CHAPTER 26

Transparency and Stakeholders' Role in the Selection of the Arbitral Tribunal

Ali Yeşilırmak

§26.01 INTRODUCTION

International arbitration has been ever evolving since the introduction of modernized arbitration rules in the last century.[1] The evolution is very much related to the satisfaction of users and other stakeholders of arbitration. One of the evolving areas is transparency. The issue of transparency mainly derived from investment arbitration[2] for the protection of public interests, but has been adopted to cover wider interests, needs and dynamics in international commercial arbitration.

Transparency touches upon many aspects of international commercial arbitration; selection/appointment of arbitrators, the arbitration process, orders and awards etc. Perhaps one of the most important of all is the selection/appointment of arbitrators. This is because 'arbitration is only as good as its arbitrators.'[3] The selection/appointment of arbitrators generally has a direct effect on the quality of arbitration. The users of arbitration desires to have predictable and just decision-making. Thus, transparency is directly related to independence and impartiality of arbitrators, due process and accountability.

1. On the evolution of arbitration, *see, e.g.*, Gary B. Born, *International Commercial Arbitration* 7 etc. (3rd ed. Kluwer 2021); Ali Yeşilırmak, *Provisional Measures in International Commercial Arbitration* 19 etc. (Kluwer 2005).
2. *See, e.g.*, Judith Gill, *Chapter 11: Transparency: Is It Really Needed and to What Extent?* in *Players Interaction in International Arbitration* 106 etc. (Bernard Honatiou & Alexis Mourre eds Dossiers of the ICC Institute of World Business Law, vol. 9, 2012).
3. *See, e.g.*, Lord Hacking, *Arbitration is Only as Good as Its Arbitrators* in *Liber Amicorum Eric Bergsten – International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* 223 etc. (Stefan Kröll, Loukas A. Mistelis, Perales Viscasillas Maria del Pilar & Vikki M. Rogers eds Kluwer Law International 2011).

Many steps have been taken for greater transparency over the last decade or so, mainly because of the above reasons. Competitive pressures among the arbitral institutions should be added to those reasons.[4]

This note reviews and analyses the following stakeholders' role in respect of transparency in the selection/appointment of arbitrators in international commercial arbitration:[5] (a) the International Bar Association and its soft law on conflicts of Interest, (b) role of arbitration institutions,[6] and (c) private initiatives.

§26.02 IBA GUIDELINES ON CONFLICTS OF INTEREST

One aspect of transparency is the disclosure of any circumstance that may give rise to independence and impartiality of arbitrators. IBA Guidelines on Conflicts of Interest in International Arbitration[7] (IBA Guidelines) deals with conflicts of interest in international arbitration. General Standard 3 of the IBA Guidelines sets out a general disclosure requirement for disclosure by arbitrators:

> (a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment 7 or, if thereafter, as soon as he or she learns of them.

This general disclosure standard articulated by non-exhaustive examples of specific situations as set out in the Application List of the IBA Guidelines. There are essentially three lists: Red List, Orange List, and Yellow List. The disclosure is required for situations set out in the Red List. The arbitrator applies the General Standards to decide on a case-by-case basis, whether disclosure should be made for the situations set out in the Orange List. There is no requirement of disclosure for the situations set out in the Yellow List. Some examples of situations from the (Red and Orange) Application List are:

- if the arbitrator is a party to the dispute or representing such party;
- if arbitrator is managing or controlling the party;
- if arbitrator has financial or personal interest in the dispute;

4. Catherine A. Rogers, *Chapter II: The Arbitrator and the Arbitration Procedure, Transparency in Arbitrator Selection* in *Austrian Yearbook on International Arbitration* 75 (Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nicholas Pitkowitz, Jenny Power, Irene Welser & Gerold Zeiler eds Manz'sche Verlags- und Universitätsbuchhandlung 2016).
5. Transparency in investment arbitration will not be dealt with.
6. This chapter will mainly focus on the approach on disclosure of arbitrators of the most preferred arbitration institutions: the International Chamber of Commerce (ICC), Swiss Arbitration Center (SAC), Hong Kong International Arbitration Centre (HKIAC), London Court of International Arbitration (LCIA), and the Chinese International Economic and Trade Arbitration Center (CIETAC). The list is acquired from the survey of Queen Mary University. *See* 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.
7. Adopted 2004 and revised in 2016.

