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The Arbitral Tribunal: Selection and Replacement of Arbitrators

Chiara Giorgetti

University of Richmond, cgiorget@richmond.edu

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I. The Arbitral Tribunal: Selection and Replacement of Arbitrators

Chiara Giorgetti

Introduction

The great majority of international investment arbitrations are decided by a three-member arbitral panel, where each party selects one arbitrator, and the presiding arbitrator is selected either by agreement of the parties, the party-appointed arbitrators, or, more often, by a neutral appointing authority.¹ Their selection is not only a characteristic feature of international investment arbitration, but also one of the most important and delicate acts taken by the parties during the proceedings.² Indeed, as frequent arbitrator Professor William W. Park noted, while “in real estate the three key elements are ‘location, location, location,’ . . . in arbitration the applicable trinity is ‘arbitrator, arbitrator, arbitrator.’”³

The selection of arbitrators is made after serious and in-depth research by counsel, in consultation with the client.⁴ It is essential that parties nominate arbitrators that are knowledgeable, capable, and can work together. There is a lot at stake: the qualifications and arbitral skills of the arbitrators can have significant impact on the conduct and development of the arbitration and, ultimately, on the award and its enforcement.⁵ Arbitrators are the adjudicators of essentially all the disputes between the parties. During the course of the proceedings, they will have the power to decide both substantive and procedural issues relevant to parties’ dispute. The quality of the arbitrators is essential for a successful arbitration and, more generally, for the reputation of the arbitration process itself.

This chapter first describes how, and assesses who, to select as arbitrators, it then reviews challenges procedures, and finally explains how arbitrators’ vacancies are filled.

A. The Selection Procedure: How To Select An Arbitrator

¹ See generally C. Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT’L L. 101 (2014).

² See Constantine Partasides, *The Selection, Appointment and Challenge of Arbitrators*, 5 VINDABONA J. 217, 217 (2001) (observing that the ability of the parties to influence the composition of the arbitral tribunal is one of the defining aspects of the arbitral process and that “their power to appoint, and the power to challenge, arbitrators are two of their most powerful tools”).

³ As quoted in *Kluwer Arbitration Blog*, “The International Arbitrator Information Project: An Idea Whose Time Has Come,” post authored by Catherine Rogers, Aug. 9, 2012, available at Kluwerarbitrationblog.org.

⁴ Michael Waibel & Yanhui Wu, “Are Arbitrators Political?,” *ASIL Research Forum* 13 (Nov. 5, 2011) (noting that “the parties to investment arbitration cases and especially their counsel spend a great deal of time and effort to scrutinize the backgrounds of arbitrators, their relationship with the parties, published works and prior appointments. The time spent on choosing the right arbitrators suggests that the personality and background of the arbitrators matters substantially for arbitration outcomes.”).

⁵ Wendy Miles, *International Arbitrator Appointment*, 57 DISPUTE RESOLUTION JOURNAL 36 (2002).

The method of appointment of the tribunal is generally found in the legal instruments that contain the parties' arbitration clause (an investment agreement) or—more often—in the State's unilateral offer to submit future disputes to international arbitration through a bilateral or multilateral investment treaty or a national investment law. In most cases, each party to the dispute selects at least one arbitrator. The appointment of the third, and presiding, arbitrator as well as default appointments are often made by a neutral appointing authority.

1. Party Appointments

In most cases, each party in the dispute selects at least one arbitrator. This gives the parties substantial say on the persons selected to judge their case, and is one of the most important features of international arbitration.⁶ As one commentator explains, “the selection of the party-appointed arbitrator may be the most critical decision in an international arbitral proceeding.”⁷ It can be even at par with the choice of counsel.⁸

The dispute resolution clause of most BITs typically provides for the arbitration selection method to be adopted in the proceedings. For example, the 2012 U.S. Model BIT provides that, unless otherwise agreed by the disputing parties, “the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.”⁹

In the absence of choice, the ICSID Convention also contains default rules. Under ICSID, the arbitral Tribunal “shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.”¹⁰ Under ICSID proceedings, Arbitration Rule 3 specifies that in a

⁶ See generally C. Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, *supra* note 1. See also Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEXAS INT'L L. J. 59 (1995); James Wangelin, *Effective Selection of Arbitrators in International Arbitration*, 14 MEALEY'S INT'L ARB. REP. 69 (Nov. 1999); R. Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395 (1998); Partasides, *The Selection, Appointment and Challenge of Arbitrators*, *supra* note 2; Wendy Miles, *International Arbitrator Appointment*, 57 DISP. RESOL. J. 36 (2002).

⁷ Wendy Miles notes that “the constitution of the arbitral tribunal is one of the most important steps in an international arbitration. The skills and qualifications of the arbitrators and the number of members on the tribunal may have significant impact on the development of the dispute resolution and, ultimately, the award itself.” See Wendy Miles, *International Arbitrator Appointment*, *supra* note 6, at 36.

⁸ Partasides, *The Selection, Appointment and Challenge of Arbitrators*, *supra* note 2, at 217 (observing that “lawyers may be loathe to admit it, but the selection of arbitrators might even be more important than their choice of counsel—although perhaps only just.”).

⁹ U.S. Model BIT, Art. 27 (Selection of arbitrators). Likewise, NAFTA Art. 1123 provides for the number of arbitrators and method of appointment and explains that “unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.” NAFTA, Art. 1123 (Number of Arbitrators and Method of Appointment).

¹⁰ ICSID Convention, Art. 37; *accord* UNCITRAL Rules (1976), Art. 5 (“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,

communication to the other party, either party names two persons, identifying one of them “as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal” and invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator.” Upon receipt, the other party shall promptly reply by naming a person appointed by it and either concur on the appointment of the President or name another person as the proposed arbitrator. The initiating party shall then notify the other party if they concur with the choice of President.¹¹

The UNCITRAL Rules similarly provide that “[i]f three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.”¹² The Claimant includes a notification of the appointment of its arbitrator in the notice of arbitration sent to the Respondent which is the initial act of the arbitration.¹³

The Rules of the International Chamber of Commerce (ICC) are slightly different and provide a sole arbitrator as a default choice. Article 12 provides that if the parties have not agreed on the number of arbitrators, the International Court of Arbitration of the ICC (the Court) appoints a sole arbitrator.¹⁴ This choice is easily justified by the variety of cases, including small commercial cases, which are resolved using the ICC Rules. However, when the Court considers that the dispute “is such as to warrant the appointment of three arbitrators” the procedure is similar to that of other investment arbitration rules.¹⁵ In such cases, the claimant nominates “an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the

three arbitrators shall be appointed.”).

¹¹ ICSID Arbitration Rule 3 (Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)) provides that “(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention: (a) either party shall in a communication to the other party: (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator; (b) promptly upon receipt of this communication the other party shall, in its reply: (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and (ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President; (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal. (2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.”

¹² UNCITRAL Rule (2010), Art. 9; *see also* UNCITRAL Rule (1976), Art. 7. The full text of the Rules can be found on the website of the Permanent Court of Arbitration at http://PCA-CPA.org/showpage.asp?pag_id=1064.

