

*Lord Hacking**

CHAPTER 11

ARBITRATION IS ONLY AS GOOD AS ITS ARBITRATORS

I dedicate this essay to Professor Eric Bergsten. It is not a piece of scholarship. Others in this *Liber Amicorum* for him are providing the scholarship. Nor do I conceive that Professor Bergsten has not thought about the issue which I raise. He must have! Professor Bergsten is not only a fine scholar but also a fine thinker in the world of arbitration. Nowhere better does he reveal his thinking than in composing the ‘Problem’ for the Willem C. Vis International Commercial Arbitration Moot held each Easter in Vienna. To state that Professor Bergsten is ingenious is to understate his skill in, year after year, producing a ‘Problem’ which is so finely balanced that the argument for the Respondent can be made just as good as the argument for the Claimant. The issue raised in this essay only comes up tangentially in the Annual Vienna Moot but it is fundamental to the arbitration process wherever in the world it takes place. It should also be a reminder to all arbitrators participating in the Moot that first and foremost the duty is to be a good arbitrator.

The right of parties to choose their own arbitrator is perceived as hallowed right in international arbitrations. As long ago as 1907 a Hague Convention of that year described that parties in arbitrations had the advantage of having their disputes resolved by “judges of their own choice”¹. Yet as I stated in an article which I wrote ten years ago:

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¹ Hague Convention 1907.

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... in international arbitrations, the selection of arbitrators is not a certain and defined process. Information is limited, guidance sparse and arbitral appointments can too readily become ‘arbitral disappointments’.²

As Jean Flavien Lalive wrote ‘arbitration is only as good as its arbitrators’:

The choice of persons who propose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only good as the arbitrators.³

In Redfern and Hunter “International Arbitration” the same point is made:

Once a decision to refer a dispute to arbitration has been made, choosing the right arbitral tribunal is critical to the success of the arbitral process....It is, above all, the quality of the tribunal that makes or breaks the arbitration...⁴

An Associate at the London law firm of Linklaters put this proposition more dramatically

...it is axiomatic that [this is]...the...most important part of the arbitral process...Get it wrong and the arbitration can be beset by problems.⁵

The question, therefore, has to be asked why, if the parties have the great advantage of being able to choose their own arbitrators, there are ‘arbitral disappointments’. There are, I believe, two basic problems: firstly there is not enough true information available to the parties and their lawyers in the selection process for an arbitrator and secondly parties and their lawyers do not approach the selection process with the right criteria. Too often the big names, among the international arbitrators, are favoured without taking into account their availability and their suitability for the arbitration in question. Parties and their lawyers are also too often tempted by an arbitrator’s previous experience in a particular form of dispute without having sufficient regard for the more important test of what is the quality of the arbitrator as an arbitrator.

I believe there are certain fundamentals in the arbitral appointment process:

² Lord Hacking, ‘Well, Did You Get The Right Arbitrator?’, *Mealey’s International Arbitration Report* 15 (June 2000).

³ J.F. Lalive, *Melanges en l’honneur de Nicholas Valticos: Droit et Justice* (1989). It is, therefore, to Jean Flavien Lalive that the author dedicates the title of this essay.

⁴ N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern & Hunter on International Arbitration 5th ed.* (2009), para. 4.14.

⁵ Lucy Greenwood: Global Arbitration Review.

Although good intellect is essential, the role of an arbitrator is also a practical one so that the arbitration is conducted fairly and efficiently and in a timely manner.

Before appointing an arbitrator a party should seek to gain the best information about the ability, experience and availability of every candidate for the arbitral appointment.

To that end, the appointing party should make the fullest enquiries about every arbitral candidate and obtain the best knowledge available about him or her.

Further to that end, every arbitral candidate should be willing to identify articles, which he or she has written, produce sanitised copies of earlier Awards which he or she has issued, name other arbitrators with whom he or she has sat, and make himself or herself available for interview.

