ML in Law

Impact of arbitrators’ background on efficiency in international commercial arbitration

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Abstract

Impact of arbitrators’ background on proceedings efficiency in international commercial arbitration

Procedural efficiency of arbitral proceedings in international arbitration has been criticised of increasing cost and reduced speed, as reflected in recent surveys among users of international arbitration. This study shows that increased appointments of non-lawyer arbitrators with expertise in the subject matter of the dispute is likely to increase the efficiency in international commercial arbitration, especially in terms of disputes that involve complex issues of non-legal nature. With the required expertise within the tribunal, the need for detail explanations of the complex issues, the extent of documentary evidence, and the need for experts’ support will be reduced. That will lead to reduced cost and increased speed and hence increased efficiency.

With an appointment of an experienced lawyer arbitrator as presiding arbitrator, the potential risk of non-enforceability or lack of juridical thinking by non-lawyer co-arbitrator(s) does not overshadow the potential benefit of their appointment as co-arbitrators on the arbitral efficiency and possible quality improvements of the awards. Project management expertise of arbitrators is also likely be beneficial for case management and improved arbitrator efficiency of the arbitral proceedings.

These conclusions were drawn after detailed analysis of the impact of appointing non-lawyer arbitrators on the fundamental principles of international arbitration, and the potential improvements of the efficiency of international commercial arbitration by having the relevant expertise within the tribunal instead of relying on party and tribunal appointed expert opinions. Results of recent survey among uses of international arbitrations were also analysed. The thesis outlines in addition, the legal framework behind international arbitration, the arbitration process, the arbitrators’ obligations and rights and the conditions and requirement for cross border enforceability and gives therefore potential arbitrator candidates with non-legal background a practical overview of international arbitration.
Útdráttur

Áhrif bakgrunns gerðarmanna á skilvirkni málsmeðferðar í alþjóólegum viðskipta gerðardómum

Skilvirkni málsmeðferðar í alþjóólegum gerðardómum hefur sett gagnrýni vegna vaxandi kostnaðar og hægari málsmeðferðar eins og sjá má í nýlegum könnunum meðal notenda alþjóólegra gerðardóma. Sýnt er fram á að aukin skipun ólöglærðra gerðarmanna með sérfræðiþekkingu á álitaefnum einstakra deilna sér líkleg til að bæta skilvirkni málsmeðferðar, sérstaklega þegar um flókin viðfangsefni er að ræða af öðrum tóga en lögfræðilegum. Með nauðsynlega sérfræðiþekkingu meðal gerðarmanna minnkar þörfin á mjög ítarlegum útskyringum flókinna álitaefna sem leiðir til einfaldari skjalagerðar sönnunargagna og minni þörf á utanaðkomandi sérfræðiálitum. Þetta leiðir af sér minni kostnað og hraðari málsmeðferð sem endurspeglast í aukinni skilvirkni.

Með skipun lögmanns með ríka reynslu af gerðardómum sem formanns gerðardóms mun áhættan á óaðfararhæfum úrskurðum eða skorti á lögfræðilegri hugsun ólöglærðra gerðarmanna ekki yfirskyggja mögulegan ávinning í aukinni skilvirkni málsmeðferðarinnar eða auknum gæðum úrskurða. Sérfræðiþekking í verkefnisstjórnun meðal gerðarmanna er auk þess líkleg til að leiða af sér ávinning við stjórnun gerðardómsins og aukna skilvirkni í málsmeðferðinni.

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1 Introduction

International commercial arbitration is widely used for dispute resolution in international commercial relationships, where two or more contracting parties choose to resolve their commercial disputes through arbitration rather than litigation in national courts. Arbitration is in principle a simple method to resolve disputes where the parties have freedom to set a forum where they can present their dispute in front of arbitrators who they entrust to resolve it.1 One of the primary reasons for international commercial arbitration is a fast and cost effective dispute resolution method where the parties can decide within the legal framework how their disputes will be resolved in a fast and cost-effective manner.2 The trend has however been that the cost of arbitrations keeps increasing and the arbitration procedural efficiency diminishes. With this in mind, and the background of the author of this work in engineering and international project management of large industrial projects, the aim is to analyse the potential impact of increased appointments of non-lawyer arbitrators with alternative expertise on the efficiency of arbitral proceedings in international commercial arbitration.

The wide use of international commercial arbitration is primarily due to the great success of the New York Convention,3 which ensures enforceability of arbitral awards across national borders. In addition, the United Nations Commission on International Trade Law (UNCITRAL) has put great effort into standardising the international arbitration laws by developing the UNCITRAL Model Law (Model Law) which has been adopted by 80 states around the world.4 Neither of these fundamental documents define however the concept of arbitration and a clear definition is hard to find. The following distinction between arbitration and litigation was drawn by Professor Julian D M Lew in a recent conference celebrating the 30th anniversary of the Queen Mary University of London, School of International Arbitration:

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1 Nigel Blackaby and others, International Arbitration (Sixth, Oxford University Press 2015) 2, 1.04.
Arbitration is not and should not be considered an alternative to the courts, it is a separate and a distinct mechanism for dispute resolution specifically for the international commercial and investment areas.5

The principal characteristics of arbitration have been identified in the following way:

- arbitration is a mechanism for the settlement of disputes;
- arbitration is consensual;
- arbitration is a private procedure;
- arbitration leads to a final and binding determination of the rights and obligations of the parties.6

The practice of international commercial arbitration is based on the party’s autonomy to decide how their dispute resolution shall be handled, including deciding on arbitration rather than national litigation. Party autonomy does also grant the parties wide discretionary powers to decide the setup of the arbitration, including the arbitral procedures and management, the number of arbitrators (generally one or three) and their required qualifications. The party autonomy grants them as well the power to delegate the appointing process to an arbitration institution or to an external appointing authority.7 The parties are generally free to appoint whomever they believe has the best qualifications and they trust to evaluate the subject matter of the dispute and render an award. The significance of this freedom is that legal education of arbitrators is only required in few jurisdictions,8 while the general rule is that legal education is not a requirement as evident from articles 11 and 12(2) of the Model law.9

The fundamental and most important limitations on arbitrators are a general requirement that they must be independent and impartial towards all parties. “Impartiality requires that an arbitrator neither favours one party nor is predisposed as to the question of dispute.”10 Impartiality is hence a requirement that the arbitrators evaluate the arguments and evidence of

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the dispute with an open mind and without any prejudice against or for any party. “Independence requires that there should be no actual or past dependant relationship between the parties and the arbitrators which may or at least appear to affect the arbitrator’s freedom of judgement.” The requirement of independence can for example be related to financial interests of the arbitrator because of other work he has performed for the party or any related third party.

Arbitration is also commonly used for dispute resolution in cross border investments contracts between a State or a State entity and a foreign investor. These investments can take various forms, including investments in infrastructure or industrial projects, purchases of properties or financial investments in equity. The investment arbitrations are normally based on multilateral (e.g. ICSID, NAFTA, Energy Charter Treaty) or bilateral investment treaties (BITs’) between states, and despite the difference in application, there are major similarities between investment arbitration and international commercial arbitration while there are also some distinct differences.

One of the primary characteristics of arbitration is the possibility to appoint arbitrators that have expertise in the subject matter of the dispute rather than law. This can be a benefit because during the arbitrations, the arbitrators need to handle procedural and substantive matters of the disputes, which as in construction disputes can be highly technical and complex. Afforded the opportunity to impact the selection of arbitrators within certain limits as previously discussed, a party could find that an engineer would be better suited to understand the technical details of a complex construction project than a lawyer and a doctor would be better suited to understand pharmaceutical disputes. With its engineering background and long practical and theoretical experience as project manager of large international construction projects, the author knows that disputes on complex projects, whether construction projects or of other type, are often heavily related to cost and time overrun. The reasons for the overruns need to be analysed with

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11 ibid 261, 11–19.
12 See ch 2.2.2
13 Born (n 2) 417, §18.01.
14 ‘ICSID - International Centre for Settlement of Investment Disputes’ <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx>; Born (n 2) 419, §18.01[A][i].
15 Born (n 2) 418, §18.01[A][1].
16 ibid 442, §18.01[E].
respect to management of the project scope, control of changes and external factors such as the impact of weather, critical equipment lost during shipping and fluctuations of international commodity prices. Expertise in project management can therefore often be of great value for understanding the disputes and should in addition be of great value in managing the arbitral proceedings whereas the arbitral process resembles in many respects the nature of projects.\(^{17}\) In practice, the appointed arbitrators are however almost always with a legal background.\(^{18}\)

In addition to the Model law that is intended as national legislation on arbitration, UNCITRAL has developed the UNCITRAL Arbitration rules, which focus on arbitration procedural issues and facilitate effective arbitral management and dispute resolution during the arbitration. The UNCITRAL Arbitration rules are widely used today in *ad hoc* arbitration.\(^{19}\)

Confidentiality in international commercial arbitration is one of the key features that separate arbitration from litigation. The general principle is that the parties keep the dispute, the arbitration process and all documentary evidence in confidence and there are strict requirements of confidentiality towards the arbitrators, the arbitration institutions and all other individuals or organisations involved in each arbitration. Because of this, the existence and the content of awards in international commercial arbitration are generally non-accessible.

Keeping in mind that:

a) the parties can appoint as arbitrators almost whoever they find best suited to resolve their dispute,

b) in some cases, it may be beneficial to appoint non-lawyer experts, and

c) in practice the evidence show that parties seldom appoint non-lawyers,\(^{20}\)

the author decided to investigate the potential impact of appointing non-lawyers as arbitrators. The research questions that will be analysed are as follows:

1. Are appointments of non-lawyer arbitrators with expertise on the subject matter of the dispute likely to increase the efficiency in international arbitration?
2. Do the risk of non-enforceability or lack of a juridical thinking overshadow potential benefits of such appointments?
3. Is expertise in project management likely to improve case management and procedural efficiency in international arbitration?

\(^{17}\) See ch 8.

\(^{18}\) Born (n 8) 1754, §12.04[D][5].

\(^{19}\) See Figure 5

\(^{20}\) Born (n 2) 146, §7.01[D][4].
Because of the confidentiality of arbitration and limited access to information on international commercial arbitration, the study is aimed to theoretically evaluate the impact of appointing non-lawyer arbitrators with expertise in the subject matters of the disputes and in project management. Domestic commercial arbitrations (which happen between parties of the same nationality and are handled within their national jurisdiction) are outside the scope of this study. Literature survey was therefore performed on the following topics:

- the principles of international arbitration with a focus on the specific issues related to the requirements and/or the importance of the arbitrators’ background and qualifications (Chapter 2),
- the contractual relationship between the arbitrators, the parties and the arbitral institutions (Chapter 3),
- recent arbitration surveys conducted among users of international commercial arbitration, highlighting the users view on positive and negative aspects of international commercial arbitration and their approach in selecting and setting up arbitral tribunals and environment (Chapter 4),
- issues for the parties’ considerations on the arbitrators and the tribunals during their drafting of the arbitration agreements (Chapter 5),
- issues for considerations during the selection of arbitrators and constituting the tribunal (Chapter 6),
- methods for collection and evaluation of evidence during the arbitral proceedings (Chapter 7),
- project management theory and its mirroring to the tribunal task of management of the arbitral procedure (Chapter 8).

These topics will then be evaluated and discussed with respect to the three research questions (Chapter 9) and finally the answers will be given in the conclusions of the work (Chapter 10).

2 General principles of international arbitration

When analysing the potential impact of appointing non-lawyer arbitrators, it is important to understand the foundations of international arbitration as a dispute resolution method (2.1) and its fundamental procedural principles (2.2). Disputes can be resolved by using either ad hoc or institutional arbitrations, representing different forms of arbitration (2.3).

2.1 The foundations for arbitration

The foundations for international arbitration are displayed in party autonomy to select the method of the arbitration and how it will be implemented (2.1.1), the parties arbitration agreement (2.1.2), the requirement that the content of the dispute is arbitrable (2.1.3) and the cross border enforceability of the tribunal award (2.1.4).
2.1.1 Party autonomy

When drafting the arbitration agreement, the parties have, due to their autonomy, power to make some initial pre-arbitration choices related to the seat of arbitration, the applicable law and procedure, the choice of institutional versus ad hoc arbitration, their choice of arbitration rules (the choice of arbitration rules is often directly related to an arbitration institution), and their choice of arbitrator(s).

The seat of arbitration defines the legal environment of the arbitration, including the countries arbitration law, the lex arbitri, which govern the arbitral proceedings and often the arbitration agreement. The selection of the seat also generally defines the laws governing the arbitrability and a careful selection of the seat of arbitration is therefore important for the parties.

Apart from defining boundaries between arbitration and the national courts and the form and validity of the arbitration agreement, lex arbitri puts very few mandatory limits on arbitration. A common requirement in lex arbitri is however a minimum standard of procedural fairness and equality, generally referred to as due process.

Party autonomy grants the parties the right to agree on ad hoc versus institutional arbitration and to define the number of arbitrators to sit on the tribunal (usually one or three). The parties can also define the requirements/restrictions of their qualification and language skills and put restrictions on their nationalities to name some. This allows the parties to exclude or allow arbitrators of given nationalities or professions, to request gender diversity, language knowledge or any other requirements they find important. The parties can agree to delegate their appointing role/duty to a third party such as an arbitration institution, either directly or through an agreement to select specific arbitration rules.

Party autonomy grants the parties also freedom to agree on rules (pre-existing or tailor made) to govern their arbitral proceedings. The parties are free to create their own set of arbitration

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21 David Earnest and others, ‘Four Ways to Sharpen the Sword of Efficiency in International Arbitration’ 30, 3–4, I.


24 Born (n 2) 161, §8.04[B].

25 ibid.

rules but should be careful not to obstruct the requirements set by *lex arbitri* or other legal restrictions by governing laws. By agreeing to arbitrate under an arbitration institution, the parties agree on the other hand to accept that the arbitration rules of the selected arbitration institution shall govern the arbitral proceedings. In case of *ad hoc* arbitration, the parties can, rather than making up their own rules, choose the UNCITRAL Arbitration rules, which are the most frequently used arbitration rules for *ad hoc* arbitration.\(^{27}\)

Of the various other agreements that the parties can make at the time of drafting the arbitration agreement, it is important to mention their freedom to define the level of confidentiality about the existence of the dispute and the arbitration process, the content of the award and all the information gathered and submitted during the course of the arbitration. The general practice is that the parties agree on strict confidentiality on all of those matters which obviously limits all information about their existence and the outcome of the arbitrations. This is among others, reflected in the ICC Arbitration rules.\(^{28}\) The 2018 Queen Mary University survey results show also that the users of arbitration consider confidentiality to be one of the key benefits of international arbitration.\(^{29}\) Because of the general practice of strict confidentiality, the access to previous arbitrations (as caselaw) is very restricted and limits the possibilities for this study to evaluate them based on the defined research questions.

The requirement of confidentiality is not as strict in investment arbitration due to the fact that the awards are commonly published due to transparency requirements of governmental activities and the publics’ right for information.\(^{30}\) There is therefore a major difference in access to awards between investment arbitration and international commercial arbitration and due to the similarity of arbitral procedural issues the case law from investment arbitration is commonly referred to both in investment and international commercial arbitrations.

2.1.2 The arbitration agreement

The primary requirement for an international commercial arbitration is a valid arbitration agreement between the parties to resolve all or certain disputes through arbitration rather than

\(^{27}\) See Figure 5.


\(^{29}\) See Figure 2

\(^{30}\) Nigel Blackaby and others (n 1) 130, 2.183.
regular court proceedings. While the establishment of the arbitration agreement can vary, it should generally follow the principles of contract formation and it is a common practice that the arbitration agreements are embedded in the terms and conditions of the general commercial contracts as arbitration clauses. Due to the doctrine of separability, arbitration agreement’s validity will sustain even though the general contract itself may be cancelled or nulled. This is important to maintain the parties’ legal status in case of termination or annulment of the general contract. In the exceptional cases where the parties do not include arbitration clauses in their general contract but agree however after a materialisation of a dispute to resolve it by arbitration, a submission agreement can be utilized to establish the legal ground for the arbitration process. A submission agreement must define the dispute and will normally identify the appointed arbitrators and the selected arbitration rules.

The only mandatory requirement to an arbitration agreement is that it displays a valid agreement by the parties to resolve their disputes through arbitration. It is however very feasible that the arbitration agreement contains thorough details about the parties’ agreement how to set up and manage the arbitral proceedings. The agreement should preferably contain the parties’ agreement on the seat of arbitration, the selection of governing laws, the arbitration form (ad hoc or institutional), the number of arbitrators, their appointment method and an arbitration institution if applicable. The arbitration agreement should further reflect the parties’ agreement on any other limitations or requirements of the proceedings or the arbitrators, including arbitrators’ qualifications or exclusions, the language of the arbitration, handling of evidence and witness statements to name some.

If the parties do not provide for specific issues in their arbitration agreement it is usually up to the arbitrators to determine those issues, absent a subsequent agreement between the parties or provision in agreed arbitration rules. The arbitrators’ determinations must however be within the limits of the lex arbitri and can for example not be in contrast to general requirements on equal treatment of the parties and their right to present their case.35

31 United Nations (n 3) art II.2; UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013 (n 7) art 7; Act on Contractual Arbitration, no. 53/1989 art 3.
32 Born (n 2) 84, 3.01[F][7].
33 ibid 34, 1.07[A].
34 Nigel Blackaby and others (n 1) 95–104, 2.71-2.100.
Investment arbitrations are also subject to valid arbitration agreements which are normally based on international treaties and the investors freedom to choose arbitration rather than litigation at national courts.36

2.1.3 Arbitrability

Even though party autonomy allows the parties the freedom to refer disputes of wide origin to arbitration for their resolution, the doctrine of non-arbitrability limits the parties’ possibilities, and there are certain subject matters of disputes that generally cannot be resolved by arbitration.37 Those limitations are found in national laws, and “some issues such as family matters, patent regulation, criminal law, and sometimes issues of bankruptcy are generally not permitted by law to be arbitrated”.38 Arbitrability varies from one jurisdiction to another and while bribery can be considered for arbitration in some countries it may not be arbitrable in other.39 In case of dispute about the arbitrability of a subject matter, the tribunal must determine the arbitrability, generally based on the non-arbitrability limitations of the lex arbitri.40 That approach is in line with the requirements of the New York Convention, which requires that the subject matter of the dispute must be within the scope of issues permissible to be settled by arbitration according to the laws of the seat of arbitration.41

2.1.4 Cross-border enforceability of binding awards

The New York Convention established an agreement between the contracting states to ensure that arbitral awards made in one contracting state can be enforced in any of the other contracting states.42 This is a fundamental convention for international commercial arbitration because without the New York Convention it could be difficult for a winning party to seek enforcement of an award because the parties are from two different countries. Recent surveys, by Queen Mary University of London, School of international arbitration reveal that the cross-border enforceability is greatly valued by the users of international arbitration.43 There are currently

36 Born (n 2) 419, §18.01[A][1][i].
37 ibid 87, §3.02[B].
38 Margaret L Moses (n 22) 77, 4.D.4.
39 D.M. Lew, A. Mistelis and M Kröll (n 10) 188, 9–6.
40 ibid 197, 9–29.
41 United Nations (n 3) art V.1(c) & V.2(a).
42 Article I ibid.
43 See Figure 2
159 contracting states to the New York Convention from all around the globe and the convention is considered to be the most important foundation for international arbitration.\textsuperscript{44} The New York Convention requires the awards however to be enforceable and it is therefore the arbitrators duty to render enforceable awards which are also by definition final and cannot be appealed.\textsuperscript{45} This requirement is also outlined in the various arbitration institutional rules.\textsuperscript{46}

2.2 Fundamental procedural principles

The fundamental procedural principles of international arbitration outline the duties of arbitrator(s) when performing their tasks associated with the arbitration. The arbitrators need to maintain due process and fairness (2.2.1) and they need to be independent and impartial towards the parties and their counsels (2.2.2). The arbitrators have a duty to perform (2.2.3) and to investigate the facts of the dispute and the applicable law so they can deliberate and render an award (2.2.4).