¹³ UNCITRAL Rule (2010), Art. 3.

¹⁴ ICC Rules 2012, Art. 12(2), *available at* <http://www.iccwbo.org/>. Note that the Court is the independent arbitration body of the ICC, and despite the name it does not itself resolve disputes. Its role is limited to administrating the resolution of disputes by the arbitral tribunals. *See* ICC Rules, Art. 1.

¹⁵ *Id.*

notification of the nomination made by the claimant.” Importantly, the Court needs to confirm the nominations of the arbitrators.¹⁶

Parties themselves select their arbitrators in the great majority of cases, up to seventy-five percent of the time in the case of ICSID.¹⁷

2. Third-party Appointments

A neutral authority usually plays a role in the process of arbitrators’ selection during the selection process under both ICSID and UNCITRAL rules. The neutral appointing authority selects an arbitrator when there is no agreement among the parties on the selection of the president of the arbitral tribunal, or when one of the parties defaults in its selection.

In ICSID proceedings, if the respondent defaults or the parties cannot agree on a president, the Chairman of ICSID’s Administrative Council, who is also the President of the World Bank, appoints the missing arbitrators.¹⁸ In his or her choice of arbitrators, the Chairman of the ICSID Administrative Council is restricted to those people listed in a Panel of Arbitrators, which only includes names of arbitrators selected by ICSID Contracting Parties and by the Chairman himself.¹⁹ The Chairman also selects the three members of ad hoc annulment committees, a special, party-led procedure that offers

¹⁶ ICC Rules, Art. 1(2).

¹⁷ Eloïse M. Obadia, *Remarks at 105th ASIL Annual Meeting*, 105 ASIL ANN. MTG. PROC. 74 (2011) (noting that seventy-five percent of the appointments are made by the parties). Historically, of the total 850 appointments made by ICSID in cases registered under the ICSID Convention and Additional facility since its first case, 460 were made by parties. In 2012, party-appointed arbitrators counted for 101 of the 139 appointments, showing a trend toward greater party-selection. ICSID, *THE ICSID CASELOAD – STATISTICS 2012*, at 19, 31 (2012).

¹⁸ ICSID Convention, Art. 38 (“If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.”). In practice, what happens is that once the ninety days have expired, the ICSID Secretariat would first try to find an agreement between the parties. To that end, they will first propose to the parties a roster of three persons and ask the parties to advise the Secretary General—and not each other—whether they would agree on these proposals, without explanations. If the parties agree, then the person is named and become the president of the tribunal. This result would be counted as a party-selection. *See* Obadia, *supra* note 39, at 76. NAFTA similarly provides that if the tribunal is not constituted within ninety days from the date of the claim submission to arbitration, the Secretary-General, on the request of either disputing party, shall appoint the arbitrators not yet appointed. NAFTA, Art. 1124(2) (providing that “If a Tribunal, other than a Tribunal established under Article 1126, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing party, shall appoint, in his discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with paragraph 3.”).

¹⁹ ICSID Convention, Art. 40 (“(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.). Each contracting state has a right to designate up to four persons to the Panel of Arbitrators. The Chairman of the ICSID Administrative Tribunal can designate ten persons. The appointment is for ten years, but it can continue until the nomination is expressly revoked.

limited review on awards.²⁰ When selecting members of ad hoc annulment committees, the Chairman is also limited to nominate only members from the Panel of Arbitrators and cannot designate those nominated to the Panel of Arbitrators by either of the two States involved.²¹

To expedite the arbitration selection process and assist the parties in identifying, if possible, a mutually acceptable candidate, the ICSID Secretariat has developed a procedure called “the ballot procedure.” Under this procedure, ICSID proposes to the parties three to seven candidates in a list (the ‘ballot’) and requests them to advise the Secretary-General if any of these potential appointees would be acceptable. To avoid any sensitive disclosures, the parties send their completed ballots to the ICSID Secretariat only, without sharing them with the other party. If this procedure results in the identification of a candidate who is mutually acceptable to both parties, that person will be appointed pursuant to the parties’ agreement. If the parties agree on more than one proposed appointee, ICSID selects one of those persons and informs the parties of the selection.²²

Under both the 1976²³ and the 2010²⁴ UNCITRAL Rules, parties can request the Secretary General of the PCA to designate an “appointing authority” for the purpose of appointing an arbitral tribunal if they fail to do so by the prescribed limit of thirty days.²⁵ In addition, under the 2010 UNCITRAL Rules, a party may also propose that the PCA Secretary General himself act as the appointing authority.

UNCITRAL provisions also specify how the appointing authority should go about making its nomination. First, at the request of one of the parties, the appointing authority communicates to both parties an identical list containing at least three names for possible appointment as arbitrator. Second, within a specified deadline, each party returns the list to the appointing authority after deleting the names to which the party objects and numbering the remaining names on the list in the order of preference. Third, and finally, the appointing authority will select the missing arbitrators following the preferences outlined by the parties.²⁶ Unsurprisingly, the PCA reports that the majority of the requests to appoint respondent’s arbitrators were withdrawn, and the selection was finally made

²⁰ On annulment, see Chapter 16 “Post- Awards Remedies” by Heiskanen and Halonen in this volume.

²¹ The latest published ICSID Statistics explain that as of June 30, 2012, there were 1583 signatories to the ICSID Convention. Under ICSID Convention, Article 13, each Contracting party may designate to the Panel of Arbitrators four persons, including its nationals. The Chairman can designate ten persons, each having a different nationality. Not all contracting states have exercised their right to nominate. Obadia states that there were 350 persons designated to the panel of arbitrators in April 2011. *See* Obadia, *supra* note 16, at 75.

²² For a more detailed description of the selection procedure by the Secretariat, see Chapter 4: “Institutional Arbitration and the Role of the Secretariat,” by Obadia and Nitschke in this volume.

²³ Note that under the UNCITRAL Rules, the first attempt to choose the presiding arbitrator is given to the two part-appointed arbitrators. UNCITRAL Arbitration Rules (1976), Arts. 6, 7 & 12.

²⁴ UNCITRAL Arbitration Rules (2010), Arts. 6 & 8-13.

²⁵ Permanent Court of Arbitration, “111th Annual Report,” 1 (2011). For an interesting overview of the PCA’s appointing authority activity in 2011, see *id.* at 11-13.

²⁶ UNCITRAL Arbitration Rules (1976), Art. 7; UNCITRAL Arbitration Rules (2010), Art. 6.

by the party itself, once the party fully appreciated the importance of the issues at stake.²⁷

Under the ICC Rules, if a dispute is referred to three arbitrators, the third and presiding arbitrator is appointed by the Court, unless the parties have agreed on another procedure for such appointment. If, under such procedure, the parties fail to reach an agreement within the prescribed time limit, the third arbitrator is appointed by the Court.²⁸ The Court appoints the arbitrator also when a party fails to nominate. The Court confirms the Parties' nominations pursuant to Article 13 of the ICC Rules.