In choosing the arbitrator the crucial test should go to the *quality* of the arbitral candidate as a *good* arbitrator. While experience of different types of arbitration and of different legal systems and procedures is important, all experienced arbitrators are familiar with analysing and deciding complex issues of fact and law whether or not such issues of fact and law have previously been before them.⁶

The starting point, therefore, should be to match the proposed arbitrator to the proposed arbitration. What nationality and cultural background should the arbitrator have? What is his or her age, arbitral experience and reputation? What professional expertise is needed...a lawyer...an engineer...an accountant etc? What knowledge is needed of the governing law of the dispute? What knowledge is needed of the procedural law of the place of the arbitration? Does the arbitrator need to have technical knowledge of the issues to be decided in the arbitration? But it goes further than that. What are the personal qualities of the 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 a bit of a fudger? Is he or she sound in judgement or lacking in it? What attitude does the arbitrator have in deciding issues of law and evidence and assessing damages? Is the prospective arbitrator legalistic and conservative or does he or she possess a broader and more robust and, possibly,

⁶ www.lordhacking.com

unsafe approach? What attitude does the prospective arbitrator have on procedural issues, document discovery, examination of witnesses and other procedural issues? Will his or her approach on these issues widen the documentary and evidential base of the arbitration (and increase time and cost) or keep the documents and evidence in a tight compass (and accelerate the arbitral process and save cost)?

There are then considerations relating to the ability of the prospective arbitrator in working with the other arbitrators in the tribunal and, as it particularly relates to the chairman of the tribunal or a sole arbitrator, does the prospective arbitrator have the right qualities for working with the parties and their advisors and conducting the arbitration with a balance of tact and fairness? When the claimant is nominating its arbitrator, is the prospective appointee likely to balance the likely choice of arbitrator to be made by the respondent? When the respondent is nominating its arbitrator will that prospective arbitrator be a good counter to the claimant's appointed arbitrator? When consideration is being made over the appointment of the chairman, will the candidate for this appointment work well with the party appointed arbitrators and provide, as necessary, the leadership for the arbitration to be fairly and efficiently conducted?

There is a lot the effective arbitrator can do to assist the appointing process. He or she can agree to be interviewed. He or she can be willing to provide references from those who have previously appointed that arbitrator or who otherwise has knowledge of his or her ability in conducting arbitrations. He or she can be willing to provide sanitised copies of previous awards, having, where necessary, obtained the necessary consents of the parties in these arbitrations.

Yes, parties, when well advised, do seek to obtain the best information which they can about the prospective arbitrator although, I suggest, they do not go as far as they could in obtaining references and in seeing previous awards issued by the prospective arbitrator. The tendency is to look at previous arbitration articles which the prospective arbitrator has written rather than seeking out and looking at previous awards. There are two basic problems. Firstly the arbitrator, unlike the judge, does not operate in an open forum to which the public has access nor gives open judgements which are available for public and academic scrutiny. Secondly the ever increasing emphasis on the prospective arbitrator being independent of the parties and their advisors moves the appointing process further away from arbitrators who are well known within the community in which the parties and their advisors are located. So it is a question of having to find out more about the unknown rather than the known. Of course there is

gossip in the corridors of arbitral appointments. As one recent writer of an arbitration article, himself General Counsel of a major corporation, stated

It is no secret that in the absence of better alternatives, parties often rely on sketchy and anecdotal information, frequently transmitted through multiple (and dubious) filters.⁷

Indeed the writer of this article makes the interesting and novel proposal of a proper 'feedback' being provided on the performance of arbitrators. He has no difficulty in justifying the value of such 'feedback' nor in identifying what that 'feedback' should contain. He does, however, have difficulty in identifying how such 'feedback' can be obtained.

A number of my colleagues in my London chambers conduct mediations. On the successful outcomes of their mediations the parties and their lawyers are happy to write words of praise which my mediator colleagues are happy to set out in their websites. Doubtless there are occasions when adverse comments are made but I have not noticed my colleagues recording in their websites the adverse comments! So mediators seem naturally to obtain 'feedbacks' and why not arbitrators?