2.2.1 Due process, fairness and duty to act judicially

Due process, fairness and duty to act judicially (to apply the appropriate law and other standards) were identified by Professor Lew as the cornerstones of arbitration proceedings as reflected in his conclusion that due process, fair hearing and independence and impartiality of arbitrators are the “magna carta of arbitration” (charter of right).\textsuperscript{47} On a similar note, the “three principal duties: to take care, to proceed diligently, and to act impartially” were named by Schöldström as the arbitrator’s primary obligations.\textsuperscript{48} The right of a fair trial is further provided for by Article 6(1) of the European Convention on Human Rights and safeguarded for arbitration in Article V(1)(b) of the New York Convention.

In practice the requirement of due process and fair treatment means that the parties have a right to be heard and that fairness will be employed by the arbitrators towards each party. The parties have also equal right to present their case by submitting evidence and testimony of fact

\textsuperscript{44} Nigel Blackaby and others (n 1) 74, 2.11; Number of contracting states according to a quick survey on the convention web page on 2018-12-10.
\textsuperscript{45} United Nations (n 3) art III.
\textsuperscript{47} D.M. Lew, A. Mistelis and M Kröll (n 10) 95,5–68.
\textsuperscript{48} Patrik Schöldström, The Arbitrator’s Mandate (Juridiska institutionen, Stockholms universitet 1998) 64, 4.7.
witnesses and experts. The Model Law outlines this in a clear way, stating that the “parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

In addition to the requirement that the arbitrators apply the appropriate law, the requirement to act judicially includes also the limitations that the tribunal or any one of its members shall not have discussions with either one of the parties or their counsel unless the other party or its counsel are present. This is to avoid any possible bias in information that could either affect the arbitrators’ perceptions because of information that the arbitrator would receive during such meetings or information that the arbitrators might give to the party.

These fundamental requirements must be ensured to fulfil the legal requirements of various national arbitration laws and therefore to avoid annulment or setting aside of the award by national courts and hence the enforceability of the award.

2.2.2 Independence and impartiality

Arbitrator independence and impartiality are a cornerstone requirement of international commercial arbitration. The meaning of the two terms is addressed in the following text.

Impartiality generally means that the arbitrator is not biased because of any preconceived notions about the issues and has no reason to favour one party over another. Independence generally means that the arbitrator has no financial interest in the case or its outcome. It can also mean that the arbitrator is not dependent on one of the parties for any benefit, such as employment or client referral, and that the arbitrator does not have a close business or professional relationship with one of the parties.

51 Nigel Blackaby and others (n 1) 328–331, 5.70-5.78.
52 United Nations (n 3) art V.2.(b).
54 Margaret L Moses (n 22) 140–141, 6.B.1.
The requirement of independence and impartiality is also commonly outlined in institutional arbitration rules,\(^{55}\) as well as the UNCITRAL Arbitration rules.\(^{56}\) Arbitrators are obliged, based on those rules, to disclose all facts or circumstances that may compromise their independence and impartiality in the eyes of a reasonable person. By ignoring that duty, the arbitrators face the risk that a challenge procedure might be raised against them during the arbitral proceedings.\(^{57}\) Furthermore, if previously unknown facts about arbitrators partiality or dependence, which would be a ground for challenging the arbitrator, become available after the final award, it can open the possibility of an annulment of the final award by a national court.\(^{58}\) A successful challenge on an award is an unacceptable result for any party that has appointed an arbitrator which did not fulfil its duty to disclose potential partiality or dependence.

The IBA Guidelines on conflict of interest are a widely used reference and a source of best practice in international commercial arbitration for issues related to independent and impartiality.\(^{59}\) The guidelines are not mandatory, but the parties can agree to apply them partly or in their entirety in their arbitrations, and if they do so they will be mandatory instructions for the tribunal. The guidelines state that an “arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.”\(^{60}\) The guidelines further state that the same principles apply if the circumstances would raise a justifiable doubt in the mind of a reasonable third person.

Part II of the guidelines categorises situations that may give rise to doubts about independence or impartiality into four lists;


\(^{56}\) UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013 (n 7) art 11-12.

\(^{57}\) ICC International Court of Arbitration (n 28) art 14(1).

\(^{58}\) Born (n 2) 331, §16.03[B][6].


\(^{60}\) ibid Part I(2)(a).
• The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge.
• The Waivable red list covers situations that are serious but not as severe.
• The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence.
• The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List.61

In a recent case brought to the Reykjanes District Court in Iceland, the court confirmed the removal of a party appointed arbitrator by the presiding arbitrator due to its previous connections to the appointing party and his personal relationship to the party counsels.62

Arbitrators can be challenged based on justifiable doubts about independence and impartiality or if they do not fulfil the requirements outlined in the arbitration agreement.63 An arbitrator can on those grounds be challenged by the non-appointing party during the appointing process and based on reasons it becomes aware of during the proceedings. The appointing party can only challenge its own appointee based on reasons it becomes aware of after the appointment.64 A challenged arbitrator can decide to withdraw from its position after a challenge has been raised without the withdrawal being an acceptance of the validity of the challenge,65 but if he decides not to withdraw the lex arbitri of Model Law countries defines it to be the responsibility of the tribunal to rule on the challenge.66 Challenging an already appointed arbitrator is generally considered to be more difficult than avoiding an appointment in the first place.67 An arbitrator can also be removed if it becomes de jure or de facto unable to perform its duty or for other reasons fails the arbitral performance requirements, the parties can jointly decide on termination.68

61 ibid Part II The full lists are presented in Appendix 4.
63 United Nations Commission on International Trade Law (n 4) art 12(1).
64 ibid art 12(2).
65 UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013 (n 7) art 13(3).
66 United Nations Commission on International Trade Law (n 4) art 13(2).
67 Nigel Blackaby and others (n 1) 279, 4.150.
68 United Nations Commission on International Trade Law (n 4) art 14(1).
*Lex arbitri* of Model Law countries allows parties agreement on a challenging procedure in their arbitration agreement.footnote{69} There are generally strict time limits for possible challenges and the process varies based on the selected arbitration rules and the *lex arbitri*.

### 2.2.3 Duty to perform

By accepting an appointment and hence establishing an arbitrator contract,footnote{70} the arbitrators must manage the arbitral proceedings in line with the contractual and governing legal requirements.footnote{71} They must further manage the arbitral process, so that it will be completed within contractual and legal deadlines.footnote{72} The contractual deadlines in *ad hoc* arbitration can either be set by requirements in the arbitration agreement or with timeline and activity requirements set by selected arbitration rules. The same applies for institutional arbitration.

The arbitrators are also responsible to complete their task and resolve the dispute by rendering an award.footnote{73} An arbitrator cannot resign from its post unless the parties settle the dispute, both parties accept its resignation or new information becomes available that gives a reason for justifiable doubts about the arbitrators independence or impartiality.footnote{74} If an arbitrator finds itself unable to continue its duties because of potential partiality and dependence, the UNCITRAL Arbitration rules and the various institutional arbitration rules include replacement methods for the arbitrators.footnote{75} The general rule is that the primary responsibility for ruling on arbitrators impartiality or independence rests with the tribunal as outlined for example in the Model Law.footnote{76}

For *ad hoc* arbitration an assistance might have to be sought from a national court if the parties cannot agree on a replacement arbitrator or do not agree to the resignation of the arbitrator.footnote{77} The court in turn should evaluate the reasons for the request in correlation to the status of the arbitrator.

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69 Article 13(1) ibid.

70 See ch 3.1

71 Nigel Blackaby and others (n 1) 319, 5.43; Born (n 8) 1986, §13.04[A][5].

72 Gaillard and Savage (n 49) 610, 1130.

73 D.M. Lew, A. Mistelis and M Kröll (n 10) 281, 12–15.

74 IBA Guidelines on Conflicts of Interest in International Arbitration (n 59) 5, 2(a).

75 *UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013*) (n 7) art 14; ICC International Court of Arbitration (n 28) art 15; ‘LCIA Arbitration Rules (2014)’ (n 46) art 11.

76 United Nations Commission on International Trade Law (n 4) art 13(2).

77 D.M. Lew, A. Mistelis and M Kröll (n 10) 281, 12–16.
proceedings, potential damages to the arbitral process and additional cost for the parties. If an arbitrator becomes aware of the situation early in the process the court is more likely to grant the permission for resignation than if it is late in the process, with consequential damages to the process and additional cost of the arbitration. An arbitrator who resign without good reasons or a court permission can be liable towards the parties for cost and damages.78

2.2.4 Duty to investigate

The duty to investigate is both related to the arbitrators’ requirement to investigate and disclose information about potential impartiality and independence and to investigate factual and legal aspects of the subject matters of the dispute so they can perform their duty and render an award. During the collection of evidence, the arbitrators have the duty to investigate the dispute at depth by going through all the evidentiary information to establish the correct understanding of the dispute, the legal grounds and the applicable laws and regulations that will be the basis of the legal decision on the dispute and a well-reasoned award.

2.3 Arbitration form and administration

There are primarily two forms of arbitration that will be discussed herein, namely, *ad hoc* arbitration (2.3.1) and arbitrations managed by arbitration institutions (2.3.2).

2.3.1 *Ad hoc* arbitration

*Ad hoc* arbitration is an independent arbitration set up to handle a specific dispute which gives the parties great freedom to define the procedural framework of the arbitral tribunal. The appointment of arbitrators is generally done by the parties and the tribunal normally consist of a either a sole arbitrator or three arbitrators. The major advantage of *ad hoc* arbitration is the parties’ possibility to tailor make the proceedings to fit the needs of the dispute. The reality is however that the parties seldom utilize the extreme freedom due to additional effort that it would require, and the parties frequently choose to select the UNCITRAL Arbitration rules to govern the proceedings.79

The major disadvantage of *ad hoc* arbitration is that it is much easier for a party with bad intent to delay and halt the arbitration process than it is in an institutional arbitration. The parties

78 Born (n 8) 2013, §13.05[B].

79 Nigel Blackaby and others (n 1) 43, 1.143-1.144.
could for example decide to deny appointing an arbitrator in a three-arbitrator tribunal and without the support of an arbitration institution and its arbitration rules that handle such instances, it may take considerable time to get a support from a national court regarding the appointment of an arbitrator.

An *ad hoc* tribunal does not benefit from an administrative organisation such as an arbitration institution. The tribunal needs itself to define and manage the arbitral process in line with the directions outlined in the arbitration agreement. If the arbitration agreement is on the other hand silent on which rules shall govern the arbitral proceedings or how the process shall be managed, the tribunal are normally afforded significant discretion, subject to the provisions of *lex arbitri* to “conduct the arbitration in such manner as it considers appropriate.”

Administration of the submission and exchange of documents, scheduling of meetings, arrangements for meeting venues and maintaining a strict timeline is all part of the tasks of the tribunal. It is therefore an established method in large and complex international arbitrations (both *ad hoc* and institutional) that the tribunal appoints an arbitral secretary to take care of the administrative duties of the tribunal. Even though the arbitral secretary may be deeply involved in the administration of the proceedings it may not take part in the deliberation of the tribunal leading to the establishment of an award. The arbitrators are not allowed to delegate their decision-making power because of their judicial role which cannot be extended, and it is one of the fundamental principles of arbitration that the tribunals render the awards. The tribunals require also often that the parties assist in various matters concerning the administration of the proceedings, such as liaising with respect to procedural timetable, making necessary arrangements for the hearings, and etc.

2.3.2 Institutional arbitration

There are many arbitral institutions around the world that provide arbitration rules and administrative services for arbitrations. The leading arbitral institutions have established

80 ICC International Court of Arbitration (n 28) art 12; ‘LCIA Arbitration Rules (2014)’ (n 46) art 5.

81 Nigel Blackaby and others (n 1) 43, 1.145.

82 ibid 354, 6.04.


84 Nigel Blackaby and others (n 1) 293, 4.193.

85 See ch 2.2.3
arbitration rules that have proven to be effective and will automatically be applicable in their whole or for gap filling of the potential requirements/restrictions set by the parties in the arbitration agreement.\textsuperscript{86} The institutional rules provide, for example, standard and efficient method for arbitrator appointment if one of the parties tries to delay the arbitration process by failing its duty to appoint an arbitrator.\textsuperscript{87} Another example are rules that provide that arbitration proceedings may proceed, and that an award can be made in the event that a party fails or refuses to participate in the arbitration.\textsuperscript{88}

The ICC arbitration rules require the tribunals to submit the arbitration awards in draft form to the ICC Court for scrutiny and quality control.\textsuperscript{89} This is a unique requirement which gives the ICC Court a possibility to inform the tribunals on matters that could be improved in the reasoning of the award but does not give the court any authority to direct the tribunal to change or modify the award.\textsuperscript{90}

The major disadvantage of institutional arbitration is considered to be the additional cost and time required for the proceedings compared to \textit{ad hoc} arbitration.

3 Arbitrator contract

In addition to the arbitration agreement which establishes the ground for the arbitration process as described earlier,\textsuperscript{91} the relationship between the arbitrators and the parties needs some attention, as outlined in the following quotation.

\begin{quote}
Despite the judicial role of the arbitrators and their resulting assimilation with judges, the source of their status remains contractual. There is no longer any serious dispute as to the existence of a contract between the arbitrators and the parties, but there remains some disagreement as to its exact nature.\textsuperscript{92}
\end{quote}

\textsuperscript{86} For example ICC International Court of Arbitration (n 28); ‘LCIA Arbitration Rules (2014)’ (n 46); ‘PCA Arbitration Rules | PCA-CPA’ (n 55); International Court of Arbitration - Arbitration Rules, Mediation Rules 2016; ‘ICSID Convention Arbitration Rules’ (n 55); ‘NAI Arbitration Rules and Explanation’ \langlehttps://www.nai-nl.org/en/documents/rules/\rangle; ‘Nordic Arbitration Centre of the Iceland Chamber of Commerce - Arbitration Rules 2013’ \langlehttps://chamber.is/services/NAC\rangle.

\textsuperscript{87} ICC International Court of Arbitration (n 28) art 12.

\textsuperscript{88} Nigel Blackaby and others (n 1) 45, 1.150.

\textsuperscript{89} ICC International Court of Arbitration (n 28) art 34.

\textsuperscript{90} ibid art 34.

\textsuperscript{91} See ch 2.1.2

\textsuperscript{92} Gaillard and Savage (n 49) 599, 1102.
The conclusion expressed in the text above, that a contract relationship exists between the arbitrators and the parties is commonly recognised and is also reflected in the following text from G. Born:

The most widely-accepted rational for the arbitrators’ relationship with the parties is contractual: under the contractual theory, the arbitrators and the parties to an arbitration agreement enter into a separate agreement with one another, pursuant to which the parties undertake to perform specified functions vis-à-vis the parties in return for remuneration, cooperation and defined immunities.93

In this light it is concluded that the arbitrators perform certain services and a contract (arbitrator contract) is established (3.1) between the arbitrators and the parties. The arbitrator contract needs to be investigated with respect to its form (3.2) and the arbitrators rights and obligations (3.3).

3.1 Establishment of the arbitrator contract

The contractual relationship has been discussed in the literature with respect to both ad hoc and institutional arbitration. Ad hoc arbitration is based on direct agreement, between the arbitrators and the parties, to arbitrate and administer the arbitral proceedings. Irrespective of whether the agreements are written or verbal, it is universally recognised that a contract is formed,94 at minimum with respect to the management of the proceedings. Institutional arbitrations with party appointed arbitrators is also based on direct agreement between the parties and the arbitrators to arbitrate while the administration will be divided between the arbitrators (procedural) and the institution (administrative). The agreement for the institutionally appointed presiding arbitrators is however directly between the institution and the arbitrators, provided that the arbitration agreement provides that the presiding arbitrator shall not be appointed by the co-arbitrators.

During the appointing process (ad hoc and party appointment for institutional arbitrations), a party must contact its candidate arbitrator and submit to it all relevant information about the dispute, so the candidate can evaluate its independence and impartiality. By contacting the arbitrator and submitting the documents, it can be argued that it entails an offer which the candidate can either reject or accept. An acceptance of the appointment can be done by

93 Born (n 8) 1967, §13.02[C].
94 Gaillard and Savage (n 49) 602, 1108.
submitting a ‘Declaration of independence and impartiality’, by signing a term sheet or by other undefined methods.\textsuperscript{95} By this acceptance, it can also be argued that the candidate has accepted an offer and a contract has been established with the appointing party. Similar contracts would be established for institutions and their appointments. The nature of those contracts will be discussed further in the following subchapters.\textsuperscript{96}

Due to the nature of the arbitrator’s tasks and the requirements of independence and impartiality, it has been argued that each arbitrator has in fact the same status towards both parties of the dispute.\textsuperscript{97} That means that each arbitrator will be bound by the same (or at least identical) contract to both parties. Since a party appointed arbitrator in \textit{ad hoc} arbitration is appointed by only one party, the governing view by authors is that by establishing the arbitration agreement the parties grant each other an agency status to establish an arbitrator contract with both parties.\textsuperscript{98} In a similar fashion, the parties are considered to grant their appointed arbitrators agency status to appoint a presiding arbitrator.

