KEATING CHAMBERS

WHO DO YOU WANT? WHAT DO YOU GET? APPOINTING THE RIGHT ARBITRATOR

By Paul Darling QC, Barrister and Arbitrator

Keating Chambers

This article is based on a paper given by the author to the East Asia Branch of the Chartered Institute of Arbitrators in Hong Kong on July 2, 2009

Introduction

"The choice of persons who compose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only as good as the arbitrators."[1]

One of the major advantages of arbitration over litigation is the opportunity for the parties to choose the number and identity of the tribunal members. This choice is significant for both positive and negative reasons. Get it right, and the chances of a well conducted process leading to a decision which is fair and based on thorough understanding, are maximised. Get it wrong, and the considerable power of the arbitrator/s, unless the parties' agreement or institutional rules limit it, can have serious impact on fairness, the efficiency and cost of the process and ultimately, the quality of the decision.

Obtaining a decision which is correct is not just a matter of preference, although that is obviously true. It must be appreciated by the parties that the circumstances in which a dissatisfied party can challenge an award are very limited, especially under the main institutional rules, compared with litigation, where the appeal system provides relatively easy access to correction. The House of Lords' decision in Lesotho Highlands Development Authority v Impregilo[2] gave a salutary reminder that, when parties opt for an ICC arbitration, they agree to be bound by the award and *"Shall be deemed to have waived their right to recourse insofar as such waiver can validly be made".*[3] The London Court of International Arbitration has a similar provision in its Rules: the parties *"waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority insofar as such waiver may validly be made"*[4], although note that the UNCITRAL Rules have no equivalent and so are less restrictive of challenge. But if the parties agree to limit their rights to challenge an award, errors of act or even law will not be enough to ground a challenge. In

---

1 Lalive *Melanges en l'honneur de Nicolas Valticos*, Droit et Justice (Editions Pedrone, 1989) p.289, cited in Redfern & Hunter, Law & Practice of International Arbitration 4th edition 2004 p.10. Note that the 5th Edition published at the end of 2009 was not available at the time of the presentation.

2 [2005] UKHL 45.

3 ICC Rules of Arbitration, Article 28.6.

4 LCIA Rules of Arbitration, Article 26.9.

the absence of a procedural error, they will be bound by a flawed decision.[5] Choosing a tribunal which will not deliver a flawed decision is doubly important, if it is final.

Number of arbitrators

How many arbitrators comprise the tribunal is one of the first considerations, chronologically and in terms of significance. It is not always a matter of personal preference. Some legal systems require an uneven number of arbitrators, to avoid a tied result. Conversely, in some City of London trade sectors, there is a tradition of two member tribunals, with subsequent reference to an umpire in the absence of agreement on the outcome. In most international commercial arbitrations, the choice is usually between one arbitrator and three.

Many institutional rules make provision for numbers, although since these will be subject to agreement by the parties, there is still choice – the 'party autonomy' principle. Thus the ICC Arbitration Rules provide[6] that *"Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators"*[7]*;* the LCIA equivalent[8] is that *"A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three member tribunal is appropriate."*

Sole arbitrators can bring advantages of efficiency, both in terms of speed and economy. Hearings can be arranged more easily where the diary of only one arbitrator needs to be consulted; self-evidently one set of fees will be cheaper than three. The time taken for the decision should also normally be shorter, as there is no need for a single arbitrator to consult, deliberate and decide with others. Therefore, if the parties can agree on a single arbitrator, identified as being suitable in qualification and independence, to resolve the whole dispute, this will often be the best route to follow.

However, in major international commercial arbitrations, where the issues are complex and the stakes are high, the preference is normally for three arbitrators. Indeed, the UNCITRAL Rule[9] provide that *"If the parties have not previously agreed on the number of arbitrators (i.e. one or three) and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."*