Basically the structure of arbitrations does not lean towards a 'feedback' system. Firstly there are, unlike in successful mediations, winners and losers. Thus if the loser thinks he has lost because of the way the arbitration has been conducted or by the ill judgement of the arbitral tribunal, the 'feedback' is likely to be biased and unhelpful. Secondly there is the delay between the end of the arbitration proceedings and the issue of the award which takes the parties' minds away from how the arbitration has been conducted to how the arbitration is decided in the award.

For myself I do not think these are insuperable difficulties. In the first place, if an arbitration has been conducted under the auspices of one of the arbitration institutes, then that institute can collect back 'feedback' from the parties. Indeed the ICC in Paris, the LCIA in London and the ICDR in New York do, one way or another, collect information from the parties and their lawyers about the conduct by the arbitrators in the arbitral process. They do not, however, make that information available to the arbitrators nor indeed to the wider public. The

⁷ Michael McIlwrath, 'Grading the Arbitrator', *Journal of the Chartered Institute of Arbitrators* 73 (May 2007): 224.

important point is that this ‘feedback’ need not be biased depending on the outcome of the arbitration. As Michael McIlwrath states out of his experience as a General Counsel in arbitrations in which he has participated:

There have been times when we have been pleased with an outcome but not the process and time taken to reach it, or displeased with an outcome but happy with the process that produced it.⁸

Turning to the arbitration institutes, over and above the insistence of the major arbitration institutes on impartiality, neutrality and independence, the ICC, the IDRC and the LCIA, as with other major arbitration institutes, do set down requirements for the suitability of arbitrators for appointment.⁹

Moreover the ICC Court holds itself free not to confirm any nomination of an arbitrator and is “at liberty to choose any [other] person whom it regards as suitable”¹⁰. Similarly “The LCIA Court may refuse to appoint any such [nominated arbitrator] if it determines that he is not suitable or independent or impartial”¹¹. Curiously, however, the ICDR International Rules contains no such provision. It is, therefore, possible for the ICDR to appoint, on the nomination of a party, an arbitrator whom they know to be unsuitable for the appointment in question.

Each of these arbitration institutes have different processes in the selection of arbitrators which they appoint. The ICC works through National Committees who are invited, usually without consultation with the parties, to recommend the necessary appointment. The ICDR provides lists of names of potential arbitrators to the parties who are entitled to strike out, without giving reasons, a specified number of these names and who then are invited to state their preferences in order of merit of the remaining names on the list. The LCIA Secretariat runs a consultation process putting names before the parties and obtaining their comments on the names and then putting before the LCIA Court the preferred choices for the selection to be made. There are advantages and disadvantages in each of these processes. The quality of the ICC National Committees varies enormously. In some countries they are dominated by academics with limited experience in the conduct of arbitrations. Other National Committees have on

⁸ *Ibid.* at 225.

⁹ See Articles 7 and 9 ICC Rules of Arbitration (1998); Articles 6 and 7 ICDR International Arbitration Rules (March 2008); Article 5 LCIA Rules (1998).

¹⁰ Articles 9.2 and 9.6 ICC Rules of Arbitration (1998).

¹¹ Article 7.1 LCIA Rules (1998).

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hand an excellent selection of working arbitrators. The problem with the ICDR selection process is that, particularly with the right to strike out, the selection can be based not on the highest common denominator of the arbitrator but on the lowest common denominator of the arbitrator. The LCIA's appointment process tends to move towards the established arbitrators rather than the less established arbitrators.

There is a good case for all arbitrators to be neutrally appointed whether by the administering arbitration institute or by other means. It would rid the arbitration process of the imbalance – and sometimes worse - arising out of party appointed arbitrators. It will, however, be hard to take away from parties the right to appoint their own arbitrators. Amongst other considerations, the right of parties to appoint their own arbitrators keeps them closer involved in the arbitration process. Perhaps, therefore, we have to live with what we have got. Yet improvements can be made. More information can be provided upon, and by, prospective arbitrators. Perhaps the arbitration institutes could set up effective, fair and open 'feedback' procedures. Above all the parties and their lawyers can and should approach arbitral appointments with much greater objectivity.

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