Party appointment in institutional arbitration generally means that an arbitrator is nominated by the parties. As reflected in the various institutional arbitration rules,\textsuperscript{99} it is generally the responsibility of the arbitration institutions to appoint the arbitrators and they can either choose to accept and appoint the party nominated arbitrator, or they can reject it. In a similar fashion to the \textit{ad hoc} conditions, the parties are considered to grant an arbitration institution an agency status to establish arbitrator contracts on their behalf by delegating the appointing authority to the institution in their arbitration agreement.\textsuperscript{100} At last, the concept of arbitrator contract is equally valid for a sole arbitrator and multi arbitrator tribunal and \textit{ad hoc} or institutional arbitrations.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{95} ibid 601, 1105; \textit{Hrd 13 January 1994 in case nr 1/1994} (The Supreme Court of Iceland).
\item \textsuperscript{96} See ch 3.2.1 - 3.2.4
\item \textsuperscript{97} Gaillard and Savage (n 49) 604, 1115.
\item \textsuperscript{98} Schöldström (n 48) 94, 5.5.2.
\item \textsuperscript{100} Schöldström (n 48) 94, 5.5.2.
\end{itemize}
\end{footnotesize}
3.2 Form of the arbitrator contract

The normal approach for establishing a contract through an offer and an acceptance is not obvious in the process of an arbitrator appointment but most authors consider a contractual relationship to be in place anyway as express in the following quotation.\(^{101}\)

Nevertheless, in recent years, the courts of various jurisdictions have expressly recognized the existence of a contract between the arbitrators and the parties to the arbitration, and the consequences that result from that relationship. In England, for example, the courts have confirmed that by accepting their appointment, arbitrators contractually undertake to fulfil their brief diligently, in return for remuneration, and that by accepting their functions, they become a party to an arbitration contract. The French courts have developed similar jurisprudence.\(^ {102}\)

Another common view considers the relationship to be similar to a relationship with a judge due to the judicial nature of the arbitrators’ function. This method is identified as the ‘status school’ and depending on the jurisdictions it can grant an arbitrator similar immunity from lawsuits as a judge and influence the applicable rules on judicial liability.\(^ {103}\)

There are principally three main views on the form of the arbitrators contract: contract of agency (3.2.1), contract of services (3.2.2) and contract *sui generis* (3.2.3).\(^ {104}\) In addition, a tripartite contractual relationship for institutional arbitrations will be discussed (3.2.4).

3.2.1 Contract of agency

In an agency relationship the agent is obliged to follow the directions given by its principal. Such directions by the parties to the arbitrators would however contradict the independence and impartiality requirement of an arbitrator. The views on the agency theory vary from one jurisdiction to another and while Swiss and German authors consider their legal systems point towards the agency relationship, the French courts have taken a firm stand against the interpretation. Because the nature of the relationship involves transfer of power to the agent (arbitrator) to represent the principal (party) the French courts have rejected it due to the

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\(^{101}\) Gaillard and Savage (n 49) 600, 1103; D.M. Lew, A. Mistelis and M Kröll (n 10) 276, 12–4.

\(^{102}\) Gaillard and Savage (n 49) 601, 1105.

\(^{103}\) Nigel Blackaby and others (n 1) 321, 5.50.

\(^{104}\) D.M. Lew, A. Mistelis and M Kröll (n 10) 278, 12–8; Gaillard and Savage (n 49) 605, 1114.
arbitrator’s judicial role, which cannot allow an agency status and contradicts the requirement of independence and impartiality.\textsuperscript{105}

Another argument involves the case when a court is requested to take on the role of an appointing authority. That would mean an agency status of the court, but it has been pointed out that no courts would be likely to act as an agent for the parties because courts are independent and cannot take on a role of an agent.\textsuperscript{106}

3.2.2 Contract of service

The service contract relationship is based on activities that the arbitrator performs during the arbitral proceedings. The arbitrator uses its expertise and experience in analysing and gathering of evidence and facts to perform the required tasks and come to a judicial conclusion. The arbitrator will then render an award based on all the relevant laws and key issues of the case. In other words, the arbitrator provides services based on its expertise and experience to render an arbitral award. It has also been argued that the “real basis for the contract theory is the fact that the whole arbitration process is based on contractual arrangements.”\textsuperscript{107}

3.2.3 Contract \textit{sui generis}

The \textit{sui generis} contract relationship is based on the nature of the relationship which cannot be explained by regular contracts due to the judicial role of the arbitrator.\textsuperscript{108} The appointment of an arbitrator is in general a source for contractual relationship, but the judicial nature of the relationship does not fall in line with the legal background of regular contracts. Once the appointments have been completed and the proceedings have started the parties have little to say about the process and the tribunal is empowered to make important decisions in a similar fashion as judges.\textsuperscript{109}

\textsuperscript{105} Gaillard and Savage (n 49) 605–606, 115–118.
\textsuperscript{106} Schöldström (n 48) 203, 8.2.1.2.
\textsuperscript{107} D.M. Lew, A. Mistelis and M Kröll (n 10) 77, 5–18.
\textsuperscript{108} Gaillard and Savage (n 49) 606, 1122.
\textsuperscript{109} D.M. Lew, A. Mistelis and M Kröll (n 10) 79, 5–22.
3.2.4 Tripartite contract in institutional arbitration

A tripartite model presented by Schöldström for institutional arbitration puts an order to the contractual relationship between the parties, the arbitrators and the arbitration institution.\(^\text{110}\) The model encounters formation of several contracts from the moment of drafting the arbitration agreement until all arbitrators have been confirmed. Assuming that the arbitration agreement defines a three-arbitrator tribunal, the important sequence starts with claimant’s decision to request arbitration. Before it does so, it normally contacts a potential arbitrator to get its consent to act as an arbitrator under the selected arbitration rules. This establishes a contract between the party and its nominee. The second step takes place when claimants request the arbitration and submits the name of its nominated arbitrator and pays the filing fee to the arbitration institution. That establishes a (interim)contract between the party and the arbitration institution as soon as the institution starts to process the request.

Assuming that once the respondent receives the notice/request of arbitration from the institution, it finds a potential arbitrator. Getting the nominee’s consent establishes an (interim) contract between the respondent and its nominee. The contractual relationship between respondent and the institution does however not materialise until the respondent has submitted its answer to the request (including the name of the nominee) and paid its part of the advance cost of the arbitration. The two nominated arbitrators will need to be confirmed by the institution (at least in the case of the ICC) and the model predicts that when the institution confirms the nominees and appoints them as arbitrators along with the presiding arbitrator (which can be selected by the institution, nominated by the co-arbitrators or nominated by the parties with similar contractual effects as for the co-arbitrators) the (interim) contractual relationships with the co-arbitrators will be transferred from the parties to the institution because of the appointing activity of the institution. At the same time (but not before) the now appointed arbitrators get the judicial power and duties associated with the arbitrator status. The result of this is that the arbitration institution has contract relationship with both parties and all the arbitrators while there is only judicial relationship between the arbitrators and the parties.

If the arbitration institution does not agree with a party on its nominee and does therefore not appoint the nominee, the contractual relationship between the institution and the nominee will not be established and the nominee will not get the judicial power. The nominee does however

\(^{110}\) Schöldström (n 48) 406, 13.2.2.1.
still have its (interim)contractual relationship with the nominating party and any work performed by the nominee will be based on that contract.

This model avoids all the complexity encountered with the other models described above for the involvement of the arbitration institutions and includes the remuneration process of institutional arbitrations, where the institution reimburses the arbitrators for their services and charges the parties for the cost of the arbitration.

3.2.5 Reflection on the contract models

The tripartite model fits the institutional arbitrations well and resolves in some extent the dilemma between the judicial environment and the contractual relationship that the *sui generis* model is based on. By dividing the contractual and judicial matters into two separate contracts the dilemma is resolved. The obvious question then must be if the same approach can be defined for the *sui generis* model in case of *ad-hoc* arbitration. That would mean that instead of one contract being formed when a party appoints its arbitrator, there would be two separate contracts, one judicial and one commercial. That seems to be a logical assumption based on the same arguments as the tripartite contract

3.3 Arbitrators rights and obligations

Irrespective of the form of the arbitrator contract, its impact is well established with both obligations and rights for the arbitrators. The obligations are primarily marked by the fundamental procedural principles discussed above.\(^{111}\) The main rights established with the arbitrator contract are related to remuneration (3.3.1) and the arbitrators immunity and liability (3.3.2).

3.3.1 Right for remuneration

Arbitrators have the right to be remunerated for their work.\(^{112}\) While in *ad hoc* arbitration the arbitrators will have to handle the invoicing process for their services themselves, in institutional arbitration it is common that the institution defines the arbitrators’ fees and the institutions will handle all the administrative task related to invoicing the parties and payments to the arbitrators.\(^{113}\) There are primarily two institutional cost models for the cost of arbitration,

\(^{111}\) See ch 2.2

\(^{112}\) Born (n 8) 2018, §13.06[A].

\(^{113}\) Nigel Blackaby and others (n 1) 294, 4.196-197; Born (n 8) 2026, §13.06[C].
an *ad valorem* model and hourly rates. While the ICC Court applies the *ad valorem* model and displays its arbitration and administration cost in an appendix to its arbitration rules as proportions of the value in dispute,\(^{114}\) the LCIA defines a schedule of cost which shall include hourly rates for the arbitrators.\(^{115}\) The arbitrators are also entitled to be reimbursed for cost associated with their function as arbitrators, including travel cost and accommodation.

### 3.3.2 Immunities and liability

Arbitrators immunity is based on the same principles as judicial immunity.\(^ {116}\) Without the immunity it is foreseen that arbitrators’ impartiality might be endangered due to potential threats from the parties of a lawsuit in case of unfavourable award.\(^ {117}\) This is also one of the main arguments for limiting arbitrators’ liability. Arbitrators cannot be held liable against the subject matters of awards and awards will not be set aside or annulled based on misapplication of the law.\(^ {118}\) The UNCITRAL Arbitration rules and the ICC Arbitration rules both define clearly limited liability of arbitrators and the arbitral institution.\(^ {119}\)

Arbitrators are however never immune from criminal liability,\(^ {120}\) and they can be held liable for lack of performance, due to wilful harm or gross negligence.\(^ {121}\) Arbitrators sabotaging actions, such as an unallowed resignation from the arbitrator position can be viewed as wilful harm and consequently would establish liability of the arbitrator.\(^ {122}\)

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\(^{114}\) ICC International Court of Arbitration (n 28) App III.

\(^{115}\) ‘LCIA Arbitration Rules (2014)’ (n 46) art 28(1); Born (n 8) 2020, §13.06[A].

\(^{116}\) D.M. Lew, A. Mistelis and M Kröll (n 10) 288, 12–39.

\(^{117}\) Margaret L Moses (n 22) 162, 6.G.

\(^{118}\) United Nations (n 3) art V.

\(^{119}\) *UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013* (n 7) art 16; ICC International Court of Arbitration (n 28) art 40.

\(^{120}\) Margaret L Moses (n 22) 163, 6.G.

\(^{121}\) Nigel Blackaby and others (n 1) 322, 5.52; Gaillard and Savage (n 49) 610, 1130.

4 Statistics – What do the users of international arbitration need, want and expect?

International commercial arbitration exists because companies, institutions and governments decide that disputes associated to their commercial or investment contracts shall be resolved through arbitration rather than litigation. Recent surveys performed by Queen Mary University of London, School of international arbitration (in cooperation with others) show that 90 – 96% of previous users of international arbitration consider arbitration with or without ADR to be the preferred dispute resolution method for cross border disputes.123

![Figure 1](https://example.com/f1)

Figure 1 The preferred method for solving cross-border disputes by participants in recent arbitration user survey by Queen Mary University London, School of international arbitration and White & Case.124

99% of the 2018 survey participants said also that they are likely to choose or recommend the use of arbitration for cross-border dispute resolution in the future.125

Based on the results of same surveys, the users consider the primary benefits of international arbitration to be the ones shown in the following chart.126

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123 For information about the surveys participants roles and positions, see Figure A6, App 2.
126 See Figure 2
Even though confidentiality is not a legal restriction in international arbitration, the parties can in their arbitration agreement decide on confidentiality as discussed before. Confidentiality is also written into arbitration rules of most arbitral institutions and the parties can agree on discarding confidentiality when they choose those rules to govern their arbitration. The importance of confidentiality to the users of international arbitration is reflected in the 2018 survey results.

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128 See ch 6


The following subchapters will focus on the survey’s results that are considered important for selection of arbitrators’ and the arbitrators’ management of the proceedings. This includes information on the form of the arbitration and the number of arbitrators (4.1), the methods for selecting and appointing the arbitrators (4.2), topics related to procedural efficiency (4.3) and the topic of arbitrators’ diversity (4.4). The surveys contain various additional interesting information on international arbitration that are beyond the scope of this study and will not be discussed here.

4.1 The form of the arbitration and number of arbitrators

Due to the confidentiality of international arbitration, it is difficult to find information about the frequency of *ad hoc* arbitration and hence the popularity of *ad hoc* compared to institutional arbitration. It is also not possible to know the ratio between sole arbitrators on the one hand and three-member tribunals on the other in *ad hoc* arbitration due to the confidentiality and hence lack of statistics. Access to information on institutional arbitration is better and statistics from the ICC Court show that 64% of ICC tribunals are composed of three arbitrator’s tribunals and the remaining 36% are sole arbitrators. Similar numbers from the LCIA institution are 82% and 18% respectively. As these are the two most preferred arbitration institutions according to the 2018 Queen Mary University survey (as seen on the following chart), they should give a fairly good view about the split between sole arbitrators on the one hand and tribunal composed of three arbitrators on the other when it comes to institutional arbitration.

![Figure 4 Most preferred organisations by participants in the 2018 Queen Mary arbitration survey](https://example.com/image)


The UNCITRAL Arbitration rules are the preferred procedural regime for *ad hoc* arbitration according to the 2018 survey.

The survey does not identify whether the parties modify the selected rules or not, but one must assume that in some cases they do and that the modified rules are within the numbers presented. It is important to keep in mind that various arbitration institutions have now started to offer administrative support for *ad hoc* arbitrations based on the UNCITRAL Arbitration rules which have increased their popularity. The survey shows also that only in 15% of *ad hoc* arbitration, the parties agree on arbitration terms outside the general regimes by writing their own. This could be the result of the complicated and cumbersome effort that the parties would have to go through in case they want to develop their own set of rules, based on their party autonomy to do so, and that few parties are willing to go down that path irrespective of their freedom.

4.2 Selection and appointment of arbitrators

Unilateral party appointment is by far the preferred appointing method for co-arbitrators when tribunals are composed of three arbitrators, with 77% and only 7% appointments from party

133 ibid Chart 14.

agreements, 8% appointment from an exclusive list of arbitrators and 7% with an arbitration institution appointment.

The preferred appointment method for a sole arbitrator or presiding arbitrator in a three-member tribunal is predominantly (55%) by parties’ agreement, followed by appointment made by an arbitration institution (27%).

These numbers show clearly the preference of the party autonomy to select and appoint arbitrators and they are in line with the highly valued characteristics of international arbitration identified in the same survey.137

The survey results confirm the believes that the parties and their counsels’ primary method to gather information about potential arbitrators are by word of mouth and by contacting internal

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136 ibid Chart 2.

137 See Figure 2.
colleagues to gather information about arbitrator’s reputation and history as reflected in the following chart. This is followed by surveys of publicly available information and then personal contacts with outside counsels. The need for improved access to information about arbitrators’ capabilities and history is therefore evident as pointed out in discussions about the Arbitrator Intelligence.138

Figure 8 Methods to find information about arbitrators139

4.3 Efficiency of arbitral proceedings

The efficiency of the arbitral proceedings is of great interest to the users of international arbitration. It will impact both the cost and time of arbitration, which users frequently list as the worst characteristics of international arbitration, cf. the results of the 2015 and 2018 surveys. Procedural efficiency can also affect the parties trust on the arbitral tribunal due to lack of transparency and a party frustration in case of dilatory tactics of the opposing party.


The users’ call for improved efficiency is also apparent in the answers to possible changes of the arbitration rules. In addition to rules for independence and impartiality, the most important issues to include in arbitration rules are related to effective time management of the proceedings.
When asked about the reasons for choosing their preferred arbitration institutions, general reputation and recognition of the institution, high level of administration, previous experience of the institution, neutrality and high pool of quality arbitrators are the top reasons for the choice. These reasons come all before considerations of cost, expertise in special type of cases and free choice of arbitrators to name some.

When selecting the seat of arbitration, reputation and recognition of the seat, the law governing the substance of the dispute, particularities of the contract or the type of dispute (likely to arise) and personal connection with the seat are the primary reasons for the parties/counsel selection of a particular seat.

Figure 10 Need for arbitralional rules (ad hoc or institutional) to deal with identified issues.\textsuperscript{141}

\textsuperscript{141} ibid Chart 38.

\textsuperscript{142} See Figure 4

4.4 Diversity of arbitrators

While the need for increased diversity of arbitrators has been argued to be of importance, only 18% of the 2018 survey participants consider increased diversity to have significant improvement in quality of the awards and 22% expect some improvement in their quality.

Figure 11 Selection criteria for the seat of arbitration.\textsuperscript{144}

Figure 12 Expected influence of arbitrator’s diversity in a tribunal on a decision-making.\textsuperscript{145}


The best approach to increase diversity amongst arbitrators is considered to be through the arbitration institutions and the least effective method is through other arbitrators’ appointments. Neither of this should come as a surprise since the arbitration institutions are the only appointing bodies that have the possibility to appoint all arbitrators for a three arbitrators’ tribunal.

Figure 13 Best chances to influence greater diversity in arbitral tribunal, “1” being the option which can have the most impact and “4” the least impact.146

The need for increased diversity among arbitrators has been a hot topic within the arbitration world over the last decade and the view that arbitration is a closed club of white middle-aged men from the western world is gaining support.147 There is therefore a call for increased number of young arbitrators, female arbitrators and arbitrators from other parts of the world.148 The argument is that increased diversity on gender, age and ethnicity, improves the quality of the awards. In a 2016 International arbitration survey on diversity on arbitral tribunals by BLP, the published results that show that “80% of respondents thought that tribunals contained too many white arbitrators, 84% thought that there were too many men and 64% felt that there were too many arbitrators from Western Europe or North America.”149 These results reflect the discussions on the need for improved diversity of arbitral tribunals.