---

5 See E Baker and Anthony Lavers *Challenge of errors in arbitrators' awards*. Asian Dispute Review October 2005.

6 ICC Rules of Arbitration, Article 8.2.

7 The Court referred to is the ICC Court of International Arbitration.

8 LCIA Rules of Arbitration, Article 5.4.

9 UNCITRAL Arbitration Rules, Article 5.

The preference for three arbitrators in large disputes is easily understood. One of the risks of the appointment of a sole arbitrator is that, if the parties cannot agree on whom it should be, or their choice is unavailable, an arbitrator will be imposed on them by an appointing authority, whether arbitral institution, professional body or national court. Where the tribunal is to consist of three arbitrators, each party will have the opportunity to nominate an arbitrator of its choice, giving both greater confidence in the suitability of the tribunal; such reassurance may be especially desirable where the parties are from different countries, or different legal and linguistic traditions. Although there will be a time cost in the process, the three members will engage in discussion, offering different perspectives and assisting each other's understanding. This is valued as reducing the possibility of the tribunal misunderstanding the position of one (or both) of the parties.

Process of selection

The arbitration agreement, typically contained in a wider contract, such as the FIDIC forms of contract in international construction and engineering projects, should contain the method of appointment of the tribunal. This does involve some restriction on total freedom of choice, which would only exist where the parties were faced with an existing dispute and no provision in place and so would have to proceed *ad hoc*. But such freedom comes at a price; the parties to an existing dispute may well not be able to agree on an appointment, leading to delays while the matter is settled, often by resort to a national court.

There is a temptation in making advance provision, to identify a named individual. This might seem in tune with the ideal of party autonomy, but is generally a mistake. The named individual could be unavailable, indisposed or even dead by the time dispute arises. Furthermore, the named arbitrator may be completely unsuitable for the dispute which actually materialises; an arbitrator appointed for special engineering expertise may be unqualified to resolve complex questions of law in the dispute which actually occurs.

So the compromise between certainty and flexibility is that the process of appointment is agreed in advance, but not the specific identify of the arbitrator. When the dispute has arisen, the parties and their legal advisors may exchange lists of proposed candidates, seeking agreement. Where more than one arbitrator is to be appointed, agreement on all would be harder to secure, so the parties will usually each nominate one, with the chairman to be appointed by arbitral institution, national court, or from a list.[10] The choice of a party nominated arbitrator is a particularly sensitive matter. While it is true that such an arbitrator will be aware of the nomination and might be expected to be

[10] See C Seppala *Obtaining the right international arbitral tribunal: a practitioner's view* International Construction Law Review (2008) Vol 25 Part 2 p.198.

receptive to the nominating party's case, or at least to understand it, rather than otherwise, it is dangerous to have an arbitrator whose impartiality is open to question; suggestions of bias may cast doubt on the validity of the award, or ground a challenge. Inexperienced parties may wrongly believe that the arbitrator they nominate is there solely to advance their cause, a serious misunderstanding.

Where there is contractual provision for reference to an arbitral institution, this usually carries with it the mechanism for appointment. Some institutions permit the parties to nominate arbitrators for the institution to appointment, but this will often be subject to the right of veto. For example, the LCIA Rules[11] state that *"The LCIA Court may refuse to appoint any such nominee if it determines that he is not suitable or independent or impartial"*. This reflects the importance which arbitral institutions attach to a reputation for standards of quality and integrity. The institution may act as an appointing body, for a fee, even if the arbitration has not been heard under its rules. Under the UNCITRAL Rules, the parties can designate an appointing authority, preventing deadlock, which might lead to the need for an application to a national court.

Institutional appointment offers the experience and knowledge of the best arbitrators, including those who operate transnationally, and an overview of many candidates, based on actual experience. It is not without disadvantage. Apart from the cost, which can be significant, the parties lose control of the process and may feel that they have not been able to inform the institution sufficiently of the nature and needs of their dispute, thereby running the risk of an inappropriate appointment.

An alternative to institutional appointment is appointment by list, whereby the respective parties compile lists of suitable (in their view) candidates and then exchange lists, either simultaneously or concurrently, to seek agreement.

Lists are also maintained by arbitral institutions and other bodies, from which the parties can make selections, deleting any names to which they object and ranking their preferences.[12] The appointment will be of the candidate ranked highest by both parties together, which can have the disadvantage of compromise, namely that neither party may be strongly in favour of the arbitrator chosen. Using a list can be time consuming as the parties research its contents before giving their responses. The legal validity of appointment from lists (in the context of adjudication) was challenged in the UK in *Mowlem v Hydra Tight*[13], on the ground that the list maintained by Atkin

[11] LCIA Rules of Arbitration, Article 7.2.