When confirming or appointing arbitrators, the ICC Court will usually consider the nationality, residence, and other relationships that the prospective arbitrators have with the countries of which the parties or the other arbitrators are nationals, as well as the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules.²⁹

In general, when the ICC Court appoints an arbitrator, it makes the appointment based on the proposal of the ICC National Committee or Group that it considers to be appropriate.³⁰ If, however, the Court decides not to accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the prescribed time limit, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.³¹ When, as is the case in international investment arbitration, one of the parties is a State, the Court may also directly appoint to act as arbitrator any person whom it regards as suitable.³²

B. The Selection Procedure: Who To Select

Parties and their counsel spend substantial time and resources selecting the party-appointed arbitrator, which underline the importance of appointments.³³ Proposed arbitrators' backgrounds are reviewed extensively, including their nationality, education, professional experience, and technical expertise. Importantly, their arbitration experience is scrutinized, including prior decisions and academic writings, and any previous

²⁷ Permanent Court of Arbitration, "111th Annual Report," *supra* note 25, at 11-13. Note that in 2011, under the above UNCITRAL provisions, the PCA received eighteen new requests that the Secretary-General designate an appointing authority for the appointment of arbitrators and ten requests that the Secretary-General act as appointing authority for the appointment of arbitrators. Of these, eight related to the appointment of the presiding arbitrator or a sole arbitrator. *Id.*

²⁸ ICC Rules, Art. 12.

²⁹ ICC Rules, Art. 13 (1).

³⁰ ICC Rules, Art. 13 (2).

³¹ ICC Rules, Art. 13 (3).

³² ICC Rules, Art. 13 (4).

³³ See Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17 MEALEY'S INT'L ARB. REP. 25 (Oct. 2002); see also Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEXAS INT'L L. J. 59 (1995); James Wangelin, *Effective Selection of Arbitrators in International Arbitration*, 14 MEALEY'S INT'L ARB. REP. 69 (Nov. 1999); R. Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395 (1998).

professional positions and relations.³⁴ In selecting their candidates, parties also take into consideration the applicable law, the forum, the kind of dispute, the location, the nationality of the parties, as well as many other issues.³⁵

The selection is also affected by a party's position in the case. For the claimant, the choice of arbitrator comes early, as the claimant has the right to nominate an arbitrator in the request for arbitration with which the arbitration begins. The claimant has the advantage to go first, and so can spend more time selecting the most suitable arbitrator for the case. Still, the selection of the claimant's arbitrator is also particularly delicate because it is done without knowledge of any of the other members of the tribunal, or counsel for opposing party.³⁶ The selection is normally done after serious research by counsel representing the claimant in consultation with the client.³⁷

The selection of arbitrators by the respondent state is also often complex, as it involves the advice of several governmental agencies that can potentially be involved in the litigation.³⁸ In the United States, for example, the office of the legal adviser of State Department often takes the lead, although it often consults with U.S. government offices, including the Departments of Commerce and Treasury and the Office of the U.S. Trade Representative. Given the growing public relevance of international investment arbitration, the selection of the arbitrator by the State also becomes an important instrument for the State to broaden the dispute beyond its bilateral terms to include adequate consideration of the public interests involved.³⁹ Additionally, the respondent is generally more pressed for time and must make a selection within a more limited timeframe.⁴⁰

As a general matter, Claudia Salomon suggests taking five factors into consideration when choosing an arbitrator: first, select someone with legal and professional experience; second, choose an impartial but known party-appointed arbitrator and a neutral president; third, choose an arbitrator who manages people well; fourth, choose an arbitrator who demonstrates communicative proficiency and juridical open-mindedness; and, fifth, choose

³⁴ Lucy Reed, Jan Paulsson & Nigel Blackaby, *GUIDE TO ICSID ARBITRATION* 77-79 (2010).

³⁵ See generally R. Doak Bishop and Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *ARB. INT'L* 395 (1998).

³⁶ Waibel & Wu, *supra* note 3, at 13; see also C. Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, *supra* note 1.

³⁷ See for example the advice given in Latham & Watkins, *GUIDE TO INTERNATIONAL ARBITRATION* 8 (2013) (noting that "Parties usually seek advice from their lawyers as to suitable arbitrators. When we advise in this regard, we draw upon our experience of persons with the required attributes (including experience as an arbitrator) and work with our client to identify those arbitrators who we would expect to follow thought processes most in tune with our client's case.").

³⁸ On this issue in general, see Chapter 3, "Representing Respondent" by Jeremy Sharpe in this volume.

³⁹ See, e.g., George H. Aldrich, *The Selection of Arbitrators*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION* (David Caron and John Crook eds., Brill, 2000) (discussing in some detail the process for choosing the third-country arbitrators at the Iran-US Claims Tribunal).

⁴⁰ For a good description of the challenges that this may entail, see Chapter 3, "Representing Respondent" by Jeremy Sharpe in this volume.

an arbitrator with a manageable case-load.⁴¹

Within these broad guidelines, the arbitrator must also possess certain mandatory characteristics as well as desirable qualities, as explained below.

1. Necessary Requirements

The applicable rules of procedure mandate that arbitrators must possess certain threshold qualities. Often, these are limited to nationality requirements and the overall essential quality of independence and impartiality.

a. Nationality

Under both ICISD and UNCITRAL rules, certain nationality restrictions apply. Under Article 39 of the ICSID Convention, the majority of the Tribunal must be composed of nationals of States other than that of the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute.⁴² In any event, Rule 1(3) of the ICSID Arbitration Rules requires the consent of the other party to appoint an arbitrator who has the same nationality of the appointing party.⁴³ ICC Rules go further and provide that the sole arbitrator or the chairman of the arbitral tribunal “shall be of a nationality other than those of the parties.”⁴⁴

Rules under UNCITRAL also contain similar nationality restrictions, but are somehow less stringent in relation to nationality requirements. Article 7 requires the appointing authority to only take into account “the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.”⁴⁵

The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules) are more limited.⁴⁶ They require the Chairperson of the Arbitral Tribunal to be of a different nationality than the parties, unless otherwise agreed by the parties or deemed appropriate by the Board of Directors of the SCC Institute.⁴⁷

Nationality is an important identifier and under most rules there is a strong preference not

⁴¹ See Salomon, *supra* note 33.

⁴² ICSID Convention, Art. 39 (stating “The majority of the arbitrators shall be national of States other than the Contracting State party to the dispute and the Contracting State whose national is a part to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.”).

⁴³ ICSID Rules of Procedure for Arbitration Rule 3 (stating “(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention: (a) either party shall in a communication to the other party: (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal.”).

⁴⁴ ICC Rules, Art. 9(5).

⁴⁵ UNCITRAL Rules (1976), Art. 6(4); UNCITRAL Rules (2010), Art. 6(7).

⁴⁶ SCC Rules (2007), Art. 15(5), available at http://cn.cietac.org/Hezuo/4_5.pdf.