146 ibid Chart 17.
148 Rogers, ‘The Key to Unlocking the Arbitrator Diversity Paradox?’ (n 138).
149 ‘BLP Arbitration Survey 2016’ (n 147).
5 Considerations related to arbitrators when drafting the arbitration agreement

The conditions for future arbitrations are set by the parties when they draft their arbitration agreement, normally at the time of establishing their commercial contract. Apart from the benefit of having thorough arbitration agreement, the parties can use their autonomy to decide on the number of arbitrators (5.1), and the method for appointing the arbitrators (5.2).

5.1 Selecting the number of arbitrators

The general rule is that the number of arbitrators on the tribunal is decided by the parties, 150 or defined by their selection of arbitration rules, and outlined in the arbitration agreement. 151 At the time of formation of the commercial contract, the parties will not know if a possible future dispute might arise or what it might entail, and they will therefore have to be prepared for various possible scenarios. The number of arbitrators influences the cost of the arbitration and can also impact the procedural efficiency and the arbitrator(s) capabilities to thoroughly analyse future disputes and render a well contemplated award. The fact that the substantive matter of awards will be the final resolution of the dispute and cannot be appealed to a higher court can therefore be of concern to the parties. 152 Some parties might therefore consider it to be too much risk to rely on a sole arbitrator instead of a larger tribunal.

The benefit of the larger tribunals is the increased knowledge and diversity within the tribunal and reduced risk associated to leaving the arbitral responsibilities to a sole arbitrator. Such risk can be of the concern for the parties in disputes where high claims and or complicated disputes need to be resolved. 153

The cost associated with arbitrators’ fees is directly related to the number of arbitrators and it is therefore evident that for cost-effective dispute resolution it will be preferable to limit the cost of arbitration to a sole arbitrator only. The parties can formulate this requirement into their arbitration agreement such that a threshold of dispute cost will determine whether the tribunal will be composed of a sole arbitrator or three arbitrators’ tribunal. The various arbitration

150 United Nations Commission on International Trade Law (n 4) art 10(1).
151 Born (n 8) 1664, §12.02.
152 See ch 2.1.4
153 Margaret L Moses (n 22) 128, 6.A.1.
institutions have recently reacted to the concerns of increasing cost of arbitration by introducing expedited arbitrations into their arbitration rules in order to speed up the proceedings and limit the cost of the arbitrations.  

In its rules on the expedited procedure, the ICC Court reserves the right to appoint sole arbitrator even if the arbitration agreement provides for a larger tribunal.

The efficiency of the arbitral process is another factor of concern. The arbitral process normally requires hearings with witness testimonies that can be either written, oral or both. For simple disputes, where the amount in dispute may be relatively low, the benefits of having a sole arbitrator compared to three-member arbitral tribunal is partially due to easier scheduling of hearings with fewer participants and reduced time for deliberations, which should result in more efficient proceedings. On the other hand, a sole arbitrator may need more outside expertise compared to a three-member tribunal that could encompass the required expertise in three individual arbitrators.

Absent agreement on the number of arbitrators in the arbitration agreement, the decision shall be made by a named arbitration institution, appointing authority or national court in line with the lex arbitri requirements as discussed below in this subchapter. The deciding factor for which of these will get the responsibility of appointing the arbitrators is based on the form of the arbitration (ad hoc or institutional). It depends also on whether the arbitration agreement identifies an institution, which arbitration rules shall govern the arbitral proceedings, or on appointing authority (especially in case of ad hoc arbitration).

The default number of arbitrators varies from one arbitration institution to another and from one jurisdiction to another. The Model Law default number of arbitrators is three, which is reflected in countries that have adopted the model law as national arbitration laws, such as in Denmark and Norway. Under the Icelandic and the Swedish Arbitration acts the default number of arbitrators is also three.

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155 ICC International Court of Arbitration (n 28) Foreword, App VI, Article 2.1.
156 ibid art 12(2).
157 United Nations Commission on International Trade Law (n 4) art 10(2).
158 The Danish Arbitration Act 2005 sec 10(2); The Swedish Arbitration Act (SFS) sec 12.
By selecting an institutional arbitration and omitting to define the number of arbitrators in the arbitration agreement, the parties grant the institution the authority to decide on the number of arbitrators, which in turn should be the default number as per the applicable arbitration rules. There is a number of arbitration institutions with a default sole arbitrator (some of the rules, e.g. the ICC rules, call however for the institutions discretion to increase the number to three if it deems so necessary),\(^\text{160}\) while other institutions have the default number of three arbitrators.\(^\text{161}\) There are also arbitration institutions that do not have a default number of arbitrators, like the Netherlands Arbitration Institute (NAI) and the Hong Kong International Arbitration Centre (HKIAC),\(^\text{162}\) which stipulates that the administrator shall decide between a sole or three arbitrators depending on the complexity of the dispute and the parties preference and interest in the efficiency of the proceedings. In addition, NAI excludes the option of even number tribunals and it states that if the parties have decided on two arbitrator tribunal, the appointed arbitrators shall appoint a third arbitrator who will be the presiding arbitrator but if they cannot agree on an appointment within fourteen days, the third arbitrator shall be appointed by a defined list procedure.\(^\text{163}\) Most of the institutions with a default of one arbitrator open up the possibility of three arbitrator tribunal in case the dispute is complex or the amount in dispute is high.

5.2 Appointing mechanism

As discussed before,\(^\text{164}\) party autonomy grants the parties right to appoint or nominate (in case of institutional arbitration) arbitrators (5.2.1),\(^\text{165}\) while in case of appointment by an arbitral institution of all the arbitrators, the institutions have their own rules related to arbitrator’s selection and appointments (5.2.2).

\(^\text{160}\) ‘Nordic Arbitration Centre of the Iceland Chamber of Commerce - Arbitration Rules 2013’ (n 86) art 11(2); ICC International Court of Arbitration (n 28) art 12.2; ‘LCIA Arbitration Rules (2014)’ (n 46) art 5.4.

\(^\text{161}\) ‘PCA Arbitration Rules | PCA-CPA’ (n 55) art 7.1.

\(^\text{162}\) ‘NAI Arbitration Rules and Explanation’ (n 86); ‘HKIAC 2013 Administered Arbitration Rules’ (n 99) art 6.1.

\(^\text{163}\) ‘NAI Arbitration Rules and Explanation’ (n 86) art 12.

\(^\text{164}\) See ch 2.1.1

\(^\text{165}\) See ch 3.1
5.2.1 Party appointments

The *lex arbitri* defines the requirements of arbitrator appointment at the seat of arbitration. The parties are free, due to party autonomy, to agree on an appointing mechanism of the arbitrators in their arbitration agreement. Due to the wide use of the UNCITRAL Arbitration rules for *ad hoc* arbitration, and the default use of the relevant arbitration rules for institutional arbitration, arbitrator appointments are generally governed by arbitration rules. In case the parties fail to agree on the appointing method (or arbitration rules), the parties need to obey the methods defined by the *lex arbitri*. For Model Law countries, *lex arbitri* defines that for a single arbitrator tribunal the parties shall seek agreement on an arbitrator and for three arbitrator tribunal each party shall appoint one arbitrator and the appointed arbitrators shall in turn jointly agree on the third arbitrator. If such agreements cannot be reached within a prescribed time limit by the *lex arbitri*, each party has the right to seek the assistance from a court or other authority that each country must identify within its adopted *lex arbitri* and will therefore vary between countries.

The party autonomy to participate in the selection of the arbitrators, is one of the key features of international commercial arbitration. There are however diverging views on the benefit and negative effects of unilateral party appointments. Jan Paulson argued that party appointments could lead to tribunals (or sole arbitrators), without the required legal knowledge, who might render an award that could contradict the governing laws applicable to the dispute, and since the subject matter of an award cannot be appealed, the outcome could be unfair. Paulson also argued that a party appointed arbitrator could have a potential bias towards the appointing party due to a subjective duty of the arbitrator to protect the appointing party’s interests. He considered the ‘bias’ to be evident because of frequent dissenting opinions by arbitrators appointed by the losing party. He then concluded that the preferred method for appointment would therefore be by an independent body like the arbitral institutions.

Opposing opinions by Alexis Mourre on one hand and Charles N Bower and Charles B Rosenberg on the other point out that the parties possibility to participate in the selection of the arbitrators

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166 See Figure 5
169 ibid 348.
arbitrators and set up of the arbitration, establishes a trust and confidence in the arbitration that would not necessarily be in place without the party appointment of arbitrators.\footnote{170} In the same publications, the authors argue that party autonomy establishes confidence in the tribunal as a whole but not in individual arbitrators and is therefore of great importance. Furthermore, that an arbitrator who will show preference towards its appointing party will become isolated within the tribunal because the presiding arbitrator will lose the respect for the biased arbitrator and its credibility will diminish as a result of the bias. Finally they concluded that since arbitrators are concerned about their reputation and possibilities for future appointments, they will avoid this situation by staying impartial as required.

As reflected in the Queen Mary University surveys, the parties’ possibility to participate in the constitution of the tribunal and the appointment of arbitrators is regarded as one of the most valuable characteristics of international commercial arbitration.\footnote{171} Based on this and the arguments presented by Mourre, Brower and Rosenberg, one can conclude that eliminating the possibility of unilateral party appointments of arbitrators or the parties’ possibility to participate in the process might deprive international commercial arbitration of one of its most important and favourite foundations.

5.2.2 Appointments by arbitral institutions

While the appointing mechanisms vary between arbitral institutions, they commonly respect the party autonomy and hence the parties’ right to select which arbitrator they want to be appointed. In some of the leading arbitral institutions, arbitrator appointments are the sole responsibility of the arbitral institution and the parties’ role (for party appointed arbitrators) is to nominate potential arbitrators which then will be evaluated by the institutions before appointment.\footnote{172}

The negative effects of party appointments argued by Paulson, are some of the benefits of appointments by arbitral institutions. The arbitrators will not be biased towards an appointing


\footnote{171} See Figure 2

\footnote{172} ICC International Court of Arbitration (n 28) art 13; ‘LCIA Arbitration Rules (2014)’ (n 46) art 5.3.
party because of the neutral/independent appointment. Another potential benefit is related to expected reduction in the number of arbitrators’ challenges. Arbitrators can be challenged by the parties based on justifiable doubts about the arbitrator’s independence, impartiality or lack of qualifications if they are defined in the arbitration agreement. Without backup of any statistics, the author foresees that because of a neutral appointment, the driving force for arbitrator challenges due to dependence to the parties should be removed except in exceptional cases.

6 Selection of arbitrators and constituting a tribunal

Selection of arbitrators is an important task at the very early stages of every arbitration. The selection of arbitrators needs to reflect the need for knowledge and experience of the legal requirements of the dispute as well as the subject matter of concern. Selection and appointments of arbitrators are primarily done by the parties (6.1) and arbitral institutions (6.2),

6.1 Party appointed arbitrators

When faced with the task to select an arbitrator, the party needs to seek a qualified candidate that is willing to act as an arbitrator and the party trusts to resolve the dispute and render an enforceable award. The primary requirement is the arbitrator’s independence and impartiality as these are potential ground for challenging and removal of an appointed arbitrator.

The parties’ selection of arbitrators needs special focus and the following four step method was recently introduced for a systematic approach of the task:

1. to establish the professional qualifications required for the specific dispute,
2. to make a list of prospective arbitrators – Investigate to discover,
3. check the arbitrator’s availability and willingness to consider an appointment,
4. to perform a pre-appointment interview.

The first topic on the list is to establish the professional qualifications required for the dispute. This will of course involve all the legal aspect of the dispute but should in addition surface the potential benefit and importance of incorporating other expertise required to understand and

173 United Nations Commission on International Trade Law (n 4) art 12(2); art 12.1 UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013 (n 7); ICC International Court of Arbitration (n 28) art 14; ‘LCIA Arbitration Rules (2014)’ (n 46) art 10.

174 Earnest and others (n 21).
resolve the dispute within the tribunal rather than relying on external expertise of parties or tribunal appointed experts.

With this mapping in hand, the second step is to create a list of prospective arbitrators. The aim should be to find all the available information about the ability, experience and availability of potential candidates for the dispute.\textsuperscript{175} The ability to perform as an arbitrator for a specific dispute should be based on multiple factors, including obviously legal knowledge on the arbitration and the \textit{lex arbitri}, as well as the governing laws of the dispute. The arbitrator might also need to have knowledge of other professions than law, such as engineering, accounting or medicine.\textsuperscript{176} This is also reflected in Professor Margaret L Moses book.

One of the advantages of arbitration is that parties can choose decisionmakers who have knowledge and experience in the area that is the subject of the dispute. This eliminates the time and effort that would be necessary, if parties were litigating before a randomly selected judge, to educate the judge about the particular industry or the matter at issue.\textsuperscript{177}

In addition to professional education and experience, each arbitrator will need to have ability to cooperate with the other arbitrators and preferably be flexible, have good management skills and analysing capabilities, have to show integrity and professionalism and in general be a congenial person. Its attitude on procedural issues such as document discovery and witness examination should also be investigated because of potential impact on the procedural efficiency.\textsuperscript{178}

The candidates’ arbitration related experience needs also to be mapped. This includes for example their reputation: related to arbitral efficiency and quality of their awards, of effective cooperation and performance on the tribunal work, of management and of analysing skills.\textsuperscript{179} Lastly, the arbitrator’s availability is also very important because the time needed for the

\textsuperscript{175} Lord Hacking - Arbitration is only as good as its arbitrators Kröll (n 170) ch 11.

\textsuperscript{176} Lord Hacking - Arbitration is only as good as its arbitrators ibid.

\textsuperscript{177} Margaret L Moses (n 22) 128.


\textsuperscript{179} Seppälä (n 178); Lord Hacking - Arbitration is only as good as its arbitrators Kröll (n 170) ch 11.
arbitration can be extended greatly by appointing an arbitrator that will not have the required time or will to put into it.

The task of finding the prospective arbitrators is a challenge and due to the confidentiality of arbitration, the knowledge of arbitrators’ competence and procedural administration capabilities’ is not a public domain information. The parties and their counsels can obviously start by identifying arbitrators that they themselves have experience of and they can in addition enquire amongst their colleagues and co-workers about additional arbitrators and their expertise and reputation on the relevant matters for the dispute. Up to this point it has been difficult to search for or inquire about the reputation of specific arbitrators outside this circle of the parties’ available contacts. The need for a better access to information about arbitrators’ performance is a driving force for the Arbitrator Intelligence (AI). Its purpose is to gather and store in a database, standardized feedback from the users of arbitration about the arbitrators’ performance and management skills and make the information available for parties who are searching for arbitrators.\textsuperscript{180}

The last of the proposed steps is to interview the potential arbitrator prior to its appointment. Interviews between the parties and potential arbitrators are a common practice.\textsuperscript{181} As outlined in the IBA Guidelines for conflict of interest, the topics for discussion must however be limited to the arbitrator’s availability and qualifications or for possible candidates of the presiding arbitrator. The merits or procedural aspects of the dispute cannot be discussed except for a very brief introduction that gives the arbitrator basic understanding of the case.\textsuperscript{182}

6.2 Arbitral institutions selection of arbitrators

As discussed previously, for institutional arbitration the formal appointments of all arbitrators, including the party appointed arbitrators, is done by the arbitral institution.\textsuperscript{183} The arbitration institutions apply various methods for selecting arbitrators and the ICC Court seeks for example proposals from National committees,\textsuperscript{184} while the LCIA has a database of arbitrators that it can

\textsuperscript{180} ‘Arbitrator Intelligence’ (Arbitrator Intelligence) <http://www.arbitratorintelligence.org/> accessed 9 October 2018.

\textsuperscript{181} §7.01[B][ii] Born (n 2) 134.

\textsuperscript{182} Green list, article 4.4.1 IBA Guidelines on Conflicts of Interest in International Arbitration (n 59).

\textsuperscript{183} See chapter 3.2.4

\textsuperscript{184} See Figure 15 and Figure 16
choose from without being obliged to do so. The SCC Arbitration institute has published a general policy for arbitrator selection and appointment. Lastly, the HKIAC has a database of arbitrators on its web page that allows open access to a search for an arbitrator with certain qualifications, background and skills.

The actual appointing mechanisms varies as well for arbitration institutions but commonly respects the party autonomy and hence the parties’ right to select which arbitrator they want appointed. The procedure for initiation of arbitration and establishing of a tribunal at the ICC Court is outlined in the following three process flow diagrams.

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185 Frequently asked question ‘The London Court of International Arbitration (LCIA)’ (n 134).
188 See Figure 14, Figure 15, Figure 16 and the ICC International Court of Arbitration (n 28).
189 Process based on information in the ICC arbitration rules. For full page presentation of all flow diagrams see Appendix 1
The procedure requires the involvement of the ICC Secretariat, the ICC Court and National committees. The diagram outlines the requirements and responses to claimants Request for arbitration and respondents Answer to the request. The flow diagrams are based on information retrieved from the ICC arbitration rules and show the principal steps without all possible variations such as the arbitrator challenge before appointment.

![Diagram of ICC Arbitration process: Standard establishment of tribunal](image)

**Figure 15** Appointing mechanism of the ICC arbitration rules – Appointment of single arbitrator tribunal

As displayed in the diagrams, the exchange and recording of documents and interactions between the ICC Court and the parties requires careful administration by the ICC Court but would primarily have to be performed, in somewhat simplified form, by a tribunal in *ad hoc* arbitration. The various arbitration institutions have however started to offer administrative...
services to *ad hoc* arbitrations which allows the *ad hoc* tribunals to focus more on the merits of the disputes rather than the administrative parts.²⁹⁰

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²⁹⁰ ‘The London Court of International Arbitration (LCIA)’ (n 134) Ad hoc proceedings; ‘WIPO Center Services in Ad Hoc Arbitrations, and in Particular, under the UNCITRAL Arbitration Rules’ (n 134).
the co-arbitrators or jointly by the parties, and each party may therefore have a tendency to focus on narrower interests when selecting arbitrators.

7 Taking of evidence during the arbitral proceedings

The duty to investigate is one of the procedural principles of arbitration and includes the arbitrators’ responsibility to investigate the facts of the dispute so they can analyse its impact and establish the factual and legal questions that need to be answered. The evidence can be grouped based on their source into evidence of facts originated during the time of the dispute development (7.1), initial documents from the parties (7.2), the parties claims and their documentary evidence (7.3), statements from witnesses of the facts (7.4), expert opinions provided in expert reports (7.5), information verified and given during the arbitral hearings (7.6) and through site and material inspections by the arbitrators or experts (7.7).

