

Key criteria in appointment of arbitrators in international arbitration

Lecturer Bazil OGLINDĂ¹

Abstract

Maybe in all situations the most important factor is the decision making person. In arbitration this person is the arbitrator. Knowing how to choose your arbitrator is the first step in knowing how to win your case. There are some important criteria that needs to be taken into account when appointing an arbitrator, like the independence and impartiality of the arbitrator, the experience in similar cases, knowledge of the system of law applicable to the contract and other backgrounds. Another important aspect is the number of arbitrators and the advantages and disadvantages of having one, three or more arbitrators. All those issues are very important when drafting the arbitration agreement and in matters of complex contracts it is of high importance to have legal advisors that will help you draft an agreement that will minimize risks and favor efficient arbitral proceedings.

Keywords: arbitration, appointment, criteria of selection, party autonomy, independence and impartiality.

JEL Classification: K33, K41

1. Introduction

Selection of arbitrators represent the essence of arbitration as a private dispute resolution method. The power given to the parties regarding the selection of arbitrators has been regulated through different regulations, guidelines, legislations or other similar documents. Nevertheless, the fact that parties in an arbitration have the liberty, yet burden to choose the best adjudicator for their case may lead to difficult situations, blockages and even insecurity of the arbitration proceedings.

There are widely recognized criteria to select arbitrators, such as impartiality, independence, honorability, availability, but, in most situations, parties have to take into consideration much more in order to feel comfortable with the outcome and be confident in the judgement of the arbitral tribunal.

Parties, in choosing their arbitrators are in front of decision based on both opportunity and legality. They have to always pay attention to the mandatory conditions imposed by law or regulations and, in the same time, they have to compare and contrast the best person for the particularities of the case at hand. Legislation comes to limit opportunity, because, if completely free, parties may

¹ Bazil Oglindă - Law Department, Bucharest University of Economic Studies, bazil.og Linda@og LindaLawyers.ro

decide the selection of arbitrators taking in consideration more of their personal interests, than the general frame of the case.

It is widely accepted that the parties' involvement in selecting the arbitrators enhances the predictability of the arbitration proceeding, taking into consideration the fact that parties should have a general representation in terms of procedure and philosophy from the arbitrator they choose.²

The question that arises is how far does party autonomy go in this respect? And even more, how much can legislation restrain this fundamental right of the parties in arbitration?

2. Principle of party autonomy

A. Party autonomy – comparative view

The vast majority of international conventions and entities handling with arbitration recognize the principle of party autonomy in selecting arbitrators or in choosing the method based on which the selection will be made.

a) Geneva Protocol and Geneva Convention

The Geneva Protocol states in article II that “the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place”.

Geneva Convention, in article 1(2)(d) provides that the arbitral tribunal is to be constituted “in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure”.

b) New York Convention

There are several provisions of the New York Convention that address the issue of selection of the arbitral tribunal.

Article V(1)(d) of the Convention provides that recognition of an award may be refused if “the composition of the arbitral authority ... was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”.

c) European Convention

In comparison with the New York Convention, the European Convention provides expressly the parties' autonomy in selecting arbitrators.

In this respect, article IV (1)(b) states that “parties shall be free to submit their disputes to an ad hoc arbitral procedure; in this case, they shall be free inter alia (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute; (ii) to determine the place of arbitration; and (iii) to lay down the procedure to be followed by the arbitrators”.

² G. Born, *International Commercial Arbitration*, Vol. II, Second Edition, Ed. Wolters Kluwer, Netherlands, 2014, p. 1641.

B. Party autonomy in Romanian legislation

Having in mind the international environment summarized above, Romanian legislation lately adapted to the international trend concerning the constitution of the arbitral tribunal.

The Rules of procedure of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, in force since June 5, 2014, provide for parties' liberty in selecting arbitrators. This approach is new under Romanian legislation, since the previous Rules of procedure deprived the parties of this essential right in arbitration proceedings.

In this respect, article 14 of the Rules of Arbitration states that, in absence of an appointment method set within the arbitration agreement or in the Rules, the arbitral tribunal shall be appointed by the parties, detailing the procedure.

The Romanian legislator imposed as condition for arbitrators only the civil capacity. This approach is in accordance with the principle of party autonomy, principle that dominates Book nr. IV of the Civil Procedural Code. It is considered that selection of arbitrator is the resort of party's wish and that the trust of the party in arbitration proceeding is a consequence of the choosing of the suitable person to act as "judge of the case".³

C. Limitations of party autonomy

Despite the wide recognition of the principle of party autonomy in selecting the arbitrators, most national laws impose some limitations in order to guarantee the effectiveness and efficiency of arbitral proceedings.

Generally, such limitations refer to:

- Avoidance of one-sided mechanisms for selecting arbitrators;
- Prohibitions against arbitrators who lack impartiality and/or independence;
- Requirements of minimum qualifications;
- Requirements related to nationality or religion.⁴

The corollary of the parties' autonomy to agree upon arbitrators or the mechanism in selecting them is the mandatory and binding character of them. In any case where an arbitrator is selected using a method contrary to the parties' agreed contractual procedures, the named appointment can be invalidated, subjecting the arbitrator to removal and exposing the award to annulment or non-recognition.