[12] See C Newmark and R Hill *The appointment of arbitrators in international arbitration* International Arbitration Law Review (2004) Vol 7 p.73

[13] (2001) 17 Const LJ 358.

Chambers was insufficiently certain, as the barristers changed with retirements and recruitment. The court rejected this argument, holding that the list was sufficiently certain and included the members of the chambers for the time being.

If the parties are genuinely unable to reach agreement, application can be made to a national court for appointment, provided it has the power to do so. As a rough guide, the more developed the arbitration system in a country, the more likely it is that the national courts would have the power to appoint an arbitrator.

Characteristics of a party appointed arbitrator

Characteristics can be divided into objective qualities, such as qualifications, skills and experience and subjective qualities, such as opinions, personality and likely influence over the panel.

Paradoxically, such matters as experience and personal opinions, while viewed as beneficial qualities, can also constitute actual disqualifications. As Okekeifere[14] put it, "*Every judge or arbitrator, however overly or covertly impartial, brings to bear on his job some innate prejudice and personal preferences which affect his interpretations and assessment of situations and decisions. One's past is often one of the sources of such prejudices and preferences*". The fineness of the balance is well expressed by De Fina[15]: *"The party appointed arbitrator cannot be an advocate or a servant of the appointing party but can and should fulfil a positive role. However, the role is exceedingly delicate and demanding. The slightest excess or impropriety at best might give rise to lack of confidence or reliance by other members of the tribunal in the arbitrator or, at worst, give rise to removal of the arbitrator."*

The requirements of independence and impartiality are fundamental. The UNCITRAL Rules make justifiable doubts as to *"impartiality"* or *"independence"* a ground of challenge.[16] The LCIA Rules[17] require the arbitrator to be "impartial and independent", although the ICC equivalent[18] only provides for *"independence"*. Personal or professional relationships, or a business connection, between arbitrator and parties may call into question his or her independence. The IBA Guidelines[19]

---

[14] See A Okekeifere *Appointment and challenge of arbitrators under the UNICTRAL Model Law Part 1: agenda for improvement.* International Arbitration Law Review (1999) 167.

[15] A De Fina. *The party appointed arbitrator in international arbitration – role and selection.* Arbitration International 1999 Vol 15 No 4 p.382.

[16] UNCITRAL Rules Article 10

[17] LCIA Arbitration Rules Article 5.2

[18] ICC Arbitration Rules Article 7.1

[19] IBA Guidelines on Ethics for International Arbitrators

define *"dependence"* as arising from *"relationships between an arbitrator and one of the parties or with someone closely connected with one of the parties"* and *"partiality"* as being *"prejudiced in relation to the subject matter of the dispute."*

Once independence/impartiality are assured, the parties will look at the arbitrator's objective qualities. Few countries have laws specifying particular qualifications, although some parties will look for certain arbitration qualifications as well as professional qualifications, such as those provided by bodies like the Chartered Institute of Arbitrators. Some contracts require that the arbitrator is a Queen's Counsel or member of a particular trade organisation. The GAFTA Rules demand that the arbitrator must be a *"GAFTA Qualified Arbitrator."*

So far as professional discipline is concerned, the split is between lawyers and those from a technical or commercial background. For major international commercial arbitrations, a sole arbitrator will be typically a lawyer, since disputes are often contractual/legal. A legally qualified arbitrator may be better able to write a written award which is reasoned and can withstand judicial scrutiny in the event of a challenge. Lawyers who have acted as advocates in particular sectors, such as shipping or construction, can often bring many years of experience to the task as well.

While a legal background is by no means essential, experience of arbitration is. Only a person with experience of arbitration, whether as arbitrator, ,counsel or expert will be able to operate the process credibly. Experience will also help to determine how much weight is attached to an arbitrator's views by other tribunal members.

Language skills are very necessary, to an understanding of issues, but especially where the dispute concerns wording of a contract or other document. Recent ICC statistics[20] show that over 70% of ICC arbitral awards are in English. The other 'top five' languages are French, Spanish, German and Italian.