7.1 Evidence of facts

The importance of evidence of facts is discussed by Nigel Blackaby and co-authors who pointed out that the awards of majority of international arbitrations are based on the facts of the case rather than the relevant principles of law and that only small minority of cases are solely based on the law with little dispute about the facts. Just as in litigation, it is therefore of great importance for the parties to put focus on establishing the facts and prepare documentation and statements that support their case.

The general rule of international arbitration for gathering of evidence is that it follows a rather practical approach. Once again, party autonomy allows the parties to set the rules for the tribunal to work with when gathering evidence and the tribunal in cooperation with the parties can further decide on handling of documentary evidence as discussed in the following subchapter. While the lex arbitri can influence the method of taking and handling evidence, the common trend is that tribunals follow the arbitration rules chosen by the parties irrespective of the national laws on evident handling at the seat of arbitration.

191 Margaret L Moses (n 22) 135, 6.A.3.a.ii(2); Seppälä (n 178).
192 Nigel Blackaby and others (n 1) 375, 6.75.
193 Born (n 8) 2310, §15.09[A].
The IBA Rules on the Taking of Evidence in International Arbitration are non-mandatory but they are generally considered to be a codification of the best practice for taking of evidence in international arbitration.\textsuperscript{194}

The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.\textsuperscript{195}

In line with principal rule of law on burden of proof, the IBA Rules on the Taking of Evidence require a party to submit to the tribunal and the opposing party all documents available to it which it intends to rely on.\textsuperscript{196} Based on the principal rule of burden of proof, a party can submit a Request to produce,\textsuperscript{197} where the tribunal will be requested to order the opposing party to submit an important and relevant document in its possession while the same document cannot be submitted by the requesting party.\textsuperscript{198} If after review of the request, the requested party objects to part or all of the requested information, the tribunal will have to evaluate the objections and rule on whether it maintains the Request to produce in its entirety or partially or if the Request to produce will be cancelled. If the requested party refuses still to submit a maintained request for information, the outcome is generally that the tribunal draws adverse inference of the denial and concludes that the content of the document supports the case of the requesting party. The tribunal has a also possibility that is seldom used to seek assistance of a national court for submission of the requested documents both within the court jurisdiction and across borders. The cross-border possibility is based on of the Hague convention on Taking of Evidence Abroad in Civil or Commercial Matters.\textsuperscript{199}

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\textsuperscript{195}ibid 4, Preamble, para 3.
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\textsuperscript{196}IBA Rules on the Taking of Evidence in International Arbitration (n 194) art 3.1; Margaret L Moses (n 22) 187, 7.E.3.c.
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\textsuperscript{197}IBA Rules on the Taking of Evidence in International Arbitration (n 194) art 3.2 - 3.3.
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\textsuperscript{198}ibid art 3.3(b).
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\textsuperscript{199}Born (n 8) 2420, §16.03[B]; UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013 (n 7) art 27; Susan Heather Blake, Julie Browne and Stuart Sime, A Practical Approach to Alternative Dispute Resolution (Oxford University Press 2016) 393, 6.131; 'Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters’ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=82> accessed 12 October 2018; Born (n 8) 2422, §16.03[D].
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7.2 Parties initial documentation

Arbitration generally starts with claimants Request for arbitration which is followed by respondent’s response/answer.\textsuperscript{200} The claims and detailed arguments in their support are sometimes included in the Request as outlined in the ICC arbitration rules, but they are more often submitted at a later time as described just below.\textsuperscript{201} In SCC institutional arbitrations, claimant for example submits its statement of claim and respondent its statement of defence after the establishment of the tribunal.\textsuperscript{202} While the arbitral procedures vary with the chosen arbitration rules, the following discussions will be based on the ICC Arbitration rules.

Claimant establishes the grounds for its claims by giving information about the dispute background in its Request for arbitration and respondent gives in a similar way information that it considers to be valid for its defence and possible counter claims.\textsuperscript{203} These documents are normally relatively short and intended to commence the arbitral process initiating the establishment of the tribunal, and to define the disputed issues that need a resolution. On the basis of these documents the tribunal is afforded the opportunity to evaluate the dispute and schedule the administration of the proceedings.

In ICC arbitration, one of the first tasks of the tribunal is to draw up, in cooperation with the parties the Terms of reference which outlines the scope of the dispute to be resolved by the tribunal. The terms of reference shall be signed by both parties and thereafter by the ICC Court. At that point, the tribunal can commence its task of dispute resolution. After the signature of the Terms of reference, neither party is allowed to add new claims unless both parties agree on the addition.\textsuperscript{204} The second step of the tribunal is to call for a Case management conference where the tribunal shall consult the parties on procedural matters, such as: how the proceedings shall be conducted, if and how to limit the length and scope of written submissions, the use of party and/or tribunal appointed experts, how to handle written and oral witness evidence and possibilities for the use of video conferencing.

\textsuperscript{200} See e.g. Figure 14 for ICC arbitrations.
\textsuperscript{201} See Figure 14
\textsuperscript{203} Nigel Blackaby and others (n 1) 373,6,66.
\textsuperscript{204} ICC International Court of Arbitration (n 28) art 23.
7.3 Parties’ claims and documentary evidence

The submission of documentary evidence is the primary method for the parties to establish the facts of a dispute and it is a general view that the tribunals have discretionary powers to define the weight of each document and testimony.\textsuperscript{205} The general tendency in international arbitration is to rely more on documentary evidence than oral testimony.\textsuperscript{206} In this regard, contemporaneous documents that were generated prior to or during the development of the dispute, are usually given the greatest weight, and because of the timing of their creation, such documents are considered much more reliable than fact witness testimonies that may be given several years after the events of the dispute.\textsuperscript{207} Documentary evidence can be in the form of written documents, photos, videos, sound files and any other form which provides light on the facts of the dispute.\textsuperscript{208}

Due to the drastic changes in information technology and reduced cost in storage of electronic data in the last thirty years, the amount of data available for the parties to build their case has increased substantially. Emails, memos, reports, photos, videos and other media files are now generated and stored in large numbers. Hundreds or thousands of photos and videos are taken during typical construction projects and computer records and voice and video files may include important information. The variety of documentary evidence is therefore enormous.

The laws and practice of national courts in many common law countries is to request submission of all documentation with relevance to a dispute.\textsuperscript{209} In today’s electronic data environment, this can lead to excessive number of documents and cause huge cost for the parties in document submission and for the tribunal (and apparently also the opposing party) who need to go through all the submitted documents in its fact-finding mission. International arbitration takes on the other hand a pragmatic approach similar to national courts in civil law countries where the parties are generally only required to submit documents that they intend to rely on. It is however at the discretion of the tribunal (limited by the arbitration agreement, Terms of reference and the Case management conference as the case may be) to decide the

\textsuperscript{205} Nigel Blackaby and others (n 1) 392, 6.128.
\textsuperscript{206} Born (n 8) 2255, §15.08[W]; Nigel Blackaby and others (n 1) 392, 6.128.
\textsuperscript{207} Nigel Blackaby and others (n 1) 393, 6.129.
\textsuperscript{208} IBA Rules on the Taking of Evidence in International Arbitration (n 194) Document definition.
\textsuperscript{209} Nigel Blackaby and others (n 1) 385, 6.105-6.106.
level of documentation required, and the tribunal can limit the parties’ document submission if it deems so necessary but must be careful not to obstruct the parties right to be heard and to present their case.\(^{210}\)

7.4 Fact witnesses

Fact witnesses are those who are able to testify about information on facts of events, circumstances, communications and other matters that are important in the fact-finding process of the arbitral tribunal.\(^{211}\) They are also likely to shed a light on the factual circumstance surrounding the dispute at hand. Due to the nature of fact witnesses’ knowledge, it is evident that they have been close to the events of the dispute and they are therefore most likely with close connections to the parties. Fact witnesses are therefore seldom independent or impartial,\(^{212}\) and the UNCITRAL Arbitration rules explicitly excludes the requirement by stating that witnesses can be parties to the arbitration or have any other relation to a party.\(^{213}\) This means that the parties’ directors, managers and shareholders can testify on factual matters where they have stakes in the outcome of the arbitration.\(^{214}\)

Statement from fact witnesses are normally submitted to the tribunal in a written form along with other party documentary evidence. Written witness statements originate from the practice in common law countries and were historically unknown in many civil law systems.\(^{215}\) They are for examples still not well seen in Icelandic courts who prefer oral witness testimony.\(^{216}\)

7.5 Expert opinions

Depending on the size and complexity of a dispute, each party may choose to appoint one or more experts to provide evaluation and expert opinions about the material, technical, sociological, legal or other content of the dispute.\(^{217}\) Contrary to fact witnesses, the party

\(^{210}\) ICC International Court of Arbitration (n 28) app IV (e).

\(^{211}\) Nigel Blackaby and others (n 1) 389, 6.120.

\(^{212}\) ibid.

\(^{213}\) UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013 (n 7) art 27.2.

\(^{214}\) Born (n 8) 2255, §15.08[W]; Nigel Blackaby and others (n 1) 392, 6.128.

\(^{215}\) Born (n 8) 2258, §15.08[X].


\(^{217}\) Born (n 8) 2279, §15.08[AA].
appointed experts generally provide opinions rather than facts of the case. Their opinions can have different theoretical footings and in order to increase the weight of their opinions they have to be supported by solid argumentation based on theory or well-known theoretical facts. There are practically no limits to the fields of expertise that can be involved in international arbitration disputes and apparently the trend of engaging experts in the process seems to be growing if anything according to the following statement from Professor Catherine A. Rogers.

Expert witnesses are a fixture in modern international arbitration. Most sizable cases are dominated by complex questions, such as economic trends in energy markets, the causes of engineering failures, the relationship between obscure biotechnology patents, projected profit and the like. As the number and range of complex legal questions in transnational disputes have increased, reliance on expert witnesses has also increased. They are now considered essential to decipher and distil various type of information for arbitral tribunals.

Party appointment of experts is commonly practiced in national court cases in common law countries while experts are usually appointed by courts in civil law countries. There are therefore different opinions about the practice of engaging experts in dispute resolution at the national courts between the two legal systems.

Party appointed experts in court cases in the USA are normally carefully selected based on their perspectives and opinions, and how well they fit with the legal strategy of the appointing party. The party appointed experts cooperate also commonly closely with the appointing party’s counsels in preparation for the court pleadings. Their analysis and expert opinions are often limited to the strategy of the party who appoints them, and their services and their fees can even be based on the outcome of the case. It has also been argued that due to the close relationship to the parties’ counsels and their building of strategy, the party appointed experts might even elevate and create disputes on issues that initially were not disputed because of strategy reasons, and they can therefore sometimes be counterproductive in finding a solution of the initial dispute.

218 Margaret L Moses (n 22) 197, 7.E.5.
219 Rogers, Ethics in International Arbitration (n 122) 139, 4.01.
220 ibid 141, 4.09.
221 ibid 145, 4.18.
Contrary to the practice in common law countries, procedural rules in civil law jurisdictions commonly require experts to be neutral and impartial.\textsuperscript{222} Instead of party appointment of experts the practice is generally that the experts are appointed by the courts to ensure their independence from the parties. The parties can however challenge court appointed experts which they do not consider independent or impartial. The tradition in Icelandic is that expert opinions from party appointed expert are practically ignored while it is deemed necessary that expert opinions should be made by court appointed experts.\textsuperscript{223}

Courts in France, Italy and Hong Kong have exclusive power to appoint expert which are normally chosen from an approved list of experts.\textsuperscript{224} In Germany however, there is a mixed system of party and court appointed experts and the courts need to seek approval of their expert appointments from the parties or choose the experts from an approved list.\textsuperscript{225}

The Model Law and the UNCITRAL Arbitration rules provide tribunals with the authority, after consultation with the parties, to appoint one or more experts to give opinions in writing on specific issues defined by the tribunal.\textsuperscript{226} Similar permissions are also generally found in various rules from the different arbitration institutions.\textsuperscript{227}

7.6 Hearings

Hearings are an important part of the arbitral proceedings because they give the tribunal a possibility to examine witnesses to clarify specific issues in their written statements and to confirm the soundness of the evidence. Similarly, the parties’ counsels get the opportunity to cross examine each other witnesses to verify or challenge their written statements.\textsuperscript{228} Hearings can be held in one single event or they can be divide up into multiple events extending several

\textsuperscript{222} ibid 144, 4.15.
\textsuperscript{223} Act on Civil Procedure, no 91/1991 art 61 para 1; *Hrd 2 April 1996 in case nr 483/1994* (The Supreme Court of Iceland).
\textsuperscript{224} Rogers, *Ethics in International Arbitration* (n 122) 144, 4.14.
\textsuperscript{225} ibid 144, 4.15.
\textsuperscript{226} United Nations Commission on International Trade Law (n 4) art 26(1)(a); *UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013)* (n 7) 21, art 29.1.
\textsuperscript{228} Nigel Blackaby and others (n 1) 404, 6.173-6.179.
months for large and/or complicated disputes.\textsuperscript{229} The tribunal does not have compulsory power to summon witnesses to hearings against their will but can seek the assistance of national courts in such cases. The tribunals do seldom use this possibility but the general consequence of a witness refusal to appear at a hearing without a good reason is that the written witness statement from that particular witness will be downgraded in value.\textsuperscript{230} It is therefore important for the parties to ensure that their prime witnesses attend hearings if required.

If neither party requests oral hearings, the tribunal can proceed and directly render an award solely based on submitted documents.\textsuperscript{231} The tribunal must be careful not to ignore a request from the parties (one or both) for hearings as they are important part of the right to be heard. It is also advisable for the tribunals to get a clear confirmation that the parties do not request /wish for hearings before they decide to skip them, to prevent a success of a post award challenge based on no hearings. Witness statements shall also be in the oral form if requested by one or both parties or deemed required by the tribunal.\textsuperscript{232}

Prior to the hearings, each party shall submit to the tribunal and the opposing party a list of all witnesses that it intends to examine during the hearings and the opposing party can then request the tribunal to add to the list witnesses that it wants to cross examine during a hearing.\textsuperscript{233} The parties have also generally the right to request tribunal appointed experts to be present at the hearings and to have an opportunity to question them on opinions in their reports as well as question them on issues raised in other documentary evidence.\textsuperscript{234}

The tribunal is responsible for managing the hearings and inform the parties with appropriate notice of the schedule of the hearings, its timing, the language of hearings, which witnesses will be examined and other relevant matters. This is important for planning efficient hearings where all parties will be treated fairly, and due process maintained on procedural issues as outlined by Blackaby and co-authors.

In short, oral hearings are the most cost-intensive periods of any arbitration and their scheduling often leads to the greatest delays, because availability of all essential

\textsuperscript{229} ibid 401, 6.158-6.161.
\textsuperscript{230} Margaret L Moses (n 22) 196, 7.E.g.
\textsuperscript{231} United Nations Commission on International Trade Law (n 4) art 17.3.
\textsuperscript{232} ibid art 24; \textit{UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013} (n 7) art 17.3.
\textsuperscript{233} Nigel Blackaby and others (n 1) 390, 6.122.
\textsuperscript{234} \textit{IBA Rules on the Taking of Evidence in International Arbitration} (n 194) art 6.6.
participants must be coordinated. Efforts should therefore be made by arbitrators and counsel to limit their duration.\textsuperscript{235}

It is evident from this statement that good management skills by the arbitrators are important for efficient planning and management of the hearings.

7.7 Site and material inspections

Inspections give the arbitrators possibilities visualize and evaluate the environment and circumstances of a dispute. Site inspections are for example common in disputes on construction contracts and performance of industrial process plants and disputes on insurance compensation because of damages caused for example by natural disaster. Inspections on materials and commodities are also important and can for example be related to defects of materials or damages during transportation.\textsuperscript{236} Inspections are therefore important possibility for arbitrators to get first (or second hand through tribunal appointed experts) information on the circumstances of the dispute.

8 Project management in international arbitration

Project management is a profession dedicated to managing and implementing projects of various types and nature for large and small corporations, governments, intuitions, organisations and individuals.\textsuperscript{237} There are many variants of project definition available, including one from Professor Emeritus Harold Kerzner:

A project can be considered to be any series of activities and tasks that:

- have a specific objective to be completed within certain specifications,
- have defined start and end dates,
- have funding limits,
- consume human and nonhuman resources (i.e., money, people, equipment),
- are multifunctional (i.e., cut across several functional lines).\textsuperscript{238}

Another definition of a project is found in the international standard ISO 21500 Guidance on project management:

\textsuperscript{235} Nigel Blackaby and others (n 1) 401, 6.161.
\textsuperscript{236} ibid 398, 6.146.
A project consists of a unique set of processes consisting of coordinated and controlled activities with start and end dates, performed to achieve project objectives. Achievement of the project objectives requires the provision of deliverables conforming to specific requirements. A project may be subject to multiple constraints.239

Examples of constraints are also given in the standard:

- the duration or target date for the project;
- the availability of the project budget;
- the availability of project resources, such as people, facilities, equipment, materials, infrastructure, tools and other resources required to carry out the project activities relating to the requirements of the project;
- factors related to health and safety of personnel;
- the level of acceptable risk exposure;
- the potential social or ecological impact of the project;
- laws, rules and other legislative requirements.240

As outlined in the third research question, the secondary purpose of this study is to evaluate whether expertise in project management is likely to improve case management and procedural efficiency in international arbitration. As discussed throughout this thesis, the arbitrators are responsible for managing the arbitral proceedings, which entails that they must: establish the terms of reference (in cooperation with the parties) which outlines the scope of the dispute and manage the dispute resolution within the limits of the scope (scope management – (8.1)); draw up and manage a timeline for the proceedings, including scheduling and managing of hearings (time management – (8.2)); manage the flow and handling of documentary evidence (information management – (8.4)); interact with the parties and ensure fair and equal treatment (stakeholder management – (8.5)); and to do all of this with the aim of cost effective arbitration (cost control – (8.3)). In addition, the administration of organising hearing facilities and other needed outside support falls under the resource management which generally also includes procurement activities. Because of this, it was decided to analyse whether expertise in project management is likely to improve the arbitral efficiency in international commercial arbitration.

8.1 Scope management

Scope management is a formal method for defining, documenting and managing the principal tasks of a project team and to define the deliverables of the project.241 While practically all

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240 ibid 8, art 3.11.
projects will be faced with changes that have to be done on its scope during its lifecycle, scope creep and uncontrolled scope changes are one of the main reasons for project failure and that project cost and time exceed the baseline budget and schedule. Scope management therefore concentrates the project team focus on analysing all proposed/required changes with respect to estimated impact on the approved cost and time baselines as well as the deliverables that mark the outcome of the project.\textsuperscript{242} When the impact of the proposed changes is known, it is the project owner’s responsibility to decide whether they will be implemented or not and all such decisions should be recorded formally for future reference and as good quality control practice.