- if the arbitrator regularly advises to the party or its affiliates;
- if arbitrator has given legal advice/opinion or prior involvement in the case;
- if the arbitrator has a relationship with the parties or counsel;
- if the arbitrator or her law firm has, within past three years, served as counsel for one of the parties or its affiliate;
- if one of the parties, its affiliate or any of the law firm involved has appointed an arbitrator on two or more occasions by within last three years;
- if the arbitrator or her law firm represents, not concerning the current dispute, a party or its affiliate on a regular basis;
- if the arbitrator was affiliated with another arbitrator or any of the counsel in the arbitration;
- if the arbitrator's law firm is currently acting adversely to one of the parties or its affiliate;
- if the arbitrator has publicly advocated a position regarding the case; and
- if the arbitrator holds a position with the appointing authority concerning the dispute.

The IBA Guidelines are of soft law in nature or 'non-binding set of principles'.[8] Despite this fact, the Guidelines are often used and widely accepted in international commercial arbitrations.[9] The Guidelines set the general standard for arbitrator conflicts of interest in international arbitration and will undoubtedly be consulted with by arbitrating parties, arbitrators, arbitration institutions and national courts.

§26.03 INSTITUTIONAL RESPONSES FOR FOSTERING TRANSPARENCY IN ARBITRATOR APPOINTMENT/SELECTION PROCESS

A number of arbitration institutions has taken various steps for fostering transparency.

8. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* 258 (6th ed. Kluwer Law International; Oxford University Press 2015).
9. Report on the Perception of the IBA Arbitration Soft Law Products, para. 101. In the ICC experience, IBA Guidelines reportedly used 60% of the cases analysed by the ICC Court of International Arbitration. *See also* Simon Greenberg & José R. Ferris, *References to the IBA Guidelines on Conflict of Interest in International Commercial Arbitration when Deciding on Arbitrator Independence in ICC Cases*, 20(2) ICC Court of Arb. Bull. 33 (2009); Andrea Carlevaris & Rocio Dign, *Arbitrator Challenges under the ICC Rules and Practice*, 23(1) ICC Disp. Res. Bull. (2016); Álvaro López de Argumedo Piñeiro, *Interaction Between the IBA Guidelines on Conflict of Interest of Arbitrators and the ICC Arbitration Rules*, 143(44) Spain Arb. Rev.: Revista del Club Español del Arbitraje (2022). For practice regarding the IBA Guidelines under other arbitration institutions, *see* Geoff Nicholas & Constantine Partasides, *LCIA Court Decisions on Challenges of Arbitrators: A Proposal to Publish*, 23 Arb. Int. 1, 3 (2014). For national court decisions referring to the IBA Guidelines *see, e.g.*, Diana Akikol, *Chapter 8: The View from the Swiss Courts on Conflict of Interest, Disclosure, Objection, and Challenges* in *Clear Path or Jungle in Commercial Arbitrators' Conflict of Interest?* 55, 68-70 (Felix Dasser ed. Kluwer Law International 2021); Paula Hodges, *Chapter 10: The View from the English Courts on Conflict of Interest: Halliburton and Beyond* in Dasser, *ibid.*, 91 etc.; Laurence Shore & Federico Alberto Cabona, *The View from U.S. Courts on Conflicts of Interest* in Dasser, *ibid.*, 115 etc. The IBA Guidelines referred to in several free trade agreements and even implicitly referred in Indian national law in 2015. *See* Felix Dasser, *Chapter 7: The View from the State Courts on Conflicts of Interest: Introduction* in *ibid.*, 47, 52.

[A] Submission of Statement of Acceptance, Availability, Impartiality and Independence

The submission of the Statement of Acceptance, Availability, Impartiality and Independence (ICC Statement) has long been the part of the ICC arbitration practice and aimed at enforcing the rules that ICC arbitrators have a duty, at all times, to act in an impartial and independent manner (Articles 11 and 22(4) of the ICC Rules of Arbitration). There are a similar disclosure requirements under the other institutional arbitration rules.[10]

The ICC Court of Arbitration adopted a reform in respect of disclosure requirements under the ICC Statement in 2016. As to what has to be disclosed, there is a general rule and a number of circumstances exemplified in the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ('ICC Note').

