

Selection and Appointment of Party-Nominated Arbitrators

Peter Morton of K&LNG, London¹

1. **INTRODUCTION**

It has been said many times, such that it is now almost a cliché, that selection of the party-nominated arbitrator is the single most important decision a party will make in an arbitration. As the distinguished practitioner Dr Jean-Flavien Lalive once put it:-

"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."²

One of the key attractions of arbitration (as far as 3 member tribunals are concerned) is the comfort and confidence parties gain by having a person of their own choice hearing and contributing to determination of their case. Of course, no equivalent opportunity exists in a Court process.

The selection of the co-arbitrators, who may in turn between them choose the chairman of the tribunal, is an extremely important means by which the parties can maintain an indirect influence over the arbitral process.

Careless selection can result, at best, in spending more time and money getting to a winning result than should have been necessary and, at worst, in jeopardising prospects of success.

The fact that the grounds of appeal or challenge to an arbitral award are limited, generally with no possibility of a review on the merits, makes the selection all the more important.

This paper focuses on selection of party-nominated arbitrators when dealing with 3 member tribunals, which is increasingly becoming the norm save in smaller disputes.

¹ Peter Morton is a partner in the Dispute Resolution and Litigation Department of K&LNG, based in London.

² J F Lalive – “*Mélanges en l’honneur de Nicholas Valticos: Droit et Justice*” (1989), p289.

2. FACTORS IN SELECTION OF A PARTY-NOMINATED ARBITRATOR

The selection of an arbitrator can often be a difficult task. As one practitioner put it:-

*“[Counsel] is duty bound to proceed in a fashion which promotes his client’s interests, while adhering scrupulously to the rules of ethics and procedure. In selecting his party appointed arbitrator, his choice will be guided not primarily by an interest in finding a strictly impartial or neutral individual, but by the hope of employing one with qualities which tend to give him and his client the greatest assurance that their viewpoint will be understood, appreciated and, ultimately will prevail.”*³

Each case will inevitably have its own special features to be borne in mind in the selection of the party-nominated arbitrator. The following items provide a checklist of the sort of matters that ought to be considered in deciding who to nominate.

Nationality - Nationality of the proposed party-nominated arbitrator is perhaps relevant on two fronts.

Firstly, parties will be interested to ensure that their party-nominated arbitrator has the same cultural background and overall outlook as they do. A means of achieving this is to select an arbitrator of the same nationality, which will bring a degree of comfort to the appointing party.

Secondly, choice of nationality can impact significantly on the nationality of the chairman. Institutional rules will often provide that the sole or presiding arbitrator is to be a nationality different from that of the parties (e.g. ICC Rules - *"The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties."* (Art 9.5)). However, if you select a co-arbitrator with the same nationality as the opposing party, and the opposing party chooses a co-arbitrator with the same nationality, the ICC will consider there is no objection to the appointment of a chairman with the nationality of the opposing party.

In addition, where nominated co-arbitrators are of differing nationalities the institution is more likely to select a chairman of a different nationality to either co-arbitrator, to give balance to the tribunal and avoid any implication of favouritism to either party (as might be the case if the nationality of the chairman selected by the institution followed that of a party-nominated arbitrator). So, whilst one might expect, for arbitrations seated in London, to end up with an English chairman, that may not be the case if you nominate an English co-arbitrator, whilst the other party has nominated, say, an Indian arbitrator.

Likely Disposition - As Professor Martin Hunter once put it, *"Where I am representing a client in an arbitration, what I am really looking for in a party nominated arbitrator is someone with maximum pre-disposition towards my client, but with minimum appearance of bias"*.

³ *"Effective Selection of International Arbitrators in International Arbitration"*, James Wangelin, Mealey's International Arbitration Report, November 1999.

What this means is that parties will commonly nominate someone who not only shares the same nationality and cultural background (as mentioned above) but also has a legal background (e.g. common law/civil law tradition) and legal disposition to suit their case.

It may be that publications or prior engagements as arbitrator or even as counsel indicate the arbitrator may be of a supportive disposition. For example, it may be that the arbitrator shows a tendency to interpret contracts purposively rather than literally, which may suit your position.

Potential Impact on selection of the Chairman - The ultimate goal in selection of your party-nominated arbitrator is to bring about the assembly of a tribunal whose majority (2 out of 3) is likely to be sympathetic to your position.

It is therefore worth thinking carefully about the likely impact your proposed nomination may have on chairman selection. In addition to the point made above with reference to the nationality of your nominated arbitrator (and what this may mean for the nationality of the chairman), your choice of nominated arbitrator may influence the selection of the chairman by virtue of his/her involvement in the selection process⁴. The extent to which, in those circumstances, parties might discuss with their nominated arbitrator the selection of the chairman is dealt with further below.

Availability - This is an important issue, in particular when considering appointing the most popular arbitrators. A criticism that one hears fairly frequently is of delay in the conduct of the arbitration and rendering of awards. Whilst some delay is inevitable when tribunal members are based on opposite sides of the globe and are having to decide a large and complex dispute, you can at least reduce the risk of delay by checking on availability and listening out for word of mouth as to whether the proposed arbitrator generally gives his/her appointments the time and energy they deserve.

Familiarity with relevant business or industry involved in the dispute - Many commercial arbitrations have as their subject matter highly technical or scientific issues. In such cases it may be of assistance to nominate a co-arbitrator with experience in and understanding of the relevant industry or sector. It can be helpful if the co-arbitrator can assist other tribunal members in understanding the evidence in a particular area in which the other arbitrators may have no background.

However, this is a factor to be approached with some caution. It should be remembered that arbitrators may have the benefit of expert testimony to help guide them through particularly technical or difficult issues where expertise would assist. It would, for example, be inadvisable to appoint an arbitrator with specialist technical expertise but with no experience in arbitration.

⁴ E.g. under UNCITRAL Rules or in ad hoc arbitrations.

Although relevant specialist knowledge is something to keep in mind, especially where the case involves technical issues, it certainly should not be treated as a matter of paramount importance to the exclusion of other considerations.

Familiarity with law governing contract - Knowledge of the law governing the contract may be of benefit, particularly where the case or significant aspects of it may turn on legal points rather than on issues of fact or, for example, on establishing the common intention of the parties to a contract. The more experienced the arbitrator the more likely they are to be open to and aware of other legal systems.

Familiarity with arbitration practice - Whilst of most importance for the chairman of the tribunal, knowledge and experience of the law and practice of international commercial arbitration is also of considerable importance for the co-arbitrators. The distinguished authors Redfern and Hunter have stated that "*probably the most important qualification for an international arbitrator is that he should be experienced in the law and practice of arbitration.*"⁵

Many suggest that expertise in arbitration practice and procedure is as important, if not more important, than knowledge of the law governing the contract. That certainly applies to the chairman, and there can be no doubt that practical experience in the conduct of arbitrations is an important quality for a potential co-arbitrator.

Language - Familiarity with the language of the arbitration and (if different) the language of the contract are both important requirements. It is costly and time consuming and generally unsatisfactory to have to rely on translation of evidence and submissions.

In terms of linguistic ability you want to be sure your arbitrator has not only a basic grasp of the language but is able to appreciate subtleties and idiosyncrasies in the particular language. Otherwise there is a danger written materials and submissions may not be fully appreciated and understood.

It may also cause difficulties as between the three arbitrators if they do not share a common language to the requisite level. Translators may not be available at all times (for example in the private deliberations or three-way telephone conversations) and this may lead to feelings of exclusion and division amongst tribunal members.

Standing and Reputation - Although possibly giving rise to a situation where the same names appear time and time again and it is difficult for new arbitrators to break into the inner circle, standing and reputation in the field of international commercial arbitration is an important consideration when deciding whether to appoint a prospective party-nominated arbitrator.

⁵ Redfern & Hunter "*Law and Practice of International Commercial Arbitration*" (4th Ed) 2004, para 4-47.

Influence/Capacity to Persuade - Tied into the previous point, your nominated arbitrator should carry sufficient weight to generate respect from the other tribunal members and be persuasive during the private deliberations of the tribunal. One would expect this to flow from reputation and stature in the legal community and also to partly hinge on appearance of absolute independence.

Impartiality and Independence - All major international arbitration rules require that each arbitrator, whether party-appointed or not, is to be “independent”, “impartial” or “neutral” or some combination of these⁶.

The appointment of an arbitrator who is positively biased towards your case, either acting as no more than a “rubber stamp” or (even worse) an advocate of your/your party’s position is likely to be counter-productive. The other arbitrators will spot what is happening and your nominated arbitrator’s influence will decline rapidly.

It is far preferable to appoint someone who, by reason of sharing the same legal and cultural background is likely to sympathize with your or your client’s position, but will still act strictly impartially, deciding the case on the facts and the law before them, and who will thereby carry greater weight in the private deliberations of the tribunal.