The purpose of international commercial arbitration is to resolve a defined dispute in a defined legal relationship, i.e. related to a commercial contract between the parties. The dispute is defined in a Terms of reference (ICC) document and the scope of the tribunal is to find a resolution to the dispute as outlined in the terms of reference.\textsuperscript{243} The scope can however be reduced if claimant/respondent decide to withdraw their claims/counterclaims entirely or partially and new issues can be added to the scope with an agreement of both parties. If a tribunal exceeds the defined scope in its award by including issues that are not included in its scope, it may lead to a successful post award challenge.\textsuperscript{244} It is therefore important to document carefully all decisions of changes to the scope as well as their origin and approval. The scope management methods of professional project management are therefore very applicable to international commercial arbitration.

8.2 Time management

Time management is one of the key tasks of project management as projects are regularly evaluated based on time performance and extended project time is one of the prime reasons for project cost overruns.\textsuperscript{245} Considerable effort is put into effective time management which is commonly split into planning and scheduling. Planning happens before the project execution starts and defines the tasks of the project by identifying what needs to be done and how it should be done while scheduling defines when the tasks will be performed and by whom. The

\begin{footnote}
\textsuperscript{242} Kerzner (n 238) 949, ch 22.
\textsuperscript{243} See ch 7.2
\textsuperscript{244} United Nations (n 3) art V.1(c).
\textsuperscript{245} Kerzner (n 238) 7, ch 1.2; Mr Dennis Lock, \textit{The Essentials of Project Management} (Ashgate Publishing, Ltd 2014) 9.
\end{footnote}
outcome before the execution of the project starts will be a defined schedule which upon approval by the project owners becomes and approved baseline schedule. The project team executes the project in accordance to the baseline schedule and it is the role of the project scheduler(s) to re-arrange and adjust the order and length of the individual tasks (in cooperation with the project team and stakeholders) as the project develops with the aim of maintaining the overall project time.\(^\text{246}\)

In arbitration the tribunal draws up a timeline for the proceedings in cooperation with the parties during the Case management conference (ICC) and establishes the schedule for the proceedings (baseline schedule).\(^\text{247}\) The schedule should include all the activities required for the proceedings and it will be the responsibility of the tribunal to manage (to schedule) the proceedings in accordance with the baseline schedule. This can be a major task and as quoted earlier, the difficult task of scheduling hearings often leads to great delays.\(^\text{248}\) Because of the complexity of scheduling hearings and unexpected circumstances that can occur during the proceedings (e.g. unavoidable delays in parties’ submittal of documentary evidence, extended time needed for expert opinions or unforeseen unavailability of an arbitrator due to sickness), changes will almost always have to be made to the schedule. Possible time restrictions set by the arbitration agreements or the arbitration rules might however limit the tribunal possibilities for time extensions except upon the parties or the arbitral institution approval. Time management methods of project management are therefore also applicable to international commercial arbitration.

### 8.3 Cost estimation and control

Cost estimation and cost control are another major task of project management.\(^\text{249}\) The task during the project preparation is to estimate the cost of the execution of the project, including the cost of the project team. At the end of the project preparation period, the project owners will normally use the best available cost estimate to approve a budget for the project team to execute the project and hand over the project deliverables at the end of the execution time. Cost management methods of project management are therefore also applicable to international commercial arbitration.

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\(^\text{247}\) See ch 7.2

\(^\text{248}\) Nigel Blackaby and others (n 1) 401, 6.161.

\(^\text{249}\) Kerzner (n 238) chs 14–15.
control will be applied during the project execution to manage the cost as the project progresses.\textsuperscript{250} It is the cost controller’s responsibility to track the cost and inform the project management team and project owners of changes and deviations from the approved budget. It is important to keep in mind that cost changes can be due to perfectly normal and justified reasons as well as unexpected events.

Contrary to project management, there is little focus on cost estimation for \textit{ad hoc} arbitrations and on establishing an approved baseline for the proceedings. The parties do therefore have little knowledge up front of the expected cost of the arbitration.\textsuperscript{251} Some of the arbitral institutions charge for their services by the hour as discussed before (e.g. LCIA) and for those arbitrations the parties would benefit from an up-front cost estimate and an approved baseline budget. The situation is different for the institutions which forecast the cost for the parties as proportion to the monetary value in dispute (e.g. the ICC) and publish it on their web pages. In those arbitrations, the benefit of effective cost control is of greater importance for the arbitration institutions than the parties. The ICC Court takes for example the arbitrators’ performance into consideration when setting the arbitrators’ fees.\textsuperscript{252}

While the cost of arbitration is of various origin, the cost under the management of the tribunal includes the cost of the arbitrators, the services fees of the arbitration institutions, the cost of tribunal appointed experts, the cost of facilities for meetings and hearings, travel and accommodation cost of the arbitrators, travel cost for tribunal appointed experts and the cost of arbitral administrative support performed by arbitrators’ assistants or secretaries. The cost that is outside the sphere of the arbitrators control includes items like: the parties’ legal fees, cost of evidentiary submission due to fact witnesses and expert reports and hearings, travel and accommodation cost, and internal cost of the parties. A baseline cost estimation for an arbitration would generally focus on the cost which is under the management of the tribunal, but the recent reforms of civil justice introduced into English courts, include also the cost of the parties to prepare and participate in the arbitration.\textsuperscript{253}

\begin{flushright}
\footnotesize
\textsuperscript{250} ibid 15.
\textsuperscript{251} D.M. Lew, A. Mistelis and M Kröll (n 10) 284, 12–24.
\textsuperscript{252} ICC International Court of Arbitration (n 28) App III, art 2.2.
\end{flushright}
Based on this, it is the opinion of the author that international commercial arbitration could benefit substantially from formal cost estimation and control methods practiced in international project management.

8.4 Information management and document control

Information management and document control are important functions in all projects. The information varies in importance and it is critical that it gets delivered and distributed to those who shall receive it but not outside that circle. It is also important that the information distribution is documented properly as required by corporate quality management systems. Document control, which is a subfunction of information management, is an important function in all project management in order to be able to retrieve documents and decisions and to ensure that confidential information is contained within the circles of confidentiality.

Information management is an important function in international arbitration. The requirement of due process puts a strict obligation on the arbitral tribunal to distribute documentary evidence to both parties without delay. The same applies for documents originated from other sources than the parties (such as tribunal appointed experts) and they should be submitted simultaneously to both parties. Information about meetings or hearings need also to be given to both parties at the same time. Document storage and control is similarly important to ensure that the arbitrators have an easy and secure access to the sometimes-excessive amount of submitted documents and other relevant information at all times and is an important part of the tribunal quality control mechanism.

8.5 Stakeholder management

Project stakeholders are a diverse group which includes obviously the project team, the project owners and the users of the project deliverables. In addition, some projects affect the general public, the government, institutions, organisations or companies to name some. The stakeholders are therefore a wide group of individuals or organisations potentially affected by the project work or the project outcome. It is the responsibility of the project team to manage their expectations by providing information about the project and to respond to their interactions with the project.254

254 PMBok Guide (n 241) ch 13.
The arbitration stakeholders are the: parties, their counsels, the arbitral tribunal, witnesses, arbitration institutions, and potentially unrelated parties if an award becomes public information and important as case law for future arbitration references. That would be the case for investment arbitration and awards that have been challenged at national courts. The tribunal needs to administer and manage interactions with its stakeholders. In *ad hoc* arbitration this responsibility is normally solely born by the tribunal while in institutional arbitration this would be a shared responsibility between the tribunal and the institution.

It is evident from this short comparison of international commercial arbitration and project management that theory and practice of project management is highly relevant to international commercial arbitration. Systematic use of project management methods is hence very likely to improved procedural efficiency of international commercial arbitration.

9 **What is the impact of appointing non-lawyer arbitrators on the arbitrations and the efficiency of the arbitral proceedings?**

International commercial arbitrations are often lengthy proceedings that deal with complex multidisciplinary issues of legal, technical, philosophical and commercial background. The ideal arbitrator encompasses all the required disciplinary knowledge in addition to knowledge of the legal environment of international commercial arbitration. Unfortunately, for large number of disputes, those individuals are very hard to find, and compromises must be made.

Party autonomy ensures the parties’ freedom to choose whoever they believe will be best suited to resolve each dispute, irrespective of education and professions. A tribunal may include experts of various backgrounds, such as computer specialists, engineers, accountants and other professions that have relevance to the subject matter of the dispute.\(^{255}\) In addition, majority of awards is based on facts rather than the relevant principles of law.\(^{256}\) The need for arbitration experience among the appointed arbitrators is however very important as reflected in the following statement by Blackaby and co-authors.

In addition to choosing an arbitrator with appropriate knowledge of the relevant substantive area of law, it is particularly important for parties to recognize the

\(^{255}\) Nigel Blackaby and others (n 1) 537, 9.103.

\(^{256}\) ibid 375, 6.75.
importance of experience in arbitration, particularly for a sole arbitrator or the
presiding arbitrator, who must control the process.\textsuperscript{257} The balance between legal background and expertise related to the substantive subject matters of the dispute has to be sought and the predominant method has been to concentrate on the arbitrator’s legal knowledge.\textsuperscript{258} The need for knowledge on substantive matters has on the other hand generally been gathered through expert opinions.

Management of arbitral proceedings is a task that arbitrators will have to handle parallel to the dispute resolution. Because of resemblance to activities of project management the possible improvements on managing the proceeding with methods of project management is also of interest. The three research questions set forth at the outset of this work were as follows:

1. Are appointments of non-lawyer arbitrators with expertise on the subject matter of the dispute likely to increase the efficiency in international arbitration?
2. Do the risk of non-enforceability or lack of a juridical thinking overshadow potential benefits of such appointments?
3. Is expertise in project management likely to improve case management and procedural efficiency in international arbitration?

These questions call for discussions on the impact of appointing non-lawyers as arbitrator: on the likelihood of breaching the general principles of arbitration (9.1), on resolving legal issues related to imperfect arbitration clauses and questions on arbitrability (9.2), on how it impacts procedural efficiency (9.3) and whether it impacts the internal tribunal dynamics (9.4).

9.1 Are the principles of arbitration likely to be breached due to appointments of non-lawyer arbitrators?

As discussed previously, the arbitrators have a joint responsibility for an efficient administration of the arbitral process and to render an enforceable award. They have also a responsibility to assure the quality of the proceedings with respect to due process requirements and parties’ right to be heard (9.1.1). Each arbitrator will have to be independent and impartial (9.1.2), and the tribunal is required to investigate the facts of the case and to act judicially (9.1.3). The tribunal has a duty to perform and to write a reasoned award (9.1.4) and the arbitrators activities and participation in the tribunal may not result in unenforceable final award (9.1.5).

\textsuperscript{257} ibid 234, 4.14.
\textsuperscript{258} Born (n 2) 146, §7.01[D][4].
Due process and the right to be heard are fundamental principles which the tribunal must adhere to during the arbitral process. If these principles are not respected, the enforceability of the award can be jeopardised which may lead to a successful a post award challenge. While these are cornerstone principles in terms of the education of lawyers around the world, that is not necessarily the case for other professions. The author therefore considers the danger of a non-lawyer arbitrator breaching this requirement higher than for lawyer arbitrators. To compensate for the increased risk, it would be logical to make the requirement that at least one of the arbitrators, preferably the presiding arbitrator, would be an experienced lawyer arbitrator who would oversee the proceedings and ensure due process and that both parties will be given equal opportunity to present their case.

Arbitrators have a judiciary role which is described in the following way by Born.

“… this is an adjudicative function and authority, which consist in hearing the parties’ submissions and evidence in fair, objective proceedings and rendering an impartial, reasoned decision that finally describes their right on the basis of their submissions and evidence.”

Due to the judiciary role, the arbitrators have a duty to apply the law in their dispute resolution and render awards which are based on the laws. This means that the arbitrators must look to both the selected contracts laws as well as other applicable laws that may have mandatory restrictions to the solution. Even though awards cannot be successfully challenged because of a misapplication of the law as discussed above, it is still important because of the judiciary role that the tribunal includes arbitrators with the legal knowledge and experience in reading and analysing the law. That does however not mean that all the arbitrators will have to have a legal background.

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260 D.M. Lew, A. Mistelis and M Kröll (n 10) 234, 10–39.

261 Born (n 8) 1997, §13.04[A][5].

262 Margaret L Moses (n 22) 87, 4.F.1; United Nations Commission on International Trade Law (n 4) art 28(1).

263 Born (n 8) 1997, §13.04[A][5].

264 See ch 2.1.4
The requirement of legal basis of the awards includes also that the tribunal shall not apply the *amiable compositeur* principle unless specifically permitted by the parties.\(^{265}\) While the author considers a potentially increased risk of and *amiable compositeur* tendency by non-lawyer arbitrators, this can be mitigated by an experienced presiding arbitrator. It is however important to keep in mind that an *amiable compositeur* award will not in itself lead to a success of a challenge on an award.

9.1.2 Independence and impartiality

While all arbitrators are required to disclose issues that may raise justifiable doubts about their independence and impartiality, the interpretation of what is considered to raise justifiable doubts is probably not as well known to non-lawyers as lawyers. Non-lawyer arbitrators should however be able to familiarize themselves with those standards quite easily. Once the arbitrator is appointed there are no reasons to expect that there is a higher risk that the independence status of an arbitrator with non-legal background will change rather than the independence status of an arbitration with a legal background.

The significance of impartiality should be well known to trained and experienced arbitrators irrespective of their backgrounds. The question remains however whether the likelihood of partial behaviour of a non-lawyer arbitrator is higher than of a lawyer arbitrator. Experts such as engineers, accountants, business administrators, computer scientists, physicists, chemists, and doctors as well as individuals of other professions requiring university education, commonly have written professional ethical requirements. These requirements have provisions on honesty, professionalism, duty to protect the interests of their clients and a duty to obey the governing laws and rules of their country and profession. These requirements are somewhat identical to the ethical requirements of practicing attorneys,\(^{266}\) and with a proper training of non-lawyer arbitrators on the principles of arbitration, it is therefore no reason to expect them to act in any way different than a lawyer arbitrator would do.

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\(^{265}\) Margaret L Moses (n 22) 83, 4.D.5.f, *Amiable compositeur* means ‘that the tribunal would not have to strictly apply the law, but can render a decision based on reasonableness and fairness.’

If an arbitrator gets challenged the rule is that the tribunal has the authority to decide on the challenge unless the arbitration agreement contains other instructions or the challenged arbitrator decides to withdraw from its office. The tribunal will therefore have to evaluate the grounds for the challenge and reach a conclusion. The reasons for challenge are primarily related to independence, impartiality or misconduct of an arbitrator and a non-lawyer arbitrator should be able to participate in those evaluations without any specific risks.

9.1.3 Duty to investigate

The duty to investigate calls for the tribunal investigating responsibility of all aspects of the dispute in its fact-finding mission. Broader knowledge within the tribunal improves the basis to understand the underlying issues of the subject matter of the dispute and should therefore be a better footing for resolving the dispute. The tribunal will not have to depend as much on outside expertise opinions in their evaluation and during the deliberations the tribunal will contain both the technical and legal knowledge which again should improve their resolution of the dispute. Where the negative effect of reduced expertise in law would overshadow the benefit of expertise in other disciplines at the time of arbitrators’ appointment, the logical choice of arbitrators would obviously be to appoint only lawyers.

9.1.4 Duty to perform

The principal responsibility related to the duty to perform is that the arbitrator must complete its tasks to render an enforceable award and in doing so it must follow the rules set by the parties in their arbitration agreement or in the chosen arbitration rules. Considering the discussions about due process and duty to investigate, there is no reason to expect a non-lawyer arbitrator to fail this responsibility rather than a lawyer arbitrator would do.

The tribunal is required to write a well-reasoned award that can withstand judicial scrutiny of a court in case of a challenge against the award. Even though the ability to write well-reasoned and structured awards is primarily gained through practice and experience, the basis for the ability is generally stronger in the lawyers’ education than many of the other professions referred to in this work. Again, an experienced presiding arbitrator should be able to ensure the quality of an award and therefore as stated above, it is always advisable to have a presiding


268 Seppälä (n 178) 203, III.A; ICC International Court of Arbitration (n 28) art 25.2; ‘LCIA Arbitration Rules (2014)’ (n 46) art 26.1.
arbitrator that has legal education and is experienced when it comes to arbitration. In case of institutional arbitration under the ICC Arbitration rules, the ICC Court requests a draft copy of an award from the tribunal before it can be submitted to the parties and its feedback gives the tribunal a chance to improve its reasoning.

Even though one might think that the parties should have explored all possibilities for solving their dispute before initiating the arbitration process the history proves that cases sometimes get settled during arbitration or special ADR steps before initiation of the arbitration. The Queen Mary University surveys also showed that the users of international arbitration are open to settlements and it is obvious that settlement that are reached early in the arbitration process can save considerable cost and time.269

It is difficult to justify an obligation for arbitrators to propose settlement, but the arbitrators have the right to make such proposals.270 The biggest concern on arbitrator’s involvement in settlement activities during arbitral proceedings is related to due process requirements and the possibility that the arbitrators (both lawyers and non-lawyers) increase the possibility of a successful challenge against the award because of their involvement in an unsuccessful settlement process. The previous due process discussions are also applicable in this case.271 The question remains however if non-lawyer arbitrators,272 would not be in a better position to recognise the settlement opportunities and hence have a major impact on the efficiency of the arbitral process by cutting the proceedings time and required documentation efforts. The process of initiating and administering settlements is a thin line for arbitrators to follow and they cannot overstep it without the consequences of possible successful challenge against the award in case a settlement will not be reached.