As a general rule in the ICC arbitration,[11] any circumstance that might be of such a nature as to call into question the arbitrator's independence in the eyes of any of the parties or give rise to reasonable doubts as to the arbitrator's impartiality must be disclosed. In making disclosure, the arbitrator should consider the following list of circumstances:[12]

- the arbitrator[13] or her law firm represents or advises, or has represented or advised, a party to the dispute or its affiliates;
- the arbitrator or her law firm acts or has acted against the party or its affiliate;
- the arbitrator or her law firm has a business relationship with the party or its affiliate, or a personal interest of any nature in the outcome of the dispute;
- the arbitrator or her law firm acts or has acted on behalf of the party or its affiliate as director, board member, officer, or otherwise;
- the arbitrator or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect her impartiality;
- the arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm;
- the arbitrator acts or has acted as arbitrator in a case involving the party or its affiliates;
- the arbitrator acts or has acted as arbitrator in a related case; and
- the arbitrator has in the past been appointed as arbitrator by the party or its affiliate, or by counsel to the party or the counsel's law firm.

10. *See* Article 12 of SAC Arbitration Rules; Article 11(4-5) of HKIAC Arbitration Rules; Article 5(4) of LCIA Arbitration Rules and Guidance Note paras 6-14; and Article 31 of CIETAC Arbitration Rules.
11. ICC Rules of Arbitration, Article 11(1).
12. ICC Note, para. 27.
13. For ICC list of circumstances, the reference to arbitrator also cover prospective arbitrator.

The above list contains similarities with and mainly derived from the list of situations set out in the IBA Guideline's Application List. The ICC's standard norms intend to supplement the latter.[14]

The ICC's list of circumstances for disclosure is of hard law in nature; that is to say contractually binding upon the arbitrator.[15] The ICC's standard norms for disclosure is wider as compared the IBA Guidelines.[16] In all circumstances set out in the ICC's list, disclosure from the arbitrator is expected.[17] Thus, the ICC's standards seem to foster further transparency. It is highly likely that other arbitration institutions will follow the ICC approach of having separate and wider standard norms (as compared to the IBA Guidelines) for disclosure of arbitrators.

[B] Availability of Arbitrators

One of the reasons for delay in arbitration proceedings is the overload of arbitrators.[18] Thus, the parties have a legitimate interest in being informed as to how busy the arbitrators are. The ICC, like other most preferred arbitration institutions, expects the prospective arbitrators to disclose relevant information regarding their availability. The prospective arbitrator should, in the ICC Statement, declare the number of arbitrations they are involved, their role[19] in such arbitrations and other commitments and their availability over the next 24 months.[20] If there is an objection of the lack of availability, the ICC may refuse to confirm the appointment.

The declaration on the availability of arbitrators generally demonstrates that the arbitrator has capacity and could spend appropriate time for the case at hand. Such a declaration, thus, in the view of the author, serves the satisfaction of the users' expectation to have a final award in a relatively short period of time. To this end, the author is of the view that other arbitration institutions could consider seeking similar information on the availability from prospective arbitrators.

[C] Sharing Information Regarding Arbitral Tribunals, Industry Sector and Law Firms Involved

In the past, arbitration institutions had shared no or little information about the arbitrators with public at large. The lack of information, in some cases, caused

14. It is rightly argued that the IBA Guidelines can work on a complimentary manner with ICC disclosure norms. Piñeiro, *supra* n. 9, 157.
15. Felix Dasser, *Soft Law in International Commercial Arbitration – A Critical Approach* in *Austrian Arbitration Yearbook on International Arbitration* 112 (Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nicholas Pitkowitz, Jenny Power, Irene Welser & Gerold Zeiler eds Manz'sche Verlags- und Universitätsbuchhandlung 2016); Piñeiro, *supra* n. 9, 144.
16. Piñeiro, *supra* n. 9, 148.
17. ICC Note, paras 20-21.
18. *See, e.g.*, Blackaby et al., *supra* n. 8, 249.
19. Whether they are acting as the president, sole arbitrator, co-arbitrator, counsel to a party, or funder.
20. ICC Note, para. 33.

criticisms towards arbitration as an institution.[21] In order to avoid those criticisms, certain actions were taken in institutional arbitration.[22] For instance, the ICC started to publish, on its website, the names of arbitrators (after the terms of reference was transmitted or approved by the ICC Court), their nationality, their role with the tribunal, their appointment method, whether the arbitration was pending or closed, industry sectors involved, law firms representing the parties, and the names of the administrative secretaries.[23] The author welcomes the ICC's approach in respect of sharing the above information and urges other arbitration institutions to follow the ICC's example.