⁴⁷ Note that the role of the Board, similarly to the ICC Court, is limited to the administration of the dispute under the SCC Rules. SCC Rules, Art. 6, Appx. I; see also *id.* Arts. 1-5 and 7.

to choose an arbitrator of the nationality of the parties.⁴⁸ Indeed, the reasons for the exclusion of arbitrators who are nationals of one of the parties can be found in the presumption that an arbitrator who is a national of one of the parties may be too inclined and sympathetic towards the position of a party with which it shares a nationality bond.⁴⁹

Note that the nationality requirement may be different under specific rules. Under Article 1125 of NAFTA, for example, parties agree to appoint arbitrators regardless of their nationality.⁵⁰ Under these rules it is customary for parties to appoint arbitrators of their own nationality. This approach can be justified by reference to the importance that national law can play in NAFTA proceedings, as NAFTA treaty violations arise from measures taken by the respondent state.⁵¹

b. Impartiality and Independence

In addition to nationality restrictions, arbitrators must be impartial and independent. Impartiality fundamentally means that an arbitrator is not partial—or biased—in favor or against one of the parties in the case.⁵² An independent arbitrator is one who does not depend—financially, professionally, personally or in any other way—on either of the parties.

Both qualities are necessary for arbitrators to perform their adjudicative functions. These requirements represent the very essence of international investment arbitration, and are expressed in a different, yet similar, way in applicable arbitration rules. Under ICSID, arbitrators need to “be relied upon to exercise independent judgment.”⁵³ UNCITRAL Rules require arbitrators to be “independent and impartial.”⁵⁴ Under SCC Rules, every arbitrator must be impartial and independent.⁵⁵

⁴⁸ Leigh Swigart, *National Judge: Some Reflections on Diversity in International Courts and Tribunals*, 42 MCGEORGE L. REV. 224 (2010) (observing that “as an identifier, nationality suggests more than a mere category of citizenship or allegiance to a particular state”).

⁴⁹ As Redfern and Hunter acutely note, “the fact that an arbitrator is of a neutral nationality is no guarantee of independence and impartiality. However, the appearance is better and thus it is a practice that is generally followed.” Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides, REDFERN AND HUNTER ON ARBITRATION 263 (Oxford University Press, 2009).

⁵⁰ NAFTA, Art. 1125 (providing, in part, that “For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 1124(3) or on a ground other than nationality: (a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules . . .”).

⁵¹ Indeed, Redfern and Hunter note that “the insistence on a neutral nationality sometimes produces curious results. In particular, it may lead to a situation where the law applicable to the merits of the dispute is that of one of the parties (a situation that is by no means uncommon); but the sole or presiding arbitrator will not be qualified or experienced in that system of law.” The NAFTA system thus addresses, at least in part, this possible problem by allowing parties to select among those that are probably most experts in the applicable law. See Redfern, Hunter, Blackaby & Partasides, *supra* note 49, at 262.

⁵² For a brief commentary on the definitions, see Partasides, *The Selection, Appointment and Challenge of Arbitrators*, *supra* note 2, at 219-21.

⁵³ ICSID Convention, Art. 14.

⁵⁴ UNCITRAL Rules (2010), Art. 10(7) & 12(1).

⁵⁵ SCC Rules, Art. 14.

Independence and impartiality are two “distinct but interrelated qualifications, required of every arbitrator” regardless of who appoints them.⁵⁶ For example, the ICC rules provide that “every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.”⁵⁷ Similarly, under UNCITRAL Rules the appointing authority is tasked to have regard for considerations that are “are likely to secure the appointment of an independent and impartial arbitrator.”⁵⁸

Beyond general understanding of the terms, the meaning of these requirements can be complex and their assessment in practice varied.⁵⁹ Independence and impartiality remain difficult to define, especially as international investment arbitrations become both more used and more complex while the pool of arbitrators remains essentially the same.⁶⁰ There are no objective tests that can fully evaluate an arbitrator’s personal conduct and arbitrators’ subjective biases cannot be known, and can only be inferred from their conduct.

The requirement that arbitrators be independent and impartial is probably the most important aspect of an arbitrator’s selection. Not only it is the foundation of the specific arbitral proceedings for which the arbitrator is chosen, but it is also at the heart of international arbitration.⁶¹ As Professor Andreas Lowenfeld explains, “one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel.”⁶² That confidence relies on the appointment by the parties of independent and impartial arbitrators.⁶³

⁵⁶ Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 154 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing, 2009).

⁵⁷ 2012 ICC Rules, Art. 11(1).

⁵⁸ UNCITRAL Rules (2010), Art. 6(7); UNCITRAL Rules (1976), Art. 6(4).

⁵⁹ As observed recently by a tribunal rejecting an arbitrator challenge based on alleged lack on impartiality, “the concept of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not easy to grasp. Generally speaking, independence relates to the lack of relations with a party that may influence an arbitrator’s decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.” See *Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision to disqualify on arbitrator, ¶¶ 30-31 (Oct. 22, 2007) (citations omitted).

⁶⁰ For a brief commentary on the definitions, see Rubins & Lauterburg, *supra* note 56, at 153-80.

⁶¹ See Gary B. Born, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 130 (Wolters Kluwer, 2012) (observing that independence and impartiality “are fundamental to the arbitral process, which is an adjudicatory procedure requiring a neutral and objective tribunal.”).

⁶² See Lowenfeld, *supra* note 6, at 62 (“Sometimes that confidence can be based on mutual acquaintances, without direct personal contact; some potential arbitrators become well-known through published writings, lectures, committee work, or public office. Others are not so well known, and I understand that lawyers or clients or both want to have a firsthand look. I think, however, some restraint should be shown by both sides.”); see also Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (arguing that decision makers who are perceived as legitimate enhance the legitimacy of the dispute resolution system itself).

⁶³ See William W. Park, *Arbitrator Integrity*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 189, 191 (Michael Waibel et al. eds., Wolters Kluwer, 2010) (stating “in a cross-border context, the prohibition on bias justifies itself by reference to the very same goal underlying the decision to arbitrate: promoting a level playing field.”).

Parties must avoid the temptation of appointing somebody who could justifiably be considered partial towards their case in the expectation that it will make the case an easier win. An arbitrator who is perceived as partisan will quickly lose influence with the other members of the arbitral tribunal, and especially with the President.⁶⁴ Additionally, a partisan arbitrator is subject to challenge procedures, which can result in substantial additional costs, protracted arbitral procedures, more acrimonious proceedings, and of course the possible removal of the arbitrator.

Instead, parties must choose an arbitrator who they think will support their legal case based on their background and past experience. Party-appointed arbitrators are nominated with the expectation that they understand the party's position and support the legal theory behind their case. It is a delicate and fine line, and one that should never be crossed into partiality. An experienced counsel can provide useful advice on the most appropriate arbitrator for a specific case.⁶⁵ In the oft-quoted words of an arbitration expert, "when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias."⁶⁶

It is incumbent upon the arbitrators to disclose any fact that could be reasonably considered as possible grounds for disqualification.⁶⁷ The UNCITRAL Rules provide that "when a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."⁶⁸ Similarly, ICC Rules require a prospective arbitrator before appointment to disclose to the Secretariat "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."⁶⁹ Under the SCC Rules, "before

⁶⁴ See Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrators*, COLUMBIA FDI PERSPECTIVES, no. 33, Dec. 14, 2010, at 2, available at http://www.vcc.columbia.edu/files/vale/print/Perspective_33_Smit_2.pdf (noting that "The presence of a partisan arbitrator on a panel will normally reduce, if not eliminate, the free exchange of ideas among the members of the panel. The chair will be less receptive to arguments that appear to be moved by partisan considerations or may join one of the arbitrators, with the result that the other party-appointed arbitrators feel excluded from the deliberations.").