3. **PRACTICAL STEPS IN SELECTING A PARTY-NOMINATED ARBITRATOR**

Although arbitration is for the most part private and confidential, there is undoubtedly intelligence that can be gathered and steps that can be taken to try to ensure that you make the right choice in your nominated arbitrator.

Biographical information – Generally the first step, and an essential one for any candidate you may be considering, is to review their CV/resume.

Ask around - Perhaps the best means of obtaining information about your proposed nominee is through word of mouth. Highly pertinent information regarding arbitrators, including their personal qualities and abilities, is still obtained informally by asking around amongst colleagues and others involved in arbitration and, for example, by meeting arbitrators at arbitration events and conferences.

Aside from direct practical experience of the arbitrator, word of mouth is the best means of finding out whether, for example, your proposed nominee has good management skills, whether

⁶ E.g. the ICC rules provide arbitrators may be disqualified for “*lack of independence or otherwise*” (Art. 11.1); the LCIA Rules focus on impartiality requiring that “*All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party*” (Art 5(2)).

he/she is decisive, is motivated, and has sound judgement. All these are important questions which simply cannot be answered by reference to publicly available information.

Previous awards - Although previous awards are not always available due to the private nature of most arbitrations, some awards are publicly available and may give an indication of the particular qualities of your candidate.

Books and articles - The writings of a prospective arbitrator can give an insight into the way they operate and may, for example, reveal their thinking on the conduct of arbitrations and knowledge of the applicable procedural law.

Interview - Interviewing is now becoming a relatively common practice as part of the 'due diligence' in selecting arbitrators, particularly in large and complex arbitrations. Given this is a topic in its own right, it is dealt with in more detail below.

Assessment of Independence/Impartiality - When considering potential candidates for nomination it is important that you identify, right at the outset, any matters that may give rise to doubts as to the proposed arbitrator's impartiality or independence. The IBA Guidelines provide an effective means of doing this, covered in more detail below.

4. THE PRE-APPOINTMENT INTERVIEW

Interviewing of potential arbitrators has become fairly common practice in recent years. Although interviewing can be a costly exercise, there are cases, particularly larger international arbitrations, where it may be appropriate and justified.

Arbitrators are however generally negative towards interviews. Many arbitrators regard them as unseemly and simply refuse an interview, instead resting on their published CVs and reputation.

Despite the reservations of some arbitrators, an interview may be a good idea if you want comfort on matters such as language skills, personality and the arbitrator's physical and mental health, none of which can be adequately assessed without meeting the arbitrator in person. So long as the interview is appropriately restricted, it can be a helpful tool in the selection process.

The sorts of matters which it is proper for a party, or its counsel, to raise and discuss in the initial interview with a potential arbitrator were helpfully set out in an article by Doak Bishop and Lucy Reed⁷:-

“(1) The identities of the parties, counsel and witnesses;

⁷ “Practical guidelines for interviewing, selecting and challenging party appointed arbitrators in international commercial arbitration”, Doak Bishop and Lucy Reed, 14 Arb Int'l 396 (1998).

- (2) *the estimated timing and length of hearings;*
- (3) *a brief description of the general nature of the case sufficient to allow the candidate to determine if he or she is competent to decide the dispute, has disclosures to make, and has time to devote to the matter;*
- (4) *the arbitrator's background qualifications and resume;*
- (5) *the arbitrator's published articles and speeches;*
- (6) *any expert witness appearances of the arbitrator, including positions taken;*
- (7) *any prior service as an arbitrator, including decisions rendered (subject to any confidentiality requirements);*
- (8) *whether there is anything in the arbitrator's background that would raise justifiable doubts as to his or her independence or impartiality, and any disclosures that the arbitrator would need to make;*
- (9) *whether the arbitrator feels competent to determine the parties' dispute; and*
- (10) *the availability of the arbitrator (i.e. whether he or she can devote sufficient time and attention to the parties' dispute in a timely manner)."*

In order to prevent the possibility of the interview giving rise to a challenge to the arbitrator, the interview *must* be strictly limited to such matters. Under no circumstances can discussions go into the merits of the dispute, whether directly or indirectly. The description of the nature of the case and the issues should be stated in a neutral fashion. Questions, even hypothetical ones, as to what position the prospective arbitrator would take on any of the issues in dispute should be strictly avoided and there should be no attempt to 'test' your case with the candidate.