[D] Sharing Information Regarding Challenges of Arbitrators

Arbitration institutions generally did not share with the parties the reasons for decisions made in respect of challenges against arbitrators. This approach has recently been changed by many institutions.[24] The leading institution for the reform on sharing reasons is the LCIA.[25] The LCIA not only shares the reasons for challenge with the parties to arbitration but also publishes, on its website, abstracts from the decisions on challenge.[26]

The ICC shares, upon request of a party, the reason for a decision on the challenge for an arbitrator (under Article 14 of the ICC Arbitration Rules).[27] Under exceptional circumstances, the ICC Court may decide not to communicate the reasons without the need of any request from a party.[28] A request could be made prior to the decision on a challenge by the ICC Court.[29]

The approach of both the LCIA and ICC are welcomed. The ICC has a rather cautious approach on sharing information concerning the reasons for challenges of arbitrators. It only shares the information, upon request with the parties with a

21. For those criticisms *see*, José R. Ferris, *New Policies and Practices at the ICC: Towards Greater Efficiency and Transparency in International Arbitration*, ICC Dis. Res. Bull. 13 etc. no. 2 (2016). The ICC Note refers to them as inaccurate or ill-informed criticisms. ICC Note, para. 50.
22. ICC Note, para. 50.
23. *Ibid.*, paras 51-53.
24. For recent initiatives by arbitration institutions, *see, e.g.*, Andrea Carlevaris, *Chapter II: The Arbitrator and the Arbitration Procedure, The Rise of Transparency in Arbitral Institutions' Decision-Makings* in *Austrian Yearbook on International Arbitration* 157, 159-162 (Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nicholas Pitkowitz, Jenny Power, Irene Welser & Gerold Zeiler eds Manz'sche Verlags- und Universitätsbuchhandlung 2021). Swiss Court of International Arbitration has started providing reasons on arbitrator challenge decisions, *see* Gabrielle Nater-Bass, *Chapter 6: SCAI's Approach to Conflicts of Interest* in Dasser *supra* n. 9, 35, 50.
25. *See, e.g.*, Peter Turner & Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* 79 (Oxford University Press 2009); Thomas Walsh & Ruth Teitelbaum, *The LCIA Decisions on Challenges: An Introduction*, 27(3) Arb. Int. 283 etc. (2011).
26. *See* https://www.lcia.org/challenge-decision-database.aspx.
27. ICC Note, para. 46.
28. *Ibid.*, para. 47.
29. *Ibid.*, para. 49.

caveat.[30] Ultimately, the approach of the LCIA for providing reasons to the parties and disseminating to public at large seems to be followed, in the author's view, by other arbitration institutions.[31] This is due mainly to the fact that, the LCIA's approach (a) assists the parties in better understand of the decision on challenge, (b) promotes predictability through uniform interpretation of standards, and (c) potentially protects arbitral awards from challenges.[32]

[E] Feeding Back to Arbitrators

The 2018 International Arbitration Survey[33] demonstrates that most of the users of arbitration services (mostly lawyers and in house counsels) wish to give feedback to the arbitrators. More than half of the arbitrators participated to the 2018 Survey desires to receive feedback from the parties.

The main benefits of having feedbacks in arbitration have many folds:[34]

- promoting confidence in arbitration;
- assisting arbitration institutions for their future appointments; and
- assisting in improvement of arbitrators' skills.

Some arbitration institutions, like the ICC and the HKIAC, receive feedback from the users (the parties and/or counsels) at the end of an arbitration.[35] The feedback is generally requested after the award is transmitted to the parties. For covering the whole service, it is logical to have feedback after the award is delivered. In such cases, in order to have a better understanding, particular attention should be given to whose (winning or losing party) feedback is being handled.