⁶⁵ See Constantine Partasides, "The Art of Selecting the Right Arbitrator" (lecture, New Academic Building, London School of Economics, London, Eng., Nov. 9, 2011), available at <http://www.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1252> (arguing that the most important issue to properly select an arbitrator is to have a legal theory that supports the case and then to walk backwards to find the most appropriate arbitrator that would likely support that legal theory).

⁶⁶ Martin Hunter, *Ethics of the International Arbitrator*, 58 ARBITRATION 219, 223 (1987).

⁶⁷ See Rubins & Lauterburg, *supra* note 56, at 153-80.

⁶⁸ UNCITRAL Rules (2010), Art. 11; see also UNCITRAL Rules (1976), Art. 9 (requiring a prospective arbitrator to "disclose to those who approach him in connexion 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.").

⁶⁹ ICC Rules, Art. 11.

being appointed as arbitrator, a person shall disclose any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence.”⁷⁰

Information that should be disclosed include any past or present relations with the parties, any financial interests possibly related to the dispute, any conflict related to the law firm where the arbitrator is employed. It has become more common to use the Guidelines adopted by the International Bar Association on Conflicts of Interests in International Arbitration (IBA Guidelines) to assess the existence of possible conflicts and the extent of any duty of disclosure.⁷¹ The IBA Guidelines offer specific lists of situations that would lead to conflict (“red” list), that exclude conflict (“green” list) and those which may, depending on the specific facts, give rise to justifiable doubts as to the independence and impartiality of the arbitrator and that require a duty to disclose (“orange” list).

c. Legal Expertise and Other Requirements

Article 14(1) of the ICSID Convention requires that prospective arbitrators be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”⁷² The requirement of high moral character is not further explained, but a similar concept is found in the statutes of most international courts and tribunals.⁷³

During the negotiation of the ICSID Convention, States discussed whether arbitrators should be required to be lawyers, but due to the potentially diverse and technical nature of disputes likely to be the subject of ICSID proceedings, it was deemed necessary to allow parties to nominate arbitrators from other fields of expertise as well. Similarly, a proposal that “the highest courts of justice, schools of law, bar associations and other relevant organizations” were consulted prior to arbitrators’ appointment to advice on competence never made it to the final draft of the Convention.⁷⁴

Despite not being a mandatory requirement, parties would be ill-advised not to appoint a lawyer as their arbitrator. International investment disputes are complex and require deep understanding and familiarity with substantive and procedural legal issues. An excellent knowledge of diverse bodies of law is essential for a competent arbitrator.

⁷⁰ SCC Rules, Art. 14(2).

⁷¹ Council of the International Bar Association, “IBA Guidelines on Conflict of Interest in International Arbitration” (approved May 22, 2004) [hereinafter “IBA Guidelines”], *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. In general, see Born, *supra* note 61, at 132-35.

⁷² ICSID Convention, Art. 14.

⁷³ *See, e.g.*, Statute of the International Court of Justice, Art. 2 (“The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character”); Rome Statute of the International Criminal Court, Art. 36.3(a) (“The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character”).

⁷⁴ Karel Daele, CHALLENGES AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 84 (Kluwer, 2012).

Requirements for additional qualifications may be found in the specific treaty or contract at issue in the dispute, including in terms of specific expertise required from the arbitrator. These may include requirements for arbitrators to be experts in “public international law, international trade or international investment agreements.”⁷⁵ More often, however, additional mandatory requirements are absent from applicable rules, leaving the choice of arbitrators squarely on the party’s side.

2. Desirable Qualities

As international investment arbitrations also tend to be complex litigation and often involve two or more legal systems and languages, in addition to mandatory requirements, there are several additional desirable qualities that a party should keep in mind when making an arbitration appointment.

To a great extent, desirable qualities that should be taken into consideration depend on the nature of the dispute. Many successful arbitrators tend to come from elite schools and have often obtained several advanced degrees, which allow them to be familiar with a variety of legal systems. It is important to consider the legal background of any prospective arbitrator in relation to the applicable law to the dispute, the applicable rules of arbitration, the nature of the dispute, and the other members of the tribunal.

It is paramount to choose someone that has a proven record in international arbitration, and preferably in international investment arbitration. Parties may wish to select an arbitrator with a demonstrated ability to participate effectively in complex arbitrations. This is particularly important for the presiding arbitrator, who plays an important role in developing consensus and ensuring smooth arbitration proceedings. For these reasons, parties often choose to appoint arbitrators that have already served as arbitrators in international investment arbitration. This practice also allows parties to better scrutinize the record of the arbitrator as more of their views and decisions are known and publicly available. However, choosing an experienced arbitrator must also be balanced with the fact that arbitrators who have served in many arbitrations may be more prone to be challenged, both for possible issues-conflicts or repeat appointments by same counsel or party.⁷⁶

Additionally, because international investment arbitrations tend to include many public international law issues, including issues of determining the content of customary law, the applicable sources of law, treaty interpretation, attribution and state responsibility, it is important to appoint an arbitrator who is fully conversant in public international law, either as a practitioner or an academic, and preferably both.

⁷⁵ See, e.g., Agreement Between the Government of Canada and the Government of the Republic of China for the Promotion and Reciprocal Protection of Investment Arbitration, Art. 24, Sept. 9, 2012.

⁷⁶ In a recently decided challenge, for example, Ecuador challenged claimant’s appointed arbitrator on the ground, inter alia, that he had been nominated by claimant’s counsel eight times. Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal or Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 75, 78-80 (Dec. 13, 2013), available at <https://icsid.worldbank.org/ICSID>; see note 107 in this chapter.

Knowledge of languages is also important. This includes not only the languages of the proceedings, but also the language in which the evidence—both oral and written—is likely to be submitted.⁷⁷ Knowledge of languages needs to include drafting abilities and is also an important consideration to assess the cohesiveness of the tribunal and the effectiveness of each arbitrator within the tribunal.

Other desirable qualities are availability and good time management skills. As international investment arbitrations tend to be long and time consuming, it is often desirable to request the arbitrator's availability before nomination and request that time is set aside for each arbitral proceeding. This has become the *modus operandi* of several arbitral institutions, including ICSID, and is mandated by the ICC.⁷⁸

Parties should also assess any candidate's ability to work efficiently with the other members of the arbitral panel and the likelihood that the views of the potential arbitrator will be appropriately heard and carry weight with the other arbitrators during the tribunal's deliberations.⁷⁹

Finally, especially when selecting the presiding arbitrator, parties need to consider the overall composition of the tribunal, in terms of languages, past experience and past common arbitral and professional experience.⁸⁰ Members of the arbitral tribunal need to work long hours together, so it is important to consider languages, training and experience in that context also.