If the interview strays into a discussion of the merits, and the nominated arbitrator then discusses the merits with the other tribunal members before the file has been transmitted to them, this will put the other arbitrators on notice of a possible lack of impartiality.

The interview should be kept short. The longer the time of contact the greater the risk that the interview will stray into the realms of impropriety. By way of an extreme example, the ICC Court once refused to confirm a party-appointed arbitrator who spent around 50-60 hours with the nominating party reviewing the case before appointment⁸.

⁸ Hascher, "ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators", 6 ICC Int'l Ct, Arb Bull 4, 11 (Nov 1995).

Some experienced arbitrators have developed their own guidelines for the conduct of interviews. These will often include some or all of the following:-

- Insisting that the interview takes place at the arbitrator's office;
- Not accepting hospitality of any kind (e.g. an interview over lunch is out of the question);
- Insisting the interview be restricted to a time limit (often 30 minutes);
- Making a note of the discussion, which may be disclosed to the other arbitrators and the parties in the event of appointment; and
- All these matters to be made clear in advance to the interviewing party/counsel.

Although these guidelines are often introduced on the initiative of the arbitrators, the protection and benefits of applying such a regime apply both ways. Applying these restrictions will preserve the arbitrator's impartiality and engender respect from the other arbitrators. They should therefore be regarded as matters of good practice both from the point of view of the prospective arbitrators and that of the nominating party.

There are some grey areas where opinions differ as to whether they are acceptable topics for discussion at a pre-appointment interview.

For example, is it acceptable to ask the arbitrator regarding his/her attitude to certain arbitral procedures? For example do they like using techniques such as witness conferencing, do they like graphical demonstrations and is it their practice to express preliminary views on the merits. The balance of opinion seems to be that such matters may be raised as part of the interview process.

Similarly, it has been said that there should be no issue with discussing possible nominations for chairman. One view is that this is both necessary and expected because in selecting the party nominated arbitrator one is affecting the appointment of the chairman. However, some arbitrators do not wish to discuss with their nominating party the possible choice of chairman. They take the view that they are nominated because the nominating party has trust in their judgement, and that should extend to selecting a chairman who will give them a fair hearing.

5. **THE IBA GUIDELINES ON CONFLICTS OF INTEREST**

Until recently there was an absence of detailed guidance for arbitrators as to which matters, potentially giving rise to a disqualifying conflict of interest, need and need not be disclosed.

All the well established rules of arbitration (e.g. ICC, LCIA, ICDR and UNCITRAL) specify general standards in terms of impartiality and/or independence and impose disclosure obligations⁹. However, none of the rules gives detailed guidance as to matters that ought to be disclosed.

This lack of detailed guidance led to the formation of an IBA Working Group, made up of 19 experts in arbitration, whose goal was to cure such uncertainties by drafting guidelines which were clear and detailed. There was also a desire to eliminate ‘over-disclosure’ by arbitrators (and the consequent delays and complications that can result) for whom the existing rules, it was felt, provided insufficient guidance.

After 2 years of careful research and consultation, in July 2004 the IBA Guidelines on Conflicts of Interest in International Arbitration (the "Guidelines") were published. A detailed examination of the Guidelines is beyond the scope of this paper. In summary, the Guidelines set out a number of general principles before going on to set out lists of over 40 factual situations – divided into Red, Orange and Green Lists – with different disclosure requirements and consequences for each different colour.

In short, the Red List represents situations where disqualifying conflicts of interest are present. This is divided into:-

- A ‘Non-waivable Red List’, where the arbitrator should decline the appointment no matter what (essentially situations where to accept the appointment would mean the arbitrator being a judge in his/her own cause).
- A ‘Waivable Red List’, described as “serious but not severe” situations, where the arbitrator may only accept the appointment if the parties provide fully informed, express consent.

The Orange List sets out situations where a disqualifying conflict of interest may be present and the relevant circumstances should be disclosed, following which (under the Guidelines) the parties have 30 days in which to challenge the appointment.

The Green List is made up of situations where a disqualifying conflict of interest is not present and no disclosure is necessary.

⁹ E.g. ICC Art 7.2 – “a prospective arbitrator shall sign a statement of independence and disclose in writing any facts or circumstances which might be of such nature as to call into question the arbitrator’s independence in the eyes of the parties”; LCIA Art 5(3) - "Before appointment by the LCIA Court, each arbitrator shall ... sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration"; UNCITRAL Art 9 - "A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances."