The feedback given provides, despite a number of impediments,[36] invaluable information about the quality of arbitration and arbitrators.[37] The feedback received is

30. The ICC Court keeps the power, in exceptional circumstances, not to share the reasons for the challenge.
31. Indeed, Born suggests that arbitration institutions must publish arbitrator challenge decisions. *See* Gary Born, *Institutions need to publish Arbitrator Challenge Decisions* (10 May 2010) http://arbitrationblog.kluwerarbitration.com/2010/05/10/institutions-need-to-publish-arbitrator-challenge-decisions/.
32. Carlevaris, *supra* n. 24, 168-171.
33. 2018 International Arbitration Survey: The Evolution of International Arbitration, https://arbitration.qmul.ac.uk/research/2018/.
34. *See* Paula Hodges, *Feeding Back to Arbitrators?*, (13 December 2018), http://arbitrationblog.practicallaw.com/feeding-back-to-arbitrators/.
35. *See* https://www.hkiac.org/news/rate-your-experience-hkiac-launches-arbitration-evaluation-system.
36. The feedback questions for the feedbacks are generally aimed at improvement of the arbitration practice of the institution but not particularly focused on analysing the quality of the arbitrators. Furthermore, not all parties respond to the surveys. *See* Rogers, *supra* n. 4, 79. Furthermore, the losing party may have emotional responses to the feedback questions. In addition, parties may fail to fill up the questionnaire for various reasons. *Ibid.*
37. There is always a risk that the losing party may exaggerate its negative comments on the arbitrators.

currently for internal use of the institution. However, it is the author's view that the transparency and confidence in arbitration could be better fostered if such feedbacks are

- designed to assess the quality of arbitrators and arbitration;
- transmitted to the arbitrators themselves; and
- with the advanced approval of the arbitrators, to third parties for considering arbitrator selection.

§26.04 PRIVATE INITIATIVES ON SELECTION OF ARBITRATORS

The 2018 International Arbitration Survey provides that 70% of the respondents have access to enough information to make an informed selection of arbitrators. Users generally rely on, according to the Survey, word of mouth from internal colleagues and publicly available information. There seems to be a room for improvement for selection of arbitrators. In order to satisfy the need and foster further transparency at the arbitration selection stage, a number of private initiatives emerged. These initiatives mainly are:[38]

- Arbitrator Intelligence (AI)[39]
- Dispute Resolution Data[40]
- Global Arbitration Review Arbitrator Research Tool.

The above tools essentially gather, by using artificial intelligence, publicly available information about the arbitrators and awards. They vary in gathering and putting forward the data gathered and surf through it. AI seems to go a step further to collect information on arbitrators through feedback questionnaires.

All private initiatives are welcomed. As publicly available information becomes more readily available and feedback questionnaires are responded by more participants, the initiatives will provide more accurate information for arbitrator selection. The author believes that the usage of private initiatives will steadily increase.

§26.05 CONCLUSION

Arbitrator disclosure is immensely important for the satisfaction of the users' desires and holding the integrity of arbitration as institution. To this end, the IBA Guidelines set the standard for arbitrator disclosure. The Guidelines are widely accepted and used

38. Daniel Schimmel et al., *Transparency in Arbitration*, Resource ID: W-013-1478 (Thomson Reuters 2018).
39. Initially launched by Queen Mary University and The Pennsylvania State University. *See* Catherine A. Rogers, *The International Arbitration Information Project: From Ideation to Operation* (10 December 2012) http://arbitrationblog.kluwerarbitration.com/2012/12/10/the-international-arbitrator-information-project-from-an-ideation-to-operation/.
40. *See* https://www.disputeresolutiondata.com/about_drd.

by arbitrating parties, arbitrators, arbitration institutions and national courts. Various arbitration institutions has taken steps, within past decade, to further foster disclosure concerning arbitrator selection/appointment:

- A statement of impartiality and independence is a tool that should be used for ensuring wide disclosure. The ICC's standard for disclosure foster wider transparency. Similar standard is expected to be followed by other arbitration institutions.
- The transparency on the availability of arbitrators is useful for satisfaction of users' needs and thus is expected to be used in the near future by major arbitration institutions.
- Sharing information regarding arbitral tribunals, industry sector, law firms involