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Commentary

'Well, Did You Get The Right Arbitrator?'

By
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Many statements are made about arbitration — some more important than others — yet the most fundamental of all is that 'arbitration is only as good as its arbitrators.' The distinguished Swiss jurist and arbitrator, Pierre Lalive, so stated in his 'Swiss Essays on International Arbitration.'[1] His brother Jean Flavien Lalive has put it more strongly

> "The choice of the persons who compose the arbitral tribunal is vital and often the most decisive step to an arbitration. It has rightly been said that arbitration is only as good as the arbitrators."[2]

In their latest edition of International Commercial Arbitration, the learned authors Martin Hunter and Alan Redfern make the same point:

> "Once a decision to refer a dispute to arbitration has been made, nothing is more important than choosing the right arbitral tribunal. It is a choice which is important not only for the parties to the particular dispute but also for the reputation and standing of the arbitral process itself. It is, above all, the quality of the arbitral tribunal that makes or breaks the process."[3]

Although it is comforting to cite distinguished jurists and learned authors, the point is self-evident. Yet, in international arbitrations, the selecting of arbitrators is not a certain and defined process. Information is limited, guidance sparse and arbitral appointments can to readily become the 'arbitral disappointments.' In theory the parties have the particular advantage, unlike in the Court process, of being able to choose an arbitral

panel which is perfectly suited to adjudicate the dispute before it. As stated in a Convention of the beginning of this century, the parties in arbitrations are given the freedom to have their disputes resolved by "judges of their own choice."[4]

What, therefore, is the process in international arbitrations for selecting arbitrators and why cannot it be relied upon to produce the right arbitral tribunal for the right arbitration?

Broadly, in international arbitrations, arbitrators are either appointed by the parties or by one of the international arbitration institutions, for example, by the Court of International Arbitration of the International Chamber of Commerce in Paris ("ICC"), the London Court of International Arbitration in London ("LCIA") or the American Arbitration Association in New York ("AAA").

Each of these institutions has different processes under which arbitrators are appointed but all share certain common features. The foremost is the dominant safeguard of independent and neutral arbitrators. The same safeguard can be found in appointments by other international arbitration institutions: viz the Arbitration Institute of the Stockholm Chamber of Commerce, the Netherlands Arbitration Institute, the Hong Kong Arbitration Centre — to name a few of the well respected international arbitration institutions.

Thus it is that arbitration institutions, throughout the world, when appointing arbitrators, go through a similar logical process on the lines of:

> Is the appointee for the arbitration neutral and independent of the parties?
>
> Does he or she have the right linguistic skills?
>
> Does he or she have the right legal knowledge for applying the governing law of the arbitration?
>
> Does he or she have the right professional expertise . . . in construction law . . . intellectual property . . . or for what ever is the subject matter of the arbitration?

Moreover almost all arbitration institutions also stipulate that the appointee should be "suitable" for being appointed the arbitrator in the arbitration in question. Under Article 9.1 of the ICC Rules of Arbitration[5] it is stipulated that the ICC Court of Arbitration "shall consider the prospective arbitrators' nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration. . ." (emphasis added). In Article 6.4 of the AAA International Arbitration Rules we find that, in making arbitral appointments, the AAA administrator ". . . after inviting consultation with the parties, shall endeavour to select suitable arbitrators."[6] Similarly in Article 5.5 of the LCIA Rules[7] the LCIA Court is under a duty when "selecting arbitrators [to give] consideration . . . to the nature of the transaction, the nature and circumstances of the dispute, the nationality, location and languages of the parties. . . ." Importantly, however, this Article is buttressed in Article 7.1 of the LCIA Rules, by giving power to the LCIA Court, when an arbitrator has been nominated by one of the parties, "to refuse to appoint any such nominee if it determines that he is not suitable or independent or impartial."

Given all of that why is there any dissatisfaction in the appointment of arbitrators by arbitration institutions? There are, I believe, several reasons. The first is that while the arbitration institutions may know more than the parties about the arbitrators, which it appoints, it does not know as much as the parties about the dispute. This may not be its fault. At the time of the appointment insufficient information may have been disclosed to it by the parties. Thus the institution may not know, for example, that the resolution of the dispute hangs upon technical points which would be best understood and resolved by arbitrators with expertise in (say) mechanical engineering or that a whole lot of procedural points will be taken in the arbitration which would be best understood and resolved by a lawyer trained in the procedural law governing the procedural issues in the arbitration.

Second, there is insufficient information known about the availability of the arbitrators for conducting the arbitration on a reasonable timetable. This is not simply a question of knowing whether one arbitrator is busy or not but whether, with a three person arbitral tribunal, each of the arbitrators can find common dates in their diaries to enable the arbitration to be conducted reasonably expeditiously.

Third there is a lack of knowledge, or a lack of acting on the knowledge, about the personal qualities of the prospective arbitrator.