The Lists are stated to be non-exhaustive and any doubt as to whether particular facts require disclosure is to be resolved in favour of disclosure. The Guidelines are also stated to be the ‘beginning rather than the end of the process’ and will be subject to review and refinement.

The Guidelines are not legally binding on parties to arbitration unless the parties agree that they shall be. Nor do they displace the governing arbitration laws or the applicable institutional rules. They are simply an expression of views of the IBA and its Working Group as to what represents ‘best current international practice’.

In light of this one might ask what useful purpose the Guidelines may serve?

- Parties considering appointing a particular arbitrator may ask the candidate whether, by reference to the IBA Guidelines, he/she would have any disclosures to make. By this means the Guidelines can be an extremely useful tool for flushing out conflicts at an early stage.
- Even if not expressly requested to do so by the parties, arbitrators may, of their own volition, assess their independence by reference to the Guidelines.
- One would expect that Institutions, in applying their own general standards as to independence and/or impartiality, are likely to have some regard to the Guidelines.
- Further, and perhaps most significantly, a Court reviewing the impartiality and independence of an arbitrator can be expected to ascribe the Guidelines considerable authority.

Accordingly, although not directly binding, one can see how the Guidelines can have an important indirect application and how they are likely to influence how parties and arbitrators operate within the legal frameworks applicable to them.

Whilst an examination of the Guidelines is beyond the scope of this paper, one particular factual scenario covered in the Guidelines is worthy of mention.

Scenario 3.3.7 on the Orange List (so a situation which may give rise to doubts as to the arbitrator’s impartiality or independence and therefore requiring disclosure) is as follows:-

“The arbitrator has within the past 3 years received more than 3 appointments by the same counsel or the same law firm”

The inclusion of this situation in the Orange List may have significant implications for some law firms. The effect of this example in the Guidelines may be to prevent law firms from returning to the same arbitrators time and time again.

One might expect that, for larger firms in particular, this may result in a rationing of appointments and the holding back of the firm’s favourite arbitrators for bigger or more

important matters. It may also give rise to ‘new blood’ amongst the ranks of arbitrators, as law firms begin to spread their appointments more thinly, to the benefit of younger and less well known arbitrators (which would be a welcome development).

6. **THE ROLE OF THE PARTY-NOMINATED ARBITRATOR ADVOCATE OR NEUTRAL**

In some contexts it is envisaged that party nominated arbitrators can act as ‘non-neutral’ advocates for their appointing party, with only one genuine neutral - the chair¹⁰. However, such an approach is unacceptable in international commercial arbitration.

As stated above, all well established rules for international arbitration require arbitrators to be independent, impartial, or neutral (or some combination) and this applies equally to the party nominated co-arbitrators as it does to the chairman.

The fundamental idea behind all these rules is the principle that arbitrators should decide the case on the facts and law in accordance with their best judgement.

Where a tribunal contains party-nominated arbitrators it is important that everyone concerned in the arbitration should know from the outset whether they are to be impartial or whether they are to be advocates of those who appointed them. Most institutional rules will deal with this expressly (e.g. the LCIA Rules provide that arbitrators may not act as advocates of the parties (Art 5(2))).

Unless it is expressly recognised that party appointed arbitrators are to act as advocates of their appointing party’s case, the more of an advocate a co-arbitrator appears to be, the less trusting the other arbitrators will be of his motives and judgement. This will hardly be beneficial to the nominating party’s cause. Parties are far better off with an arbitrator who has the respect of his colleagues and defends the integrity of the process.

There are, however, certain practices which are commonly regarded as acceptable as part of a party-nominated arbitrator's role which are reflective of a surviving link, after appointment, between a party and its nominated arbitrator.

Ensuring the Proper Understanding of the Nominating Party’s Case - It is generally accepted that part of the function of party appointed arbitrator is to ensure all arguments presented by the appointing party are fully considered and understood by the tribunal as a whole.

¹⁰ E.g. the domestic rules of the AAA – AAA Commercial Arbitration Rules, Art 12(b) effective 15 Sept 2005.

It can be difficult presenting one's case to a panel made up of lawyers who differ in native language, legal training and culture from counsel appearing before them and, very often, each other. Matters which are self evident to lawyers from one country may be puzzling to lawyers from another and require explanation.

The party-appointed arbitrator, sensitive to the particular characteristics of a party may become aware that the other Tribunal members are not understanding or appreciating what is being submitted. As Redfern and Hunter have put it:-

“An arbitrator nominated by a party will be able to make sure that the case of the appointing party is properly understood by the arbitral tribunal. In particular, such an arbitrator should be able to ensure that any misunderstandings that may arise during the deliberations of the arbitral tribunal (for instance because of difficulties of legal practice, culture or language) are resolved before they lead to injustice”¹¹.

