

# **CENTRE FOR INTERNATIONAL LEGAL STUDIES**

Conference on International Commercial and Construction Arbitration

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## **Party Appointed Arbitrators**

Presentation by David Hacking<sup>1</sup>:

### **"DID YOU NOMINATE THE RIGHT ARBITRATOR?"<sup>2</sup>**

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<sup>1</sup> Chartered Arbitrator and Barrister-at-Law. Member of Littleton Chambers, 3 King's Bench Walk North, The Temple, London EC4Y 7HR

<sup>2</sup> The author would like to express special thanks to Richard H Kreindler for letting him have a copy of his notes for his address "How to Choose the Arbitrator" to Dubai Chamber of Commerce and Industry of May 1999 and to Professor Pierre Lalive for his papers "Requirements of International Arbitration, The Selection of Arbitrators" and "On the Neutrality of Arbitrators and The Place of Arbitration"

1. 'ARBITRATION IS ONLY AS GOOD AS ITS ARBITRATORS'

- 1.1 "The choice of the 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." *Jean Flavien Lalive*<sup>3</sup>.
- 1.2 "Once a decision to refer a dispute to arbitration has been made, nothing is more important than choosing the right arbitral tribunal ... It is, above all, the quality of the tribunal that makes or breaks the process." *Alan Redfern and Martin Hunter*<sup>4</sup>.
- 1.3 With or without distinguished jurists and learned authors, **this is self evident**.

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<sup>3</sup> J. F. Lalive: "Melanges en L'Honneur de Nicholas Valticos" *Droit et Justice* (1989) Editions Perdone at page 289. Dr Jean Flavien Lalive's distinguished younger brother, Professor Pierre Lalive, cited a similar quotation "An arbitration is worth what the arbitrator is worth" in his Swiss Essay on International Arbitration see p 27 of paper of Pierre Lalive "On the Neutrality of the Arbitrator and of the Place of Arbitration" ICC Conference Lausanne 1994.

<sup>4</sup> Redfern & Hunter: *Law and Practice of International Commercial Arbitration* (3rd Edition) 1999 Chapter 4, paragraph 4-12 page 190.

## 2. IMPARTIALITY, NEUTRALITY AND INDEPENDENCE

2.1 "Every arbitrator must be and remain independent of the parties involved in the arbitration.": *Article 7.1 ICC Rules of Arbitration (1998)*.

2.2 "Arbitrators acting under these rules shall be impartial and independent.":  
*Article 7.1 AAA International Arbitration Rules (1997)*.

2.3 "All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties.": *Article 5.2 LCIA Rules (1998)*.

2.4 Whether nominated under the Rules of these Arbitration Institutions or under like rules of other international Arbitration Institutions or in 'ad hoc' arbitrations, the *vital importance of impartiality, neutrality and independence, is recognised in all (almost all!) international arbitral appointments.*

## 3. OTHER CRITERIA IN THE NOMINATION/APPOINTMENT OF ARBITRATORS

3.1 Nationality and cultural background.

- 3.2 Linguistic skills.
- 3.3 Age, arbitral experience and reputation.
- 3.4 Professional expertise (a lawyer or engineer or accountant etc).
- 3.5 Knowledge of governing law of dispute.
- 3.6 Knowledge of procedural law of place of arbitration.
- 3.7 Technical knowledge of issues to be decided in arbitration.
- 3.8 Availability for conducting arbitration.

**4. WHAT ABOUT THE PERSONAL QUALITIES OF PROSPECTIVE ARBITRATOR?**

- 4.1 Does he or she have good management skills?
- 4.2 Is he or she decisive or do arbitrations 'run away from this arbitrator'.
- 4.3 Is he or she good on procedural issues or is he or she a bit of a fudger?

- 4.4 Is he or she sound in judgment or profoundly lacking in it?
- 4.5 Is he or she diligent or cursory in conducting arbitrations?
- 4.6 What are the quality of awards previously given by the prospective arbitrator?
- 4.7 And are these awards well written and well reasoned?
- 4.8 What attitude does the prospective arbitrator have in deciding issues of law and evidence and assessing damages, (*i.e. is the prospective arbitrator legalistic and restrictive in deciding issues of evidence, law and damages or does the prospective arbitrator have a broad and robust attitude to these issues?*)
- 4.9 What attitude does the prospective arbitrator have on procedural issues, document discovery, examination of witnesses and other procedural issues? (*i.e. is the approach of the prospective arbitrator to these issues one which results in **widening** the documentary and evidential base of the arbitration **and hence increase the time and cost of it** or one which keeps the documents and evidence in a tight compass **and hence accelerates the arbitral process?***)
- 4.10 Does the prospective arbitrator (either as Chairman or party appointed arbitrator) work well with other arbitrators?

**5. BALANCE OF ARBITRAL TRIBUNAL**

- 5.1 In the appointment of a sole arbitrator has he or she the right abilities for working with the parties and their advisers and conducting the arbitration with the right balance of tact and firmness?
- 5.2 In the Claimant's nomination of its arbitrator, is its prospective appointee likely **to balance** the likely party appointed arbitrator of the Respondent?
- 5.3 In the Respondent nominating its party arbitrator will its prospective appointee be a **good counter** to the claimant's party arbitrator?
- 5.4 Will the proposed Chairman work well with the party appointed arbitrators and provide the **leadership** for the arbitration to be fairly and efficiently conducted?