³ G. Mihai, *Arbitrajul international si efectele hotararilor arbitrale straine*, Universul Juridic, Bucharest, 2013, p. 114.

⁴ G. Born, *International Commercial Arbitration*, Vol. II, Second Edition, Wolters Kluwer, Netherlands, 2014 p. 1659.

D. Procedures for selecting arbitrators

The most frequently used manner to regulate the procedure for selection of the arbitrators is through the arbitration agreement (including the institutional arbitration rules that it incorporates). In case neither the parties, by means of arbitration agreement, nor the institutional arbitration rules do not provide for a proper mechanism for arbitrators' appointment, generally, national laws provide for default procedures.

There are many aspects to take into consideration in selecting an arbitrator. Whether some disputes require for specific languages skills, technical expertise, legal qualifications or personal abilities, there is no such thing as a suitable arbitrator for any arbitration.⁵

This is why parties, starting with drafting the arbitration agreement, should take into consideration the specifications of their case and providing a suitable mechanism of selection of arbitrators in case of dispute.

The most common method used for constitution of the arbitral tribunal is the appointment of the two co-arbitrators by each party and the nomination of the presiding arbitrator by the two co-arbitrators. In case of sole arbitrator, the mechanism of selection is, most commonly, by agreement of the parties.

3. Criteria for selecting an arbitrator

A. Criteria for selecting co-arbitrators

The most relevant information to take into consideration when deciding in nominating an arbitrator refer to personal competence, intelligence, diligence, availability, nationality, integrity, experience in arbitration, linguistic abilities, knowledge of particular industry of field of law. There is not to be overlooked the openness of the arbitrator to work with the other members of the arbitral tribunal, particularly with the presiding arbitrator.⁶

It is not a secret that parties tend to choose, within the limits of the law, arbitrators that may be sympathetic or supportive with regard to the case at hand.⁷

The guarantees of independence and impartiality requested from co-arbitrators, presiding arbitrators or sole arbitrators are to be constantly observed by the parties. Accordingly, there might be a fine line between a favorably disposed arbitrator and someone who could be subject to legitimate challenge.

⁵ D. Hacking, *Well, Did You Get The Right Arbitrator?*, in "International Arbitration Report", USA, 2000, p.10.

⁶ P. Morton, *Selection and Appointment of Party-Nominated Arbitrators*, presented at K&LNG International Arbitration Symposium at Claridges Hotel, London, 23 March 2006.

⁷ G. Born, *International Commercial Arbitration*, Vol. II, Second Edition, Ed. Wolters Kluwer, Netherlands, 2014, p. 1683.

In selecting their arbitrators, parties should take into consideration, as well, their eventual prior contacts with the suggested arbitrators, in order to avoid any possible conflict of interest issues that may appear later on.

B. Criteria for selecting sole or presiding arbitrator

Aside from the criteria mentioned in the section above, which apply as well in the procedure for selection of the sole or presiding arbitrator, in this case, there are some extra issues that are worth taken into consideration.

Commonly, there are two methods of selecting the presiding arbitrator: by the two co-arbitrators nominated by the parties or by the parties themselves. In case of sole arbitrator, parties usually agree on the appointment themselves or through their counsels.

The selection of presiding arbitrator or sole arbitrator by the parties seems to be the most effective mean, taking into consideration the fact that parties know best the characteristics that would be most appropriate in accordance to their case.⁸ Moreover, the selection of the sole arbitrator or the arbitral tribunal is to build confidence and cooperation in the entire arbitral proceeding.⁹

From a temporal point of view, the selection of sole or presiding arbitrator can intervene directly through the arbitration agreement, or in post-dispute discussions. Both solutions present advantages and disadvantages. Making a choice by taking into consideration the factual scenario at the moment of the conclusion of the arbitration agreement may not turn to have the desired outcome for the moment the dispute may arise. On the other hand, at the moment the dispute arises, parties are less likely to reach an agreement concerning the nomination of a sole or presiding arbitrator, taking into consideration the tension between them.¹⁰

In case of a three arbitrator tribunal, the two party-nominated co-arbitrators may be given the task to appoint the presiding arbitrator. In this case, it is allowed and even recommended for the co-arbitrators to consult with their nominating parties concerning the choosing of the chairman. International regulations on arbitration expressly provide the right of the co-arbitrators to consult with the nominating parties in relation to the appointment of the third arbitrator.

Generally, parties, in deciding on the sole or presiding arbitrator, adjust their expectations and seek an arbitrator who is indisputably independent and impartial. On the other hand, parties tend to seek a presiding arbitrator who they perceive to be capable of managing the co-arbitrators and resist stubbornness from the co-arbitrators.¹¹

⁸ E. Onyema, *Selection of Arbitrators in International Commercial Arbitration*, in "International Arbitration Law Review", 2005, p. 9.

⁹ D. Hacking, *Did you nominate the right arbitrator?*, Austria, 2000, p. 7.

