a tribunal, those who greatly approve of the current system might be advised to work on imagining other ways of constituting a tribunal.

For example, I was much impressed by the ingenuity of counsel, for both the claimant and the respondent state-owned entity, in the context of a case where the arbitration clause had provided for all three arbitrators to be appointed by the ICC International Court of Arbitration. (A good example of how the corporate lawyers putting the contract together so often neglect to seek the advice of their partners who may be called upon to clean up the mess when the contract is breached!) When the balloon went up, the lawyers on both sides understandably turned their noses up at that arbitration clause and negotiated a replacement: the parties first would agree on the president of their tribunal, only after which they would decide upon and simultaneously exchange the names of the co-arbitrators that they were nominating.

The first advantage: that of choosing your party-appointed arbitrator *knowing who the president is*, which should lead counsel to appoint as co-arbitrators persons who they know are highly regarded by the president. The result should be a compatible threesome.

The second advantage: no need to worry, as claimant, whom the respondent will appoint or, as respondent, whom the claimant will appoint – as both parties will work on the same basis, namely to make the president happy by selecting co-arbitrators that they respect and to whom they will listen.

In this case, the president they selected was a celebrated QC, former head of his chambers and a deputy High Court judge; the respondent appointed a recently retired and highly respected Law Lord; and I was appointed by the claimant (whose counsel incidentally I had whooped in a major arbitration – always a very satisfying appointment!). The result was a unanimous award of approximately US$2.5 billion. In the end, the parties agreed that the claimant would waive the interest portion of the award and the respondent would immediately pay the principal amount of the award.

– Charles N Brower, Twenty Essex

replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise'.[63]

63 2021 UNCITRAL Arbitration Rules, Article 15.

On the other hand, Article 14(1) and (2) of the Permanent Court of Arbitration's Arbitration Rules, which is essentially the same as Article 14 of the UNCITRAL Arbitration Rules, provides that:

> *in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may . . . appoint the substitute arbitrator.*[64]

Parties faced with the replacement of an arbitrator should perform the same careful arbitrator research as they did at the beginning of the arbitral process.

64 2012 PCA Arbitration Rules, Article 14(1), (2).