**6. APPOINTMENT OF 'SUITABLE' ARBITRATORS**

- 6.1 "... the [ICC] Court shall consider ... the prospective arbitrator's availability and ability to conduct the arbitration.": *Article 9.1 ICC Rules of Arbitration (1998)*.

6.2 "... the [AAA] administrator ... shall endeavour to select suitable arbitrators.":

*Article 6.4 AAA International Arbitration Rules (1997)*

6.3 "The LCIA Court may refuse to appoint any such [nominated arbitrator] if it determines that he is not suitable or independent or impartial.": *Article 7.1 LCIA*

*Rules (1998)*

6.4 What, however, **criteria** do arbitration institutions apply in deciding whether a prospective arbitrator is "suitable" and, more fundamentally, **what knowledge** do arbitration institutions and parties have about the prospective arbitrator in order to form **a judgment** on "suitability"?

## 7. DOES THE REQUIREMENT FOR 'IMPARTIAL, NEUTRAL AND INDEPENDENT' ARBITRATORS WORK AGAINST THE APPOINTMENT OF 'SUITABLE' ARBITRATORS?

7.1 Does the movement towards more and more neutrality (resulting from conflict of interest challenges by opposing parties) result in arbitral appointees being more and more **unknown** to the parties?

7.2 Could **insistence** on 'neutrality' mean that all prospective arbitral appointees with knowledge in the essential issues in the arbitration (*viz the engineering issues*) be **disqualified** because they have publically expressed views on them (*viz on*

*the preferred structure of the subject bridge of the arbitration)?*

7.3 Would it improve the arbitral process if arbitrators had **more knowledge** of the parties and the issues in dispute?

**8. DO THE ADVANTAGES OF ARBITRAL APPOINTMENTS, END UP TO BE DISADVANTAGES?**

8.1 In the words of the Hague Convention 1907 parties in arbitrations have the advantage of having their disputes resolved by “judges of their own choice”. Therefore, unlike in the Court process parties in arbitrations have **the advantage** of being able to **choose their arbitral panel** and, in doing so, **ensure it is suited** to adjudicate the dispute before it.

8.2 However, 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**.

**9. WHAT STEPS CAN THE PARTIES TAKE, WHEN SELECTING AN ARBITRATOR FOR NOMINATION, TO ACQUIRE THE KNOWLEDGE WHICH THEY NEED TO EXERCISE THAT JUDGMENT?**



- 9.1 Prepare a profile or list the arbitral qualities sought in the appointment.
- 9.2 Obtain the resumé/cvs of potential arbitrators who match the sought 'profile'.
- 9.3 Have on hand, in a database, a fully categorised list of persons who undertake international arbitral appointments.
- 9.4 Ask around among those (*viz lawyers who have appointed arbitrators in the needed sector, other members of potential arbitrators' profession etc*) about the reputation and performance of potential candidates as arbitrators.
- 9.5 Sound out, insofar as they are prepared to provide comment or information, the Secretariats of International Arbitration Institutions who have knowledge of the prospective arbitrator.
- 9.6 Obtain and examine articles or books written by the prospective arbitrator.
- 9.7 Insofar as they provide any help, consult the published Directories of arbitrators.
- 9.8 Seek an interview with those who are shortlisted for appointment.
- 9.9 Obtain and calendar the available dates of every prospective arbitrator.

**10. WHAT HELP THE INTERNATIONAL ARBITRAL COMMUNITY CAN GIVE**

10.1 Agree to be interviewed.

10.2 Be willing to provide references to those who have previously appointed that arbitrator and who have full knowledge of his or her ability in conducting arbitrations.

*[Everybody knows, or should know, when they are working with a good competent arbitrator. While the losing party and its adviser may have less favourable views, consulting losing parties and their advisers should not blight the process. Indeed in doing so a more balanced view of the prospective arbitrator should be obtained.]*

10.3 Be willing, with the consent of the parties in previous arbitrations and with the removing of names and other points of identification, to show copies of previous Award.

10.4 Avoid overbooking and be willing to refer an arbitration to another arbitrator, of the right ability, who has more time available to conduct that arbitration.

10.5 Work actively towards bringing in new blood and with it, hopefully, new

generations of intelligent, able and innovative arbitrators.

*[Arbitrators who cling on to too much work and thereby delay the conduct of arbitrations, damage, in the end, the whole arbitral process. The swifter and the better the arbitral process, the more - not less - the international commercial community will want to use it.]*

## 11. CONCLUSIONS

- 11.1 With important matters and large monies at stake, it is **quite wrong** for parties to have to select arbitrators **in any ignorance** of the qualities of those arbitrators.
- 11.2 There is **no value** in having the theoretical advantage, in the arbitration process, of being able to choose an arbitral panel perfectly suited to adjudicate the disputes before it, if the parties and their advisers **cannot truly exercise this right** and have their disputes resolved by "judges of their own choice".<sup>5</sup>
- 11.3 **The better and swifter** is the conduct of international arbitration **the more it will expand and thrive.**

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<sup>5</sup> The Hague Convention 1907

- 11.4 The international arbitral community should constantly **invigorate itself** with **new generations** of "resolute arbitrators" for not only will it **prosper** if it does, but **decay** if it does not.<sup>6</sup>

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<sup>6</sup> See Redfern and Hunter: *Law and Practice of International Commercial Arbitration* (Third Edition) 1999 Introduction page vi.

Also Chapter 4: "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": *paragraph 4-44 page 208.*