These mix of required and desirable qualities result in the selection of a small group of highly talented international arbitrators, who are generally experienced lawyers of high international standing, often multilingual and capable of handling complex cases involving complicated sets of facts, diverse applicable law and rules of procedures, and multi-cultural parties.⁸¹ Most generally, the group is composed of public international law academics and international law practitioners.⁸²

⁷⁷ Obadia, *supra* note 16, at 76 (noting that several issues are considered when making an appointment).

⁷⁸ ICC Rules, Art. 13(1).

⁷⁹ Obadia, *supra* note 16, at 76 (noting issues considered when making an appointment include “the cohesiveness of the tribunal.”).

⁸⁰ See Redfern, Hunter, Blackaby & Partasides, *supra* note 49, at 263 (observing that the task of presiding over an international arbitration “is no less skilled than that of a surgeon conducting an operation or a pilot flying an aircraft. It should not be entrusted to someone with no practical experience of it.”).

⁸¹ See Catherine Rogers, *The Vocation of International Arbitrators*, 20 AM. U. INT'L L. REV. 958, 958-59 (2005).

⁸² In its Guide to International Arbitration, Latham & Watkins suggest considering the following issues when selecting an arbitrator: “the candidate's familiarity with the governing law and the applicable arbitration rules; the candidate's background (e.g., legal training and experience, experience in the relevant industry or similar industries); the language and the place of the arbitration; the candidate's writings (although many arbitrators are guarded in their publicly expressed views) and past decisions/awards to the extent known or available; our interactions with the candidate in previous arbitrations or at conferences, the views of our colleagues and the candidate's general reputation; and the candidate's ability to influence the selection of the Chairman/President and the likelihood that the candidate's views will carry weight with the other arbitrators during deliberations.” Latham & Watkins, *GUIDE TO INTERNATIONAL ARBITRATION* 8 (2013).

Some counsel developed the practice to contact potential arbitrators to assess their suitability, availability, and interest in the case. This practice is known as “interviewing” arbitrators and it is not uniformly approved. Some arbitrators find it improper to discuss any issues related to a potential appointment, others do not want to subject themselves to this practice.⁸³ Under the IBA Guidelines, an arbitrator is not disqualified if she or he has an initial contact with the appointing party prior to the appointment provided that that contact “is limited to the arbitrator’s availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.” While interviews are becoming more common and accepted, counsel must be very conscious of their limitations and must avoid creating a conflict where none existed by discussing any specific procedural or substantive aspects of the case.⁸⁴ As general guidance, those present during the interview should behave as if the opposing party was also present in the meeting.⁸⁵

C. Constitution Of The Tribunal

Once the arbitrator is selected, the institution that administers the proceedings steps in and requires the arbitrator to fulfill certain administrative and disclosure acts. These confirm the appointments and result in the constitution of the tribunal and, in most cases, the formal commencement of the arbitral proceedings. The specific procedures required for the final constitution of the tribunal vary.

Under ICSID, the Secretary General must be notified of the appointments. As soon as the Secretary-General is informed by a party or the Chairman of the Administrative Council of the appointment of an arbitrator, the Secretary General will seek the appointee’s acceptance.⁸⁶ The arbitrator must confirm the appointment within fifteen days, failure of which will result in the appointment of a new arbitrator. The tribunal is deemed constituted and the proceedings begin on the date on which the Secretary General notifies the parties that all arbitrators have accepted the appointment.⁸⁷ Before or at the first session of the Tribunal, each arbitrator is required to sign a declaration of independence and confidentiality.⁸⁸ Any arbitrator that fails to sign the declaration by the end of the

⁸³ See Redfern, Hunter, Blackaby & Partasides, *supra* note 49, at 264 (stating that “a number of European arbitrators have declined to participate in such events [interviews] on the grounds that they were at best demeaning, and at worst improper.”).

⁸⁴ See Redfern, Hunter, Blackaby & Partasides, *supra* note 49, at 264-65 (observing that “it is hard to perceive the practice as being objectionable in principle; provided that is not done in a secretive way and that the scope of the discussion is appropriately restricted. In particular, it is quite appropriate for a prospective arbitrator to be questioned in person on matters relating to the existence of conflict interest.[...] [H]e or she may also be questioned on their experience in the relevant field, qualification for the case in hand, as well as availability. It is also reasonable for a party’s representatives to have an opportunity to assess the candidate’s physical and mental health. However, there should be no probing of the prospective arbitrator’s view on the merits of the case.”).

⁸⁵ See Born, *supra* note 61, at 126.

⁸⁶ ICSID Arbitration Rule 5.

⁸⁷ ICSID Arbitration Rule 6.

⁸⁸ The declaration states: “To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between (party) and (party). I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the

first session of the Tribunal is deemed to have resigned from the arbitral tribunal.⁸⁹

Similarly, ICC rules require a prospective arbitrator to sign a statement of “acceptance, availability, impartiality and independence” before appointment or confirmation. The prospective arbitrator must also disclose in writing to the Secretariat any facts or circumstances that may call into question the arbitrator’s independence in the eyes of the parties, as well as any circumstances that could give rise to any reasonable doubts as to his or her impartiality. The Secretariat will then provide the information to the parties in writing and fix a time limit for any comments from them.⁹⁰

The procedure under the ICC also includes an additional confirmation of the arbitrators’ nomination by the Secretary General and the Court. The Secretary General confirms the nomination provided that the statement they have submitted contains no qualification regarding impartiality or independence or if that qualification has not given rise to any objections. The confirmation is reported to the Court at its next session. If the Secretary General considers the prospective arbitrator should not be confirmed, the matter is referred to the Court.⁹¹ In confirming arbitrators, the Court considers the prospective arbitrator’s nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals, as well as the prospective arbitrator’s availability and ability to conduct the arbitration in accordance with the Rules.⁹² The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator are final, and their reasons remain confidential.⁹³ As soon as the tribunal is constituted, and provided that the advance on costs is paid, the Secretariat transmits the file of the case to the arbitral tribunal.⁹⁴

Under the SCC Rules, the prospective arbitrator must submit to the secretariat a signed statement of impartiality and independence which discloses any circumstances that may give rise to justifiable doubts as to his or her impartiality or independence. The Secretariat provides the parties with a copy of the statement.⁹⁵ When the arbitral tribunal

Tribunal. I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto. Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.” *Id.*

⁸⁹ *Id.*

⁹⁰ ICC Rules, Art. 11.

⁹¹ ICC Rules, Art. 13(2).

⁹² ICC Rules, Art. 13(1). On the ICC practice concerning confirmation, see Anne Marie Whitesell, *Independence In ICC Arbitration: ICC Court Practice Concerning Appointment, Confirmation, Challenges And Replacement of Arbitrators*, in THE INDEPENDENCE OF ARBITRATORS ICC, INTERNATIONAL COURT OF ARBITRATION BULLETIN 7 (Spec. Supp., 2008).