Language will not, however, be the sole driver of nationality of appointment, which may be significant where the dispute involves political sensitivities. LCIA Rules[21] and ICC Rules[22] provide that the chairman or sole arbitrator will normally be of a different nationality from the parties, while ICC would not normally appoint a chairman of the same nationality as one of the party appointed arbitrators, unless the parties agree otherwise.[23]

---

[20] ICC International Court of Arbitration Bulletin 2008 Vol 119 No. 1

[21] LCIA Arbitration Rules Article 6.1

[22] ICC Arbitration Rules Article 9.1

[23] ICC Arbitration Rules Article 9.5

In 2007 the main nationalities for ICC arbitrator appointments[24] were: Switzerland 13.5%, UK 9.5%, USA 8.6%, Germany 8.2%, France 7.6%.

Subjective qualities

Beyond independence/impartiality and objective qualities, regard must be had to further elements, which may be harder to define, but are nonetheless important. Seppala[25] notes correctly that *"if arbitrators are selected with no attention to their particular qualifications, their doctrinal views, their ways of thinking or to their characteristics or personalities, a party can have no way of knowing how they are likely to decide the dispute or to receive the party's evidence or arguments, or to react to the particular lawyers it has chosen to represent."*

Bishop and Reed[26] note that *"a party will strive to select an arbitrator who has some inclination or predisposition to favour that party's side of the case such as sharing the appointing party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party's case. Provided the arbitrator does not 'allow this shared outlook to override his conscience and professional judgment', this need carry no suggestion of disqualifying partiality."*

This last point contains an essential truth: that a party appointed arbitrator must maintain integrity and professionalism, in order to be taken seriously by the other members of the tribunal. Someone clearly acting as a puppet for their appointing party will have little influence on the other tribunal members. The same is true of powers of analysis and expertise. As well as the substantive benefit of a tribunal with the capacity to understand and resolve the issues, an able and analytical arbitrator will command more respect and authority, even with (perhaps especially with) the chairman.

In a three member tribunal, a party appointed arbitrator must be able to steer the difficult course between independence and being well disposed to the case of the appointing party. Appointing parties and their legal advisors habitually use such factors as:

- legal/professional background research on cases, articles, public comments
- views of other lawyers who have appeared before them
- the results of interviewing the prospective arbitrator (although this is regarded as controversial by some commentators)

---

[24] ICC International Court of Arbitration Bulletin 2008 Vol 119 No. 1

[25] C Seppala op cit.

[26] D. Bishop and L Reed Practical guidelines for interviewing, selecting and challenging party appointed arbitrators in international commercial arbitration Arbitration International (1998) Vol 14 No. 4 p.395

to test how the arbitrator may view the dispute. There is some danger of compromising the independence of the arbitrator in this process, particularly in an interview. Any interview should be limited to factual matters like availability and experience and issues of the dispute strictly avoided.

If an arbitrator is going to be effective in the arbitral proceedings, purely personal characteristics can also be significant. A claimant, or, less frequently, a respondent, may find that the other side are 'dragging their feet', failing to meet deadlines, asking habitually for extensions of time and not complying with disclosure orders. A reticent, under-confident tribunal may allow a good deal of latitude in this respect. By contrast, a strong, proactive arbitrator will place a limit on the indulgence to be given to such behaviour and will tackle it, through orders and in the tone of communications. Being strong minded is in no sense inconsistent with being collegiate towards the other tribunal members, sensitive to cultural differences and inclusive in manner. This is not merely a matter of courtesy and professionalism: it also maximises the likely influence of a party-appointed arbitrator.

Conclusion

The importance to parties of the outcome of an arbitration should be sufficient to concentrate their minds on the need to give thought to the composition of the arbitral tribunal. Finding agreement between parties on that composition can often be a tortuous process, and there are many methods by which a tribunal can be appointed. But the party should not lose sight of opportunities to find an arbitrator who has characteristics which may make them of positive value. If time is devoted to this process, a party can obtain an arbitrator who is already favourable to their case, even before the proceedings have begun. What is almost certain is that if one party does not take this opportunity, the other side definitely will.

Paul Darling QC
Keating Chambers