9.1.5 Enforceability

Because awards cannot be successfully challenged on the ground of misapplication of the law,273 the risk of non-enforceability is primarily related to quality assurance of the procedural

269 See Figure 1
270 Born (n 8) 2006, §13.04[D].
271 See ch 9.1.1
273 See ch 2.1.4
aspects of the arbitral process, primarily due process, partiality and the right to be heard. Unfair treatment of the parties or hindrance of their right to present their case in addition to a potential danger of the tribunal exceeding its scope carries a risk of the award being non-enforceable.\(^{274}\) This reflects that the tribunals need to respect due process and the various restrictions set by the parties in their arbitration agreement or in the selected arbitration rules as well as during the Case management conference.\(^{275}\) The first Civil Law Court of Switzerland annulled in 26 May 2010 an award, in a dispute between unnamed companies from USA and Turkey, based on the tribunal ignoring to take note of a post-hearing submissions and therefore breaching the respective party’s right to be heard.\(^{276}\) In the Immoplan vs Mercure case the Court of Appeal in Paris annulled an award due to tribunal decisions to decide the dispute without hearings and because the tribunal based its award partly on issues not addressed by the parties.\(^{277}\) The tribunal did therefore not respect the parties right to be heard and exceeded its permissions by incorporating issues not addressed by the parties.

9.2 What will the impact be on tribunal handling of imperfect arbitration clauses and questions on arbitrability?

Incomplete arbitration clauses may lead to a need for the arbitrators to determine the seat of arbitration (and hence *lex arbitri*) as well as the applicable contract laws and the language of the proceedings. This is reflected in the following statement:

In international commercial arbitration it is usual that at least one member of the tribunal is a lawyer or a person with sufficient knowledge about arbitration law and practice. Even simple disputes may, in an international context, lead to difficult problems of procedure or conflict of laws. These problems are generally better handled by a lawyer than by a lay person with expertise in another area.

In a three member tribunal it is often possible to have the legal as well as the technical expertise within the tribunal. In those situations preferably the chairman should be a lawyer with the two party appointed arbitrators have the necessary non-legal expertise.\(^{278}\)

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\(^{274}\) *Carolina-Virginia Fashion Exhibitors Inc vs Gunter* (NC); *Excelsior Film v UGC-PH* (French Cour de cassation civ le).

\(^{275}\) See ch 9.1.1

\(^{276}\) *4A_433/2009* (n 259).

\(^{277}\) *Immoplan vs Mercure* (n 259).

\(^{278}\) D.M. Lew, A. Mistelis and M Kröll (n 10) 234, 10-38-10–39.
It is therefore important that the knowledge on conflict of law exists within the tribunal, especially in *ad hoc* arbitration which normally does not benefit from a support of an arbitration institution.\(^{279}\)

*In ad hoc* arbitration based on the UNCITRAL Arbitration rules, the rules provide that the tribunal shall determine the seat in cases where the parties have not previously agreed on it in the arbitration agreements.\(^{280}\) It is therefore preferable that the tribunal has a knowledge of the legal impact of its determination regarding *lex arbitri* and potential impact on the enforceability of the award and possible support from national court if it will be needed. Even though the tribunal could proceed without this knowledge, the impact of their selection on the proceedings and the enforceability of the award are important.

When the laws governing the contract have not been defined, the tribunal should generally apply conflict of laws principles which vary between countries. Based on the results of the *Sapphire* case,\(^{281}\) the arbitrators were however freed from a duty to apply any specific conflict of law methods and the tribunal was given practically a full freedom to choose the governing law as they please.\(^{282}\) As previously, assuming that at least the presiding arbitrator is an experience arbitrator with a legal background, there should be no special impact associated with non-lawyer arbitrators and the selection governing contract laws.

Arbitrability is one of the fundamental requirements for an award to be enforceable according to the New York Convention.\(^{283}\) As arbitrability varies from a country to country,\(^{284}\) the arbitrators must have the legal knowledge to question the arbitrability of each case and seek the answers in the respective law governing the contract and the *lex arbitri*. Non-lawyer arbitrators have little to offer in this evaluation.

### 9.3 Impact on procedural and cost efficiency

The impact of appointing non-lawyers, with expertise on the subject matter of the dispute, on the procedural and cost efficiency of the arbitral proceedings, are reflected in the impact: on

\(^{279}\) Born (n 2) 121, §6.03[B].

\(^{280}\) UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013 (n 7) art 18(1).

\(^{281}\) Sapphire International Petroleum Ltd v The National Iranian Oil Co [1964].

\(^{282}\) Nigel Blackaby and others (n 1) 222, 3,213.

\(^{283}\) United Nations (n 3) art V.

\(^{284}\) Nigel Blackaby and others (n 1) 111, 2,127.
the management of the proceedings (9.3.1), on the extent of the documentary evidence and expert opinions for arbitrators understanding of the subjects at dispute (9.3.2), and finally the impact on the procedural timeline (9.3.3).

9.3.1 Management of the proceedings

The impact of non-lawyer arbitrators’ appointments on the management of the proceedings can be divided further up into impact on the arbitral procedural requirement (9.3.1.1), the impact on potential settlements because of the presence of expertise on the subject matter of the dispute (9.3.1.2), and how that expertise will impact the general work of the tribunal compared to support of party and tribunal appointed experts (9.3.1.3).

9.3.1.1 Arbitration procedural requirements

As discussed before, arbitration fits well to the definitions of project management.\textsuperscript{285} After the initial steps of establishing a tribunal, the tribunal is responsible for administration and management of the proceedings until its completion with an award, or its termination by joint agreement of the parties. The process outlined in the ICC Arbitration rules from the tribunal establishment to hearings is shown in the following two flow diagrams. The process stars with the tribunal drafting of the Terms of reference documents which fixes the scope for the tribunal. It is followed by the signature of the tribunal, the parties and the ICC Court. It then proceeds to the Case management conference which sets the boundaries for the proceedings. As can be seen from the phase of establishing the facts which continues on the latter flow diagram, the process is complicated and can lead to excessive number of produced documents. It involves the establishment of the tribunal scope, development of the timeline for the proceedings, management of the flow of documents between the parties, scheduling of hearings, etc.

\textsuperscript{285} See ch 8
Based on the aforementioned, it is the conclusion of the author that project management methods are valuable for the management of the arbitral proceedings. While project management is generally not a field of strength for lawyers, it is very common that engineers and several other professions have good knowledge and practical experience in the field. The management of arbitral proceedings would therefore almost evidently benefit from an appointment of a non-lawyer arbitrator who would bring this expertise into the tribunal along with expertise on the substantive matters of the dispute. An arbitrator with a legal background and a special training in project management would of course also be very beneficial for the procedural management of the proceedings.
With all the evidentiary documents in place, the tribunal needs to review them and arrange for the hearings that could last from few hours up to months, depending on the size and complexity of the dispute.  

For large cases the arrangements are often complicated and may need large facilities with multiple rooms and specialized equipment. Hearings can therefore be similar in planning as small international conferences and they are frequently held in places unfamiliar to the arbitrators and should benefit greatly from systematic planning and scheduling methods of project management. The impact of non-lawyer arbitrators on post hearing activities include post hearing submissions, closing of the arbitral proceedings and the tribunal deliberation and conclusion before with writeup of the award is more related to their expertise on the subject matter of the dispute than on managing those activities.

9.3.1.2 Settlements

There is a fundamental difference between settlements reached and agreed by the parties during arbitration and tribunals’ application of amiable compositeur. Parties settlement is an agreement that both can support, and which can safe valuable business relationship between

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286 ibid 401, 6.158-6.161.
the parties. Recent studies have shown increased support for the arbitrators to actively support settlement during the arbitral proceedings as outlined in the following quotation:

While it is true that, first and foremost, it is the arbitrator’s mandate to decide the parties’ dispute, that mandate is not limited to decision-making. Rather, settlement facilitation has become a genuine additional part of the modern arbitrator’s mandate. In line with that change, most practitioners have overcome the common law/civil law divide. They facilitate settlement where the parties and the case so require – regardless of their cultural background and legal upbringing.287

The parties often see opportunities to settle their dispute after the early stages of the proceedings. The likelihood for eying a solution in a deadlock dispute is greater for an arbitrator with the relevant expertise in the subject matter rather than a lawyer, which gives a possibility to propose to the parties to evaluate a settlement possibility. The arbitrators will have to be very careful not to obstruct due process requirements, e.g. by suggesting solutions or by being too involved in the process, but the result can be considerable savings in time and cost.

9.3.1.3 Expertise related to the subject matter of the dispute

While there are no requirements for arbitrators to have expert knowledge of the subject matter of the dispute, the potential benefit is commonly acknowledged amongst arbitration professionals and institutions. This is clearly indicated in the SCC Arbitration institute policy for appointment of arbitrators.288

Part of the attraction of arbitration is the way in which the expertise necessary for the understanding and resolution of the dispute may be found amongst the arbitrators themselves. For example, if a dispute arises out of an international construction contract involving matters of a technical nature, it may be appropriate that one (or more) of the members of the arbitral tribunal should be a civil engineer, or someone skilled in the particular technical matters that are in issue.289

Even though the rules for appointing arbitrators do not limit the parties’ autonomy to appoint non-lawyer arbitrators and general agreement exists on the benefits described above, there are little discussions in the literature about the appointment of non-lawyer arbitrators. In reality,

288 See ch 6.2
289 Nigel Blackaby and others (n 1) 248, 4.56.
the general practice is to appoint lawyers with knowledge of the legal environment associated with the relevant field of business rather a non-lawyer expert.290

The lack of the arbitrators understanding of the details in dispute is largely mitigated with opinions of party and tribunal appointed experts. The expert opinions assist the arbitrators in understanding the complexity of the facts and evidence. As discussed previously,291 the number of documentary evidence and party appointed expert reports can be excessive and include important details which the arbitrators may need further assistance with. This assistance can be provided by tribunal appointed experts which appointments are permitted in most arbitration rules.292 The tribunal appointed experts commonly get a list of predefined issues that the arbitrators need their expert opinions on.293

Since the tribunal is not authorised to delegate its decision authority to the tribunal appointed experts, the arbitrators will have to go through all of the documentation as well in their fact-finding mission.294 It is evident that the benefit of appointing an arbitrator with expertise in the field of the subject matter of the dispute could reduce the need for tribunal appointed experts and hence reduce the size and extension of their reports. The risk of delegation of decisions authority to the tribunal appointed experts has been addressed by the LCIA:

A natural extension of having a tribunal-appointed expert is to have an expert as a member of the tribunal. Having an expert as a tribunal member overcomes one of the potential limitations of tribunal-appointed experts: a tribunal that relies too heavily on its appointed expert may be said to have delegated its fundamental decision-making responsibility, which could impact the enforceability of any award rendered. If the expert is a member of the tribunal, no such issue arises.295

It can obviously be argued that in complex disputes the expert opinions might be so diverse that an appointment of one or two expert arbitrators would make little difference in the required amount of tribunal expert opinions. That is of course a possibility, but one might however expect that in majority of such cases there would be few major issues where arbitrators’

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290 Born (n 2) 146, §7.01[D][4].
291 See ch 9.3.1.1
292 Nigel Blackaby and others (n 1) 395, 6.136.
293 ibid 313, 5.25.
294 Rogers, *Ethics in International Arbitration* (n 122) 152, 4.37.
expertise in the subject matter of the dispute would still prove valuable to improve the efficiency of the proceedings. They might as well be better prepared to understand the importance and interconnection of the various aspects of the dispute than a lawyer arbitrator would be.

Another argument might be that the lawyer arbitrators would still need all of the tribunal appointed expert opinions, so they could make up their mind independent from each other. That argument goes against the fundamental principles of the tribunals, to have different expertise within the tribunal and effective deliberation amongst the arbitrators where they jointly discuss all the different aspects of the case, legal and non-legal, and come to a decision based on the outcome of the deliberation. This is the very same process that lawyer arbitrators with expertise in different fields of law do on a regular basis without a problem.

In the context of need for expert opinions within the tribunal it is interesting to point out the existing practice of the national courts in Iceland. It has been permitted by the various laws of Iceland for a long time,296 to allow the district courts to appoint experts as supporting judges in complicated cases where expert knowledge is required to resolve the dispute.297 With two exceptions, the number of judges for each case in the district courts in Iceland is one.298 The first exception is when special conditions call for an appointment of experts (expert judge(s)) to support the court judge and the second exception is for extremely extensive cases or cases of special public importance (when three court judges would rule on the case).299 Until 1 January 2018, in cases of the first exception, the Act on Civil Procedure called for appointments of two expert judges (non-lawyer experts) to support the court judge, and it was the responsibility of the court judge to ensure the legal correctness of the judgment. In theory, it was possible that the court judge could find itself in a minority which increased of course the likelihood of an appeal to the Supreme Court of Iceland. As of 1 January 2018, when a new act on the Icelandic judiciary came into force, the number of expert judges is either one or two and a second court judge may need to be appointed to bring the number of judges to three. Another

296 Hrd 14 March 1960 in case nr 67/1959 (The Supreme Court of Iceland).
298 Act on Judiciary, nr. 50/2016 art 33.
299 ibid art 40; Act on Civil Procedure, no 91/1991 art 2 para 2.
major change with the new law was an introduction of a new appellate court that also has the same possibility to appoint experts to sit in with the appellate court judges.

The primary reason for reducing the number of expert judges from two to one is to save on cost. The practice of appointing experts to sit in with the Icelandic district court judges has been active for decades and it is frequently used and recognised as an effective method to improve the efficiency of court handling of complicated technical disputes, including disputes on construction, insurance claims, financial matters and more. This has also been mentioned as one explanation as to why arbitration has not enjoyed the same success in Iceland as in neighbouring countries.

9.3.2 Documentary evidence and expert opinions

Arbitrations of large and complex disputes generally call for extensive submission of evidentiary documents from the parties. Prior to, or during the initial phase of the proceedings, the parties engage experts to evaluate and provide expert opinions on issues that they believe to be important for building their case and to establish basis for their legal argumentation.

The expert opinions are also intended to provide the arbitrators with sufficient information, so they can understand the various important aspects of the case and provide a solution.

When drafting their arbitration agreement, the parties have due to their autonomy a right to agree on a limited submission of documentary evidence. By reaching an agreement on limitation on documentary evidence, the parties can reduce potential cost and time of future arbitrations but at the same time it limits their flexibility and freedom in production of documentary evidence. If the parties choose to do so, the tribunal is obliged to follow their criteria insofar as such criteria does not contradict mandatory provisions of the lex arbitri. As outlined by the Case management conference requirement in the ICC arbitration rules, the parties can by agreement also limit the submissions of documentary evidence after the initiation of the arbitration. The practice of appointing experts in international commercial arbitration is widely used and as an example the LCIA registers around 300 new arbitrations each year and

300 'Alþt. 2015-2016, A-deild, þskj. 1017 615 mál’ Comments to the bill on the new act on courts, II, para. 8.
301 Garðar V Gunnarsson (n 216) 9, B.3.
302 See ch 7.5
303 ICC International Court of Arbitration (n 28) art 24.
nearly all, if not all, of them involve the use of experts. A trend of exhaustive submissions of specialized expert reports seems to be developing according to the following quote.

… a trend appears to be developing in international arbitration for the submission of exhaustive written submissions, which are heavy with hyperbole and repetition. Not only does this add considerably to the time and cost of proceedings, but it can hinder a tribunal’s understanding of a case. Increasingly, therefore, arbitral tribunals are now considering the imposition of page limits on (at least some of) parties’ written submissions.

The practice of rebuttal of all expert reports and rebuttal of rebut reports can increase the number of expert reports further with the consequences that the expert statements soon become hundreds or thousands of pages, photos, video files or other technical details that lawyer arbitrators have little or no possibility to evaluate by themselves. Another common problem with expert reports from party appointed experts is that they usually work in isolation and can take incompatible approach in answering the same question and they sometimes also disagree on the question itself. This increases the need for support of tribunal appointed experts for tribunals consisting of only lawyers.

In an effort to reduce the documentation and sharpen the focus on the issues in dispute, a practice of joint expert reports has been introduced. The tribunal then asks the experts to work together to identify the major issues and submit a joint expert opinion on them.

9.3.3 Impact on procedural timeline

Cost, lack of effective sanctions during the arbitral process and lack of speed were considered the worst characteristics of international arbitration in the 2015 and 2018 Queen Mary University surveys presented before. The initial mission with international arbitration to establish a fast and cost-effective dispute resolution method is therefore not reflected in the survey results. The arbitration timeline from the tribunal establishment to closure of the

305 Nigel Blackaby and others (n 1) 375, 6.74.
306 See ch 7.5
307 LCIA (n 303) 12.
308 ibid 13.
309 See Figure 9
proceedings can be divided into few sections depending on the different activities taking place in each period, as outlined in the following figure.

![Figure 19 Schematic timeline of an arbitration process](image)

The required time for the initial steps of tribunal establishment and definition of scope and procedural methods depend heavily on the content of the arbitration agreement. If the arbitration agreement is incomplete the required time needs to be extended to decide on missing items such as the seat of arbitration. Institutional arbitrations will in these cases benefit from their applicable arbitration rules and administrative support provided by the institutions, while tribunals for *ad hoc* arbitration tribunals will have to resolve those issues themselves. In any case, their resolution will always need additional time while the parties can with careful drafting of the arbitration agreements avoid such delays. Non-lawyer arbitrators will only be able to take limited part in resolving the important questions during this part and their appointment may therefore possible delay the process in those cases but well-balanced tribunal with experienced arbitrators with legal and non-legal background may also be well equipped to handle the situation.

In their effort to produce the documentary evidence for a tribunal containing expertise on the subject matter of the dispute, the parties may be able to reduce the required detailed descriptions of issues and events that mark the dispute. Even though the arbitrators may not be very busy during this period the impact of the tribunal composition can have great impact on the required time and also the effort and hence cost that the parties need to put into the documentary evidence.

The time it takes the tribunal to review the documentary evidence will also be impacted by the extent of documentary evidence. A well balance tribunal with all the required legal and non-legal expertise can speed up the review and improve the tribunal understanding of the important aspects of the dispute. The same level of understanding may not be reached through the use of lengthy documentary evidence and expert reports. That is an important aspect because the
arbitrators must discuss their findings and seek to resolve the dispute during the deliberations and the level of their understanding can influence the outcome and therefore the award as well. The foundations for well-reasoned awards will only improve with the expertise within the tribunal itself as opposed through various expert reports.

The need for tribunal appointed experts should be drastically reduced and the time that they need for their evidentiary review and writeup of reports should be shortened and can possible be eliminated, saving both time and cost. The complexity in scheduling of hearings is directly related to the number of individuals required at the hearings and by reducing the number of appointed experts the scheduling will be simplified and potential delays can be avoided.

The reduced effort in the production of documentary evidence by the parties, because of reduced need for detailed explanations, will lead to reduced cost of their production and their study by the tribunal. A reduced need for tribunal appointed experts will also reduce the administrative tasks of the tribunal. When arbitrators’ fees are based on hourly rates and accumulated hours, it is obvious that the cost related directly to the arbitrators will decrease with reduced number of documentary evidence and less time to review such evidence. Cost will also be reduced because of reduced administrative complexity due to appointment of tribunal appointed experts. The cost for hearings and their administration will also decrease because of smaller facilities and reduced time for the hearings.