⁹³ ICC Rules, Art. 11(4).

⁹⁴ ICC Rules, Art. 16.

⁹⁵ SCC Rules, Art. 14(3).

is appointed and the advance cost is paid, the Secretariat refers the case to the arbitral tribunal, which begins its work.⁹⁶

UNCITRAL rules are less detailed and require the arbitrator, from the time of the appointment and throughout the arbitral proceedings, to disclose without delay any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.⁹⁷

D. Procedures Related To Challenges of Members of the Tribunal

Circumstances may exist that lead one of the parties to challenge one or more arbitrators. The challenge of an arbitrator is a delicate, complicated, and risky matter. There is no denying that a challenge, whether it is successful or not, may alter the dynamics of the arbitration completely, both in terms of relations with the tribunal and with the other party. Challenges are also costly and time consuming.

Arbitrator challenges were once rare in international investment arbitrations. In the last few years, however, they have become much more common, though they are most often unsuccessful.⁹⁸ On one side, repeat appointments and potential personal, professional and case or issue conflicts result in more reasons for parties to suspect an arbitrator's partiality.⁹⁹ On the other side, tactical or unmeritorious challenges are also on the rise, and are used by the parties to delay proceedings, obtain tactical advantages and minimize possible disadvantages.¹⁰⁰

Grounds for challenging an arbitrator are generally limited to an alleged lack of the qualities needed to be an arbitrator, which most often revolve around an asserted lack of independence and impartiality. The proper applicable standards differ and the applicable

⁹⁶ SCC Rules, Art. 18.

⁹⁷ UNCITRAL Rules (2010), Art. 11; *see also* UNCITRAL Rules (1976), Art. 9 (“A prospective arbitrator shall disclose to those who approach him in connexion 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.”).

⁹⁸ Of the forty-one challenges filed at ICSID between 1980 and 2011, all but two were filed after 2001. *See CHALLENGES AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION* 515-27 (Karel Deale ed., Kluwer Law International, 2012) (table of cases).

⁹⁹ For example, an arbitrator was recently challenged because, *inter alia*, he had been nominated by claimant's counsel eight times. *See Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal or Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013); *see also infra* note 107 of this chapter.

¹⁰⁰ For example, in the many treaty arbitrations filed against Argentina at ICSID, Argentina regularly challenged arbitrators appointed by the investors and the President even if all were rejected. Argentina challenged the investor's arbitrator in *BG Group v. Argentina*, against the entire tribunal in *Sempra Energy International v. Argentina* and *Camuzzi International SA v. Argentina*; against the president and the party-appointed arbitrator in *National Grid Group v. Argentina*. In *Abaclat v. Argentina*, Argentina challenged the same party-appointed arbitrator and tribunal's president twice. *See also* Partasides, “The Art of Selecting the Right Arbitrator,” *supra* note 65 (arguing that parties can have four reasons to launch a tactical challenge: delay proceedings, send a warning to the challenged arbitrator, drive the arbitrator into making a mistake and create a reason to challenge, and push the arbitrator to resign).

rules should be closely examined when considering a challenge.¹⁰¹

Challenges procedures under ICSID are quite unique.¹⁰² Article 57 of the ICSID Convention provides that a party may propose the disqualification of an arbitrator “on account of any fact indicating a manifest lack of the qualities” required to be nominated.¹⁰³ In the ICSID practice, the term “manifest” has been strictly applied to mean “‘obvious’ or ‘evident’ and highly probable, not just possible.”¹⁰⁴

Challenges proposals under ICSID must be filed with the Secretary General “promptly” and in any case before the proceedings is declared closed.¹⁰⁵ The Secretary General then transmits the proposal to the members of the tribunal and notifies the other party. If the challenge relates to a sole arbitrator or the majority of the tribunal, the file is also transmitted to the Chairman of the Administrative Council. The challenged arbitrator is then invited to furnish explanations to the Tribunal or the Chairman. The remaining members of the Tribunal consider and vote on the proposal. Only if the remaining members are equally divided or if the disqualification proposal pertains to the majority of the tribunal, the Chairman decides on the challenges, using his best effort to make a decision within thirty days after he has received the proposal. Pending the decision, the proceedings are suspended. The strict threshold required to challenge an arbitrator under

¹⁰¹ See generally C. Giorgetti, *Challenges of International Investment Arbitrators: How Does it Work And Does it Work?*, 2 WORLD ARB. AND MED. REV. (2013).

¹⁰² See generally James Crawford, “Challenges to Arbitrators in ICSID Arbitration” (panel, Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration PCA Peace Palace Centenary Seminar, The Hague, Netherlands, Oct. 11, 2013).

¹⁰³ ICSID Convention, Art. 57 (stating that “A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.”).

¹⁰⁴ *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, ¶ 56 (Feb. 27, 2012), available at <http://icsid.worldbank.org/ICSID/Index.jsp>. Similarly, another ICSID Tribunal deciding a proposal for the disqualification of a member of the arbitral tribunal confirmed that the term manifest meant “obvious” or “evident” and that such a finding would require “obvious evidence” of a state of mind lacking independence or impartiality. See *Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentina*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 35 (Oct. 22, 2007).

¹⁰⁵ ICSID Arbitration Rule 9 (detailing the procedure to be taken: “(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor. (2) The Secretary-General shall forthwith: (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and (b) notify the other party of the proposal. (3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be. (4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision. (5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal. (6) The proceeding shall be suspended until a decision has been taken on the proposal.”).

ICSID and the fact that decisions are taken by the tribunal's remaining members have drawn criticism¹⁰⁶ and have resulted in very few challenges being upheld.¹⁰⁷

Other rules apply similar grounds for challenge, but adopt a different threshold to assess impartiality and a different mechanism to decide the challenge. Under UNCITRAL Rules, arbitrators may be challenged "if circumstances exist" that give rise to "justifiable doubts" as to the impartiality or independence of an arbitrator.¹⁰⁸ The standard in this case is very different from the ICSID "manifest" lack standard and it is generally interpreted as a requirement that a reasonable and informed third party would have justifiable doubts as to the impartiality of the challenged arbitrator.¹⁰⁹ Note that a party can challenge the arbitrator it appointed only for reasons the party learnt after the appointment was made.

Under UNCITRAL Rules, a party that intends to challenge an arbitrator must send a notice of the challenge within fifteen days after it has been notified of the appointment of the arbitrator or within fifteen days after learning of the circumstances giving rise to the

¹⁰⁶ On this issue, see Rubins & Lauterburg, *supra* note 56, at 163 (noting that "The ICSID's unique system for adjudicating arbitrator challenges raises interesting questions. Are a challenged arbitrator's colleagues on the tribunal likely to remove him in light of the personal and professional connections between them? It would seem that an arbitral institution (like the ICC or the SCC Board) would have more interest than co-arbitrators in carefully scrutinizing alleged conflicts of interest, given the systemic and reputational risks that such conflicts implicate.").