¹⁰ D. Hacking, *The effective arbitrator*, in "Procedural Section", 1998, p. 12.

¹¹ G. Born, *International Commercial Arbitration*, Vol. II, Second Edition, Ed. Wolters Kluwer, Netherlands, 2014, p. 1703

C. The standard of independence and impartiality

“Impartiality is the watchword of all tribunals, including arbitrators”.¹²

Requirements of impartiality and independence are to be observed not only in the process of appointment of arbitrators, but in the subsequent processes of challenging arbitrators or seeking for annulment or enforcement of the arbitral award.

Although the standard of impartiality and independence is generally recognized and required in international arbitration, there are many controversies regarding the content of this obligations.¹³ These standards are usually regulated in detail by national legislations. Thus, international entities tried to set guidelines and general rules applicable in connection with the requirements for arbitration,

In this respect, the IBA Guidelines on Conflicts of Interest, the New York Convention or the UNCITRAL Model Law represent attempts to standardize the content of impartiality and independence in arbitration. However, substantial differences continue to exist in the international environment.

One of the aspects in which most national laws convert is the subject of no lawyer-client relationship between arbitrator and party. It is generally acknowledged that the arbitrator, even if nominated by one of the parties, does not act as the lawyer of that party and has to fulfill the requirements of impartiality and independence underlined by the law governing the matter.

Even regarding these requirements there are significant differences between several national legislations. For example, the Model Law requires for arbitrators to be both independent and impartial; the Swiss Law on Private International law impose the requirement of independence; and the English Arbitration Act states the criteria of impartiality.¹⁴

Scholars¹⁵ have extensively discusses the content and differences between independence and impartiality.

In this respect, independence is considered to refer to the inexistence of any unacceptable external relationships or connections between an arbitrator and a party or its counsel. On the other hand, impartiality is explained as the attribute of an arbitrator of being subjectively unbiased and not predisposed towards one party.

A comparative commentary states that “in general, impartiality means that an arbitrator will not favor one party more than another, while independence requires that the arbitrator remain free from the control of either party.”¹⁶

¹² Amec Civil Eng'g Ltd. V. Secretary of State for Transp., 2005, English Court of Appeal.

¹³ W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* (3rd ed. 2000): “it is undoubtedly established that all ICC arbitrators must be independent, but the definition of ‘independence’ remains elusive”, p. 274

¹⁴ D. Hacking, *Arbitration is only as good as its arbitrators, Synergy, Convergence and Evolution: Liber Amicorum for Eric Bergsten*: in “Kluwer Law International”, March 2011, chapter 11.

¹⁵ Bishop&Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 1998, p. 397-400. Fouchard, Gaillard Goldman, *International Commercial Arbitration*, Kluwer Law International, Netherlands, 1999, pp. 1028 – 1038.

In addition, IBA Rules of Ethics state in article 3(1) that “partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or someone closely connected with one of the parties.”

4. Conclusion

In appointing arbitrators, parties have to take into consideration the national law applicable to the matter, the international guidelines and rules regulating the selection of arbitrators and the factual aspects of the case. The ideal arbitrator is the one that meets both the criteria of opportunity and legality with regard to the specific case at hand. An objective assessment of the case and the needs of the parties is essential in selecting an arbitrator.

As correctly authors Redfern and Hunter¹⁷ summarize the issue of selection of arbitrators, “it is, above all, the quality of the arbitral tribunal that makes or breaks the process”.

Bibliography

1. A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet&Maxwell, London, 2004.
2. Amec Civil Eng'g Ltd. V. Secretary of State for Transp., 2005, English Court of Appeal.
3. Fouchard, Gaillard Goldman, *International Commercial Arbitration*, Kluwer Law International, Netherlands, 1999.
4. D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 3rd edition, 2013.
5. D. Hacking, *Arbitration is only as good as its arbitrators, Synergy, Convergence and Evolution: Liber Amicorum for Eric Bergsten*: in "Kluwer Law International", March 2011, chapter 11.
6. D. Hacking, *Did you nominate the right arbitrator?*, Austria, 2000.
7. D. Hacking, *The effective arbitrator*, in "Procedural Section", 1998.
8. D. Hacking, *Well, Did You Get The Right Arbitrator?*, in "International Arbitration Report", USA, 2000.
9. E. Onyema, *Selection of Arbitrators in International Commercial Arbitration*, in "International Arbitration Law Review", 2005.
10. G. Born, *International Commercial Arbitration*, Vol. II, Second Edition, Ed. Wolters Kluwer, Netherlands, 2014.
11. G. Mihai, *Arbitrajul international si efectele hotararilor arbitrale straine*, Ed. Universul Juridic, Bucharest, 2013.

¹⁶ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 3rd edition, 2013, p. 213.

¹⁷ A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet&Maxwell, London, 2004, p. 202.

12. P. Morton, *Selection and Appointment of Party-Nominated Arbitrators*, presented at K&LNG International Arbitration Symposium at Claridges Hotel, London, 23 March 2006.
13. W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed, Oceana TM Publication, 2000.