9.4 Impact on internal dynamics of the tribunal

The fundamental principle of tribunals is to gather the expertise within the tribunal to ensure thorough understanding of the issues of the dispute and allow for effective deliberation amongst the arbitrators where they jointly discuss all the different aspects of the case, legal and non-legal, and come to a decision based on the deliberation. The tribunal itself decides on its internal cooperation (9.4.1) and how it manages its work and distributes responsibilities of analysing the different legal and non-legal aspects of the case. It is the responsibility of the tribunal to act as one team (9.4.2) and because of the different background of the arbitrators, whether they are all lawyers or not, the arbitrators most likely divide the responsibility based on their legal and non-legal expertise.
9.4.1 Internal tribunal distribution of work

As discussed at the beginning of this chapter, the perfect arbitrator would have all the non-legal expertise concerning the dispute as well as thorough knowledge of the applicable legal regime to ensure the required quality assurance of both the proceedings and the eventual award. For majority of cases, those individuals are nearly impossible to find. The approach of arbitration is therefore to include specialists with different background to encompass the required knowhow within the tribunal. The primary reason for a three-arbitrator tribunal instead of a sole arbitrator is a believed that the quality of the awards in complex cases will in general be better ensured with multiple arbitrators sitting in the tribunal. Increased knowledge within the tribunal brings also increased diversity in opinions to the deliberations and writing the award as discussed before.

While the power of all arbitrators is equal when it comes to deciding the dispute, the presiding arbitrator is often provided with increased authority to decide on procedural arbitral matters. Because of the importance of the role, the presiding arbitrators should preferably be experienced arbitrator with an extensive knowledge of the arbitration legislation as well as the legal field of conflicts of law. In a tribunal with a mixed background, including one or two non-lawyer arbitrators, the role of the presiding arbitrator becomes even more important than when all the arbitrators have a legal background. The presiding arbitrator will then have to safeguard the principles of the proceedings, the due process and the right to be heard, in order not to risk the enforceability of the award.

Just as the presiding arbitrator should have a legal background, the same arguments apply to a sole arbitrator. In extreme cases one might however see a very experienced non-lawyer arbitrator in the role of a sole arbitrator, but a risk of a negative court review because of non-legal background raises a doubt of the feasibility. The primary concerns would be the potential obstruction of the parties’ right to be heard, requirement of due process and formulation and reasoning of the awards.

310 See introduction to chapter 9
311 Margaret L Moses (n 22) 128, 6.2.b.
312 See ch 4.4
313 D.M. Lew, A. Mistelis and M Kröll (n 10) 234, 10–39.
9.4.2 “One team” versus “divided team”

The arguments for including non-lawyer arbitrators with expertise in subject matter of the dispute are to include within the tribunal the expertise required to establish the best solution of the dispute. The practice of increasing the expertise in the tribunal has however generally been to appoint lawyers with diverse knowledge of the different fields of law rather than engaging non-lawyer expertise within the tribunal. One possible reason for this could be a psychological threshold among lawyer arbitrators and the parties’ counsels to accept that a non-lawyer arbitrator with the right expertise can be of greater value for the dispute resolution than a second or third lawyer. Rather than recognizing the benefit of the technical expertise within the tribunal, the outcome could be an isolated non-lawyer arbitrator whose expertise will be ignored by the lawyer arbitrators. This could possibly happen because of the human nature for sympathy for one’s companions and distrust on the unknown, reflected in that lawyers are more likely to find a match in other lawyers than in experts of other professions. This issue was raised by Blackaby and co-authors in the following quotation.

However, if the presiding arbitrator is likely to be a lawyer, a party should consider carefully before nominating a technical arbitrator in cases in which the other party has nominated a lawyer. This combination may result in the arbitral tribunal having two lawyers ‘against’ a technical expert arbitrator. As concluded multiple times in this work, it is preferable that the presiding arbitrator should be an experienced arbitrator with a legal background when non-lawyer arbitrators are part of the tribunal. This is due to the importance of the presiding arbitrator’s role for the quality assurance of the proceedings. The presiding arbitrators’ importance is also reflected in the fact that they are compensated at higher level of hourly rate than the co-arbitrators or they might receive extra payment for their services. The presiding arbitrator is generally, by most arbitration rules, the last arbitrator to be appointed when party appointments are used. If the concerns raised above are the guideline for the parties in their selection of potential arbitrator, it could result in hesitation from the parties to use their freedom to select non-lawyer experts because they might interpret this such that “their arbitrator” would lose weight in the tribunal. There should however be no such thing as “their arbitrator,” because all arbitrators shall be

314 Born (n 2) 146, §7.01[D][4].
315 Nigel Blackaby and others (n 1) 248, 4.57.
impartial, and they should respect due process requirements in their work. As outlined in the discussions about the arbitrator contracts, the arbitrators have the same duties to both parties irrespective of who appointed them. A non-lawyer expert might however be very beneficial for the solution of the dispute.

10 Conclusions

There is a clear demand among users of international arbitration for improved efficiency of arbitral proceedings. This is reflected in the results of the 2015 and 2018 Queen Mary University arbitration surveys where 68% of the surveys’ participants named cost the worst feature of international arbitration. Lack of speed and methods to keep the arbitration momentum going (effective sanctions) had also very negative score. Both time and cost concerns, who generally define the efficiency of arbitral proceedings, can be addressed with appointments of arbitrators with expertise in the subject matter of the dispute.

Research question 1:

The principal scope of the arbitrators is to resolve a defined dispute based on the arbitration agreement, the applicable law and the facts of the case. In doing so, the arbitrators have to respect the judiciary requirements of due process, fairness and the parties’ right to be heard. These fundamental requirements mean that in practice at least one arbitrator in a multi member tribunal, preferably the presiding arbitrator, should be a lawyer. A sole arbitrator should also preferably be a lawyer (or otherwise a professional who is very experienced in the field of international arbitration). Otherwise, there is an increased probability that an award from a sole arbitrator or a tribunal that does not include an arbitrator with a legal background, will not sustain scrutiny by a court or the applicable enforcement authority in case of a post award challenge.

So, what impact will an appointment of a non-lawyer arbitrator with expertise in the subject matter of a dispute have on the different tasks of the arbitral proceedings?

The need for the parties’ production of extensive documentary evidence aimed to explain complex commercial or technical details for the arbitrators will be reduced. The number, interaction and sequence of the various details can result in complex disputes which resolution

317 See Chapters 7.3 and 9.3.2
requires expertise knowledge on the subject matter. With the expertise inside the tribunal the need for expert opinions from party and tribunal appointed experts will consequently be reduced. The time and effort needed by the parties for production of extensive documentary evidence influences the parties’ cost. Sir Rupert Jackson, a renowned former High Court judge in England, recently stated the parties’ cost is “the lion’s share” of the cost of arbitration.\textsuperscript{318} With reduced need for details, the parties should however be able to provide the documentary evidence in shorter timeframe and at reduced cost, and hence contributing to increased arbitral efficiency.

The arbitrators’ effort to analyse the evidence will also be affected by reduced volume of documentary evidence. The reduced volume will also result in reduced time needed for the tribunal to familiarize itself with complex details.\textsuperscript{319} That contributes also to improved efficiency.

The need for expert opinions from party appointed experts should generally be reduced as well, resulting in fewer and shorter expert reports.\textsuperscript{320} The need for additional expert opinions from tribunal appointed experts should however be reduced seriously and possibly eliminated altogether. The reduced need for expert opinions will be reflected in the cost associated with the services of the experts and less time needed for arbitrators’ review of the expert opinions.

Management of hearings will benefit from reduced number of participants because of easier scheduling and shorter hearings.\textsuperscript{321} The impact on the deliberations and writing of the award is not as clear. Due to reduced need for establishing the tribunal understanding of the commercial/technical details, one can however foresee that the deliberations will be more efficient. The impact on the quality of the tribunal deliberations and the award will however without a doubt be improved because of the expertise within the tribunal rather than having the arbitrators basing their deliberations and decisions on expert opinions.

\textsuperscript{318} Jackson (n 253).
\textsuperscript{319} See Chapter 9.3.3
\textsuperscript{320} See Chapters 7.5 and 9.3.3
\textsuperscript{321} See Chapter 9.3.3
Based on these conclusions, the first research question:

1. Are appointments of non-lawyer arbitrators with expertise on the subject matter of the dispute likely to increase the efficiency in international arbitration?

must be answered positively.

**Research question 2:**

The risk of non-enforceability is primarily related to arbitrators breaching the requirements of due process, the right to be heard and impartiality.\textsuperscript{322} The risk of non-lawyer arbitrators breaching these *magna carta* requirements of arbitration must be considered greater than for lawyer arbitrators. As discussed throughout this thesis, and especially in Chapter 9, the increased risk can however be mitigated with an experienced presiding arbitrator who will have a leading role in safeguarding these principles during the proceedings.

The requirement of judicial thinking is important for an award to be legally fair to the parties. However, because awards that are based on misapplication of the law are not a ground for non-enforceability, the lack of judicial thinking does not cause a major threat to enforceability.\textsuperscript{323} Lack of judicial behaviour would on the other hand breach the due process requirement as was discussed in the previous paragraph. Again, with mitigating efforts of an experienced presiding arbitrator the risk does not overshadow the likely increased procedural efficiency.

Based on the discussions, the second research question,

2. Do the risk of non-enforceability or lack of a juridical thinking overshadow potential benefits of such appointments?

must be answered negatively due to the great potential increase in efficiency of the arbitration.

**Research question 3:**

As outlined in Chapter 8, international arbitration has great resemblance to projects and application of professional project management methods in arbitration will bring benefits for the planning and managing of the proceedings. Formal cost estimation and an agreement of baseline budget for *ad hoc* and institutional arbitrations that are based on hourly rates, will bring benefit for the parties. Due to the little experience with arbitration of some parties, they cannot visualize the cost which can build up during the arbitration. Transparency will be

\textsuperscript{322} See ch 2.1.4 & 9.1.5

\textsuperscript{323} See ch 2.1.4 & 9.1.5
increased with a formal baseline budget, which in turn the tribunal can use to control the cost as the proceedings progress. The cost estimate will also give the parties a chance to re-define the extent of documentary evidence, use of expert opinions and extent of hearings if they find the cost estimate to be too high. The parties will therefore be given a chance to decide how much they want to invest in the dispute resolution instead of the cost building up without their formal approval.

Development of a formal time schedule based on planning methods from project management can bring a baseline schedule which the arbitrators can manage throughout the proceedings using project management scheduling methods. This will lead to better focus of the parties and the tribunal on maintaining the objectives to resolve the dispute within the given time and cost and should lead final arbitration time and cost closer to the parties’ expectations. That in itself will be an improvement. Without the cost and schedule baselines there is no common ground for the parties and the tribunal to evaluate the efficiency of the proceedings and the expectations might be far apart.

The third research question,

3. Is expertise in project management likely to improve case management and procedural efficiency in international arbitration?

will therefore have to be answered positively.

**Selection criteria for arbitrators with expertise in the subject matter of a dispute**

The diversity of disputes resolved by international arbitration calls for a systematic method for selection of arbitrators as proposed by Earnest and his co-authors. When establishing the requirement of the arbitrators’ professional qualifications, the benefit of a mixed tribunal of lawyers and experts of other relevant professions should be evaluated carefully. For disputes that evolve primarily around legal issues and there is no need for different expertise within the tribunal, the selected arbitrators should all have legal background. For disputes that mainly evolve around commercial or technical details, the results of this work suggest that the circle of professions should be expanded to include the relevant expertise for the benefit of the quality of the resolution and the potential improvements on the efficiency of the arbitration. In addition, the selection criteria for arbitrators of all backgrounds (lawyer and non-lawyers)

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324 See ch 9.3.3
325 Earnest and others (n 21); Wee ch 6.1
should include the arbitrators’ qualifications in project management because of the potential improvements on the procedural efficiency. The project management expertise might also be a required expertise for the dispute resolution in some cases but would generally be supplemental qualifications of arbitrators with other required expertise. That would also apply to lawyers with education or experience in the field of project management.

Arbitration institutions are in an ideal position to act and materialize the benefits of appointing arbitrators with expertise in the subject matter of the dispute. It is the authors view that when the arbitration institutions are in the position of selecting and appointing all of the arbitrators, they should evaluate in a systematic way whether the subject matter of the dispute calls for non-legal expertise. To facilitate a systematic evaluation, the institutions could develop guidelines where benefits of project management and process flow mapping can be implemented.

Due to the potential benefits on the efficiency of arbitral proceedings associated with appointments of arbitrators with expertise in the subject matter of the dispute, the institutions who carefully evaluate the alternative and increase the appointment of arbitrators with non-legal background, may end up improving their competitive status among international arbitration institutions.

When drafting the arbitration agreements, the parties can take advantage of specialized arbitration rules that may be available for their given business. The American Arbitration Association has for example established a series of specialised arbitration rules for the different types of disputes.326

When faced with the task of selecting arbitrators, the parties and the arbitration institutions should carefully evaluate the need and benefit of expertise on the subject matter of the dispute. They should keep an open mind because for some disputes the resolution and the arbitral proceedings may be better served by a tribunal with mixed legal and non-legal expertise than legal only.

Appendix 1 Flow diagrams for arbitrations based on the ICC Arbitration rules

Figure A1 Appointing mechanism of the ICC arbitration rules – Initial steps (See Figure 14)
Figure A2: Appointing mechanism of the ICC arbitration rules – Appointment of single arbitrator tribunal

**Appointment of single arbitrator tribunal**

**ICC Arbitration process: Standard establishment of tribunal**

1. **Proposing mechanism**
   - **National Committee**
     - **Proposal**
     - **No:** Seek proposal from a national committee (13.3)
     - **Yes:** Propose an arbitrator
   - **ICC Court**
     - **No:** Identify arbitrator candidate
     - **Yes:** Approve arbitrator
       - **Yes:** Appoint the sole arbitrator
       - **No:** Reject arbitrator and seek new arbitrator
   - **ICC Secretariat**
     - **Proposition accepted?**
       - **No:** Seek another proposal?
       - **Yes:** Proceed with arbitrator appointment
     - **30-day time limit (12.2)**
   - **Sole arbitrator**
     - **No:** Identify arbitrator candidate
     - **Yes:** Sole arbitrator declaration on independence and impartiality (11.3, 13.1)
     - **Declaration on independence and impartiality (11.3)**
Figure A3 Appointing mechanism of the ICC arbitration rules - Appointment of three arbitrator tribunal (See Figure 16)
Figure A: Simplified illustrative explanation of tribunal establishment of scope and establishment of procedural methods and first part of establishment of the facts of the case, based on the ICC Arbitration rules. (See Figure 17)
Arbitral proceedings – post tribunal establishment

Respondent

Claimant

Tribunal

Establishing the facts of the case

Additional evidentiary documents?

Yes

No

Prepare additional evidentiary documents

Submit additional evidentiary documents to Claimant

Additional evidentiary documents

Respondent's arguments, evidentiary documents, facts and expert witness statements, case law

New evidentiary and witness statements concerning information in Respondent's Memorandum

Rebuttal: Respondent's arguments, evidentiary documents, facts and expert witness statements, case law

Rebuttal: New evidentiary and witness statements concerning information in Respondent's Memorandum

Rebuttal: Additional evidentiary documents

New evidentiary and witness statements concerning information in Claimant's additional evidentiary documents

Additioanl evidentiary documents

Additional evidentiary documents

Submit new evidentiary documents to Respondent

Additional evidentiary documents

Figure A5 Simplified illustrative explanation of the second part of establishment of the facts of the case up to hearings, based on the ICC Arbitration rules. (See Figure 18)
Appendix 2 Participants in Queen Mary University arbitration surveys

Figure A6 Survey participants roles/positions
Appendix 3 UNCITRAL Model Law status map

Figure A7 Map showing an overview of countries that have implemented the UNCITRAL Model Law as their national arbitration laws.
Appendix 4 IBA General Standard on Conflict of interest

Part II: Practical Application of the General Standards

1. If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today’s arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. For this purpose, the Guidelines categorise situations that may occur in the following Application Lists. These lists cannot cover every situation. In all cases, the General Standards should control the outcome.

2. The Red List consists of two parts: ‘a Non-Waivable Red List’ (see General Standards 2(d) and 4(b)); and ‘a Waivable Red List’ (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).

4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator’s impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, he or she can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification.

5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.

6. Situations not listed in the Orange List or falling outside the time limits used in some of the Orange List situations are generally not subject to disclosure. However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts as to his or her impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is ‘yes’, the arbitrator should consider a disclosure.

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based
on reasonableness; in some situations, an objective test should prevail over the purely subjective test of ‘the eyes’ of the parties.

8. The borderline between the categories that comprise the Lists can be thin. It can be debated whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as ‘significant’ and ‘relevant’. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive.

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

2.2 Arbitrator’s direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.

2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute. (Throughout the Application Lists, the term ‘close family member’ refers to a: spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.)

2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3 Arbitrator’s relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration. (Throughout the Application Lists, the term ‘affiliate’ encompasses all companies in a group of companies, including the parent company.)

2.3.5 The arbitrator’s law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

2.3.6 The arbitrator’s law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.
3. Orange List

3.1 Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

3.1.4 The arbitrator’s law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

3.2 Current services for one of the parties

3.2.1 The arbitrator’s law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.2.2 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator’s law firm renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

3.2.3 The arbitrator or his or her firm represents a party, or an affiliate of one of the parties to the arbitration, on a regular basis, but such representation does not concern the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers’ chambers.

3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.

3.3.4 A lawyer in the arbitrator’s law firm is an arbitrator in another dispute involving the same party or parties, or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personal friendship exists between an arbitrator and a counsel of a party.

3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

3.3.9 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.

3.4 Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator’s law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.

3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.
3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.5 If the arbitrator is a former judge, he or she has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.

3.5 Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.

3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1 Previously expressed legal opinions

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

4.2 Current services for one of the parties

4.2.1 A firm, in association or in alliance with the arbitrator’s law firm, but that does not share significant fees or other revenues with the arbitrator’s law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.

4.3 Contacts with another arbitrator, or with counsel for one of the parties

4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.

4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.

4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.

4.3.4 The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.

4.4 Contacts between the arbitrator and one of the parties

4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this 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, other than to provide the arbitrator with a basic understanding of the case.

4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.

4.4.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case.

4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.
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