¹⁰⁷ For example, the recent ICSID decision to disqualify an arbitrator is only the second successful challenge procedure in ICSID proceedings. The challenge was because, *inter alia*, that arbitrator had been nominated by claimant's counsel eight times. The challenge on this point was rejected, but it was upheld as the ICSID Chairman considered that the allegations about the ethics of counsel raised by the challenged arbitrators manifestly evidenced an appearance of lack of impartiality. *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal or Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 75, 78-80 (Dec. 13, 2013); *see also* Crawford, *supra* note 102.

¹⁰⁸ UNCITRAL Rules (2010), Art. 12(1) (stating that "1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. 2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.").

¹⁰⁹ For example, the Decision on the Challenge to Mr. J. Christopher Thomas, QC in *Vito G. Gallo v. Canada* was taken under UNCITRAL Rules. In that case, claimant filed a challenge after learning that Mr. Thomas' professional situation had changed since his appointment. Specifically, Mr. Thomas had agreed to advise Mexico, a non-disputing party under NAFTA, on legal matters, which could include international investment arbitration. The appointing authority concluded that from the point of view of a "reasonable and informed third party" [...] there would be justifiable doubts about Mr. Thomas' impartiality and independence as an arbitrator, and directed him to choose whether to continue to advise Mexico, or continue to serve as an arbitrator. He resigned a few days after the decision. *Vito G. Gallo v. Government of Canada, NAFTA/UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas, QC* (Oct. 14, 2009), available at http://italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf. Similarly, in *ICS v. Argentina*, the challenge of a claimant-appointed arbitrator was upheld, because it was concluded that there was a sufficiently serious conflict given by the fact that the arbitrator was a partner in a firm that had a concurrent representation in a separate, long-running case against Argentina, which gave rise to objectively justifiable doubts as to the arbitrator's impartiality and independence. *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9, Decision on Challenge to Arbitrator, ¶ 4* (Dec. 17, 2009), available at <http://italaw.com/sites/default/files/case-documents/ita0415.pdf>.

challenge.¹¹⁰ The notice of challenge and its reasons are communicated directly to the other party, the arbitrator who is challenged, and to the other arbitrators. If, within fifteen days from the date of the notice, the parties have not agreed on the challenge or the challenged arbitrator has not withdrawn, the party making the challenge may pursue the challenge by seeking, within thirty days from the date of the challenge notice, a decision on the challenge from the appointing authority.¹¹¹ The combination of the justifiable doubts threshold with the fact that challenges decision are taken by the appointing authority seems to provide a balanced approach to challenges.

Under SCC Rules, a party may challenge an arbitrator if there are circumstances which “give rise to justifiable doubts as to the arbitrator’s impartiality or independence” or if the arbitrator does not possess the qualifications agreed by the parties.¹¹² Any challenge procedure must be submitted in writing to the Secretariat within fifteen days from when the circumstances became known to the party. A failure to challenge within the allotted time constitutes a waiver of the right to make the challenge. The Secretariat then notifies the parties and the arbitrators of the challenge and gives them all an opportunity to submit a comment on the challenge. If the other party agrees on the challenge, the arbitrator must resign.¹¹³ In all other cases, the Board of Directors of the SCC Arbitration Institute makes the final decision on the challenge.¹¹⁴

ICC Rules allow a more expansive ground for challenge.¹¹⁵ The Rules provide that a challenge to an arbitrator, “whether for an alleged lack of impartiality or independence,

¹¹⁰ UNCITRAL Rules (2010), Art. 13 (stating that “A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party. 2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge. 3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. 4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.”).

¹¹¹ *Id.*

¹¹² SCC Rules, Art. 15.

¹¹³ *Id.*

¹¹⁴ *Id.*; *see also* SCC Rules, Art. 16 (Release from Appointment). Note that LCIA Rules also provide that arbitrators can be challenged if circumstances exist that give rise to justifiable doubts as to their independence and impartiality. Challenges must be filed in writing to the LCIA Secretariat within fifteen days from the establishment of the tribunal or from the moment in which the party became aware of the circumstances justifying the challenge. The LCIA Court decides on the challenge in writing. Since 2006, the decisions related to challenges are published in a suitably redacted form. *See* LCIA Rules, Art. 10.

¹¹⁵ ICC Rules, Art. 14 (stating that “1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. 2) For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification. 3) The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an

or otherwise,” must be filed with the Secretariat in writing specifying the facts and circumstances on which the challenge is based. Challenges must be made within thirty days from the appointment or confirmation of the arbitrator, or from the date when the party making the challenge was informed of the facts and circumstances. The Secretariat then offers the opportunity to the arbitrator concerned, the other arbitrators, and the parties to comment in writing. It is for the ICC International Court of Arbitration to rule on the admissibility and, at the same time, if necessary, on the merits of a challenge.

When a party has genuine concerns about the arbitrator’s ability to act impartially and independently during the arbitration, it should carefully consider the applicable challenges rules and consider initiating a disqualification. Parties should act expeditiously as most rules have strict time limits. Although challenges procedures are on the rise, many challenges procedures are unmeritorious. Successful challenges remain rare. Unsuccessful challenges could backfire.

E. Replacement of the Arbitrator

In certain cases, it is necessary to fill vacancies in the arbitral tribunal. Vacancies can arise for several reasons, and notably as a result of a successful challenge, as a consequence of the resignation of an arbitrator, or if an arbitrator passes away. In general, the new appointment is made in the same way as the original appointment.

For example, ICSID provides that after a tribunal is constituted and proceedings have begun, the composition of the tribunal should remain unchanged, unless the death, incapacitation or resignation of an arbitrator results in the vacancy of the tribunals. Such vacancies are filled in accordance to the provisions applicable for the nomination of arbitrators.¹¹⁶

Similarly, under UNCITRAL Rules, if an arbitrator has to be replaced during the course of the proceedings, the substitute arbitration is to be appointed pursuant to the procedure that was applicable to the appointment of choice of the arbitrator being replaced.¹¹⁷

Note, however, that the ICC Rules afford the Court the discretion to decide whether or not to follow the original nominating process.¹¹⁸

opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.”).

¹¹⁶ ICSID Convention, Art. 56.

¹¹⁷ UNCITRAL Rules (2010), Art. 14 (stating that “Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.”); *see also* SCC Rules, Art. 17 (“The Board shall appoint a new arbitrator where an arbitrator has been released from his/her appointment pursuant to Article 16 (release of appointment), or where an arbitrator has died. If the arbitrator being replaced was appointed by a party, that party shall appoint the new arbitrator, unless otherwise deemed appropriate by the Board.”).

Conclusion

The selection of arbitrators is at the very heart of all international investment arbitral proceedings and it is often one of the main reasons that led parties to choose arbitration in the first place.

Parties and their counsel should consider carefully the selection of the most appropriate arbitrator for the dispute, taking into consideration both the necessary and desired qualities for the arbitrator and for the panel overall.

Once the arbitration panel is selected, the arbitral proceedings begin.

Should a vacancy arise, parties will be most probably asked to choose a substitute arbitrator. The same careful choice should be made then.

¹¹⁸ ICC Rules, Art. 15(4) (stating: “When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.”).