This raises the question of how far an arbitrator may go in fulfilling this function before overstepping the line. If counsel for the arbitrator's nominating party is making an argument ineffectively, but the arbitrator understands the argument nevertheless, is he/she to step in and make out the argument for the nominating party? This would clearly be going too far. However, whilst the arbitrator cannot act as an advocate, he/she can assist the other members of the Tribunal and the parties by directing a question or questions in the open session for the sole purpose of enabling a proper understanding and appreciation by both the Tribunal as a whole and the parties of those aspects upon which there is an apparent difficulty. The arbitrator may also provide a further exposition of the case being made in the private deliberations of the tribunal.

This is, however, a delicate area where the slightest excess on the part of the arbitrator may give rise to lack of confidence by other members of the tribunal in that arbitrator.

Appointment of the Chairman - In a process where the co-arbitrators are to choose the presiding arbitrator, it is generally regarded as permissible for party-nominated arbitrators to refer back to the parties who nominated them regarding the proposed choice, and by this means ensure that the appointee is acceptable to all concerned¹².

The IBA Rules of Ethics for International Arbitrators¹³ specifically permit communications between parties and arbitrators to obtain the views of the nominating party as to the acceptability of candidates being considered for the position of chairman.

¹¹ Redfern & Hunter *“Law and Practice of International Commercial Arbitration”* (4th Ed) 2004, para 4-17

¹² E.g. see Lowenfeld, *“The Party Appointed Arbitrator in International Controversies – Some Reflections”* 30 Texas Int'l L J 59 (1995); Redfern & Hunter - *“Law and Practice of International Commercial Arbitration”* (4th Ed) 2004, para 4.28.

¹³ Rule 5.2.

The UNCITRAL Rules provide that the two co-arbitrators shall choose the presiding arbitrator¹⁴ but are silent on whether the co-arbitrators should consult with their nominating parties prior to consultation - i.e. the UNCITRAL Rules do not require consultation with the parties, but nor do the Rules exclude it.

This is, however, another area that needs to be treated carefully. If the nominating party's first choice of chairman is not agreed by the other arbitrator, is the arbitrator to continue to consult with the appointing party?

Part of the benefit of having co-arbitrators select the chairman is that they can select a chairman with whom they know they can work and who they believe will give the parties a fair hearing. If the co-arbitrators become no more than conduits for the parties as to their nominations for the chairman then (i) that benefit is lost; and (ii) it becomes more likely that it will be impossible to reach agreement on the identity of the chairman, leaving the parties to rely on fall back provisions such as appointment by the administering institution.

Accordingly, whilst it is not improper for arbitrators to solicit views from the parties as to candidates for the position of chairman, they should not allow the parties to directly or indirectly dictate the outcome.

Reporting lack of impartiality - Where a party-nominated arbitrator becomes aware of a lack of impartiality on the part of another arbitrator, perhaps in the private deliberations, it is acceptable (generally after consultation with the chairman/other impartial arbitrator), for the party-nominated arbitrator to raise the matter with the nominating party for the purpose of considering whether to make a challenge.

7. CONCLUSION

The authors Redfern and Hunter have rightly said that "*It is, above all, the quality of the arbitral tribunal that makes or breaks the process*"¹⁵.

With careful research and discussions with arbitration practitioners and suitable colleagues, parties and their counsel can go a long way to ensuring they end up with the 'right' arbitrator.

Interviewing can be a helpful tool in some cases, if strictly policed, although there will be many instances where the necessary comfort factor can be gained through other means.

¹⁴ Art 7(1).

¹⁵ Redfern & Hunter "*Law and Practice of International Commercial Arbitration*" (4th Ed) 2004, para 4-12.

The IBA Guidelines on Conflicts of Interest have certainly come as a welcome development in a complex area of practice, both for arbitrators and the parties/their counsel and should help in identifying disqualifying factors amongst candidate arbitrators at an early stage.

Whilst the idea of having a non-neutral as your party appointed arbitrator may have an initial appeal, a party's best interests are served by nominating an arbitrator with a similar outlook to theirs, who is likely to sympathize with their position, but who ultimately will decide the case impartially on its merits, and who will engender the respect of the other tribunal members in doing so.

Peter Morton
Kirkpatrick & Lockhart Nicholson Graham LLP

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