> Does he or she have good management skills?
>
> Is he or she decisive or do arbitrations 'run away' from this arbitrator?
>
> Is he or she good on procedural issues or is he or she just a bit of a fudger?
>
> Is he or she sound in judgement or profoundly lacking in it?
>
> What is known about the quality of awards of the prospective arbitrator, and are they well reasoned?
>
> And most fundamentally of all, is he or she up to the job of being arbitrator in this arbitration?

Some of the difficulties arise out of the different ways institutions select the arbitrators whom they appoint. For example the ICC works through National Committees. So when a French arbitrator is requested, the ICC National Committee of France makes the recommendation. The same applies for recommendations for appointments by other ICC National Committees. Some of these National Committees are very good in recommending arbitrators who have all the right qualities for the appointment in question. Others are not so good. There is a particular tendency, for example, in some European National Committees for the members to be dominated by academia. While there are in Europe those, holding academic appointments, who make brilliant arbitrators, there are also some academics — out of the cut and thrust of practical life — who make very poor arbitrators.

The AAA makes its arbitral appointments in a different way. The Secretariat of the AAA, having consulted the parties on the qualities for which they are seeking in the arbitrator, provide, from the appropriate AAA panel of arbitrators, a list to the parties

of arbitrators from which they are invited to select their preferences. If the AAA is appointing a sole arbitrator the AAA Secretariat produces a list of ten persons for the parties' selection and if the AAA is setting up a three person arbitral panel then its Secretariat lists 15 persons for selection by the parties. In the former each party is then given an opportunity to 'strike out', without giving reasons, three persons on the list and in the latter the right to 'strike out', without reasons, five persons on the list. This can somewhat narrow the selection process because if each party 'strikes out' a different three persons on the list of ten, there will only be four persons left in this list. Similarly, if the parties each challenge five different persons out of a list of 15, there will only be five potential arbitrators left in the list.

When this process has been completed the parties are invited to select in order of preference their preferred arbitrators by marking their first preference "1", their second preference "2" etc. Thus the arbitrators with the lowest 'count' become the chosen arbitrators for the arbitration in question. Operating properly each party should be listing its preferences for the arbitrator by putting, in its judgment, the best first, and the worst last. It does not, however, always work out that way because, as with the selection of a jury, there is the temptation for a party, with a poor case, not to prefer arbitrators who are likely to spot the weaknesses in their case and find against them. I believe, therefore, the basic drawback in the AAA selection system, is that rather than selecting arbitrators on the basis of the 'highest common denominator' it can end up, at worst, by selecting them on the basis of the 'lowest common denominator'.

There is also a 'lacuna' in the AAA International Arbitration Rules when the parties are choosing ('designating') the arbitrators. This is done under Articles 6.1 and 6.2 of the AAA International Arbitration Rules. However, unlike under the ICC and LCIA Rules, the AAA Secretariat has no power to refuse to make the appointment of the 'party-chosen' arbitrator when it knows from previous experience of that arbitrator, that he or she is a lousy arbitrator or otherwise thoroughly unsuitable for the arbitral appointment in question. It is, of course, possible for the AAA Secretariat to make it known to the parties its reservations about the proposed appointment but, if they do so, they could find themselves in an awkward position, and even litigation, with the party 'designated' arbitrator when, as a result of the representations made by the AAA Secretariat, that 'designated arbitrator' is not appointed!

The LCIA runs its selection process of arbitrators on a consultation process in which its Secretariat proposes to its Board its preferred choice for the arbitral appointment. The LCIA Board then decides whether to make that appointment or not. Inevitably there is a conservatism in this process. It is very important for the LCIA, as for any arbitral body, to appoint arbitrators with established records. This makes it hard for new younger, and more innovative, arbitrators to be put forward and selected.

As I have identified, at the forefront of appointments by the major international arbitration institutions, is a concentration upon the appointment of arbitrators who are, and can be seen to be 'neutral' and 'independent' of the parties. This is highly commendable but the drawback is that the quality assessment of the arbitrator is not the first consideration in the appointment of the arbitrator. Indeed the prospective arbitrator has to be so neutral (particularly as Chairman or Sole Arbitrator) that he or she is not only neutral but unknown to the parties! At the recent meeting of the International Bar Association in Barcelona I was on a panel, considering the processes of arbitral appoint-

ments, with representatives, amongst others, of the ICC, the AAA and the LCIA. During the course of our discussions I asked each of them what knowledge they imparted to the parties to the personal qualities of the proposed arbitrator. The basic answer was "none." Each of these arbitral bodies acknowledged that they did have knowledge about the personal qualities of the arbitrators, being put forward for appointment, but such information for all sorts of reasons of confidentiality was not disseminated. The representative of ICC agreed that the ICC is in a particularly good position to know about the qualities of its arbitrators. All ICC arbitral awards are scrutinised by the Secretariat who can refer back to the arbitrator any points in the award over which they are not happy. Also the ICC, like the AAA and the LCIA, do get informal reports back from the parties about the arbitrators they appoint. Indeed the ICC representative told members at this IBA programme that they had weekly meetings of the Secretariat in which the quality of their arbitrators was raised and discussed.

The same problem prevails when the parties are seeking to appoint a sole arbitrator and, to some extent, when the parties are involved in the appointment of the third arbitrator or Chairman of the tribunal. The great emphasis is on finding in this arbitrator someone who is, and can be seen to be, totally neutral of the parties and the issues in dispute. It is true that, when faced with recommendations for arbitral appointments of persons unknown to the parties or their advisers, there are a few ways of finding out more about the proposed arbitrator. For example, a telephone call to the ICC Secretariat can, on an informal basis, provide useful information. There is, however, (in European Union parlance) insufficient "transparency"! The basic problem is that the more 'neutral' is the candidate for arbitrator, the more the candidate is likely to be 'unknown' to the parties and their advisers. Unlike judges, arbitrators do not operate in an open forum where they can be seen at work and where the products of their work, in the form of awards, are open to public inspection. What, therefore, can be done?

I believe the arbitral community, particularly the international arbitral community, can do more to assist. For example all potential arbitrators should be willing to be interviewed by the parties wanting to make the arbitral appointment. Of course a party, wanting to make an arbitral appointment, cannot argue the merits of its case to the arbitrator being interviewed but it can set out the basic facts and ascertain whether that arbitrator has the necessary experience and skills to act as arbitrator in that case. Of course these meetings should take place in a neutral venue, for example the arbitrator's office or chambers (not over a meal, with good food and wine, in a smart restaurant!) and it is prudent for the arbitrator, after the interview, to make a note of it and, if appointed, disclose it to his fellow arbitrators.

Next, parties can ask to see examples of awards written by the arbitrator who is being considered for appointment. Again there have to be safeguards. An arbitrator should not show an award, given in another arbitration, without the consent of the parties to that arbitration and usually without removing their names and other points of identification from the award. But these are not insuperable difficulties. In the annual ICCA Yearbook there are a number of international arbitration awards (suitably pruned) published.

I also see no reason also why parties should not ask a potential arbitrator for references or to ask a potential arbitrator if they can speak to an arbitration institution which has knowledge of this arbitrator's performance in the conduct of arbitrations. I am aware

that the argument that the loser will not have a good word for the arbitrator who finds against him. For myself I think that is a puerile argument — if not also insulting to the parties and their advisers. Everybody, in an arbitration, knows when they are working with a good competent arbitrator and when they are not. I see no reason, therefore, why the taking of references from losing parties, as well as the successful ones, would blight the selection process.

Finally there are always the written works of an arbitrator being considered for appointment. Those who have experience in arbitration regularly attend arbitration conferences and give papers at them. They also regularly write in the many arbitration journals, which are in the public forum. In my view, therefore, a party should not make an appointment without looking at the written works of a person being considered for appointment.

I suggest, therefore, the basic problem is that there is not enough information available to the parties, and their advisers, in the arbitral appointment process. Yes, there are some directories, which list those who are holding themselves out for arbitral appointment. You can also obtain the resumes of potential arbitrators, for example in the AAA appointment system, although other institutions are more guarded about giving access to their lists of arbitrators and the resumes, which they have upon them. With a well run institution this is valuable property! Another course of action is to ask around among those who have knowledge of the personal qualities of the arbitrators in their region or professional discipline. All such enquiries should be made. But I believe the community of arbitrators themselves can provide more help. Would it not be very convenient if there was a website in the internet in which arbitrators listed their professional qualifications, the areas of their expertise, their experience as arbitrators, the names and contact points for referees and gave access (suitably tailored) to awards which they have previously published and listed their available dates for the conduct of arbitrations!

I believe too that the provision of more information on arbitrators should also be seen as part of the exercise of opening up the ranks of arbitrators so that "a new generation of resolute arbitrators"[8] may become available to tackle the new problems in the conduct of international arbitrations. As the learned authors Redfern and Hunter rightly argue:[9]

> "There must always be a new generation [of arbitrators] in prospect, otherwise there will only be a diminishing group of ever-more-elderly people suitable for appointment."

ENDNOTES

1. Pierre Lalive "On the Neutrality of the Arbitrator and the Place of Arbitration" (Zurich, 1984). On p 27 Prof. Lalive quotes 'an arbitration is worth what the arbitrator is worth.'

2. J. F. Lalive. "Melanges en l'honneur de Nicholas Valticos: Droit et Justice" (1989).

3. Redfern and Hunter: Law and Practice of International Commercial Arbitration (Third Edition) 1999 Chapter 4, paragraph 4-12, page 190.

4. Hague Convention 1907.

5. The International Chamber of Commerce Rules of Arbitration in force as from January 1, 1998.

6. The International Arbitration Rules of the American Arbitration Association as amended and effective April 1, 1997.

7. The Arbitration Rules of the London Court of International Arbitration effective 1 January 1998.

8. See Redfern and Hunter: Law and Practice of International Commercial Arbitration (Third Edition) 1999 Introduction page vi.

9. Ibid. Chapter 4 paragraph 4-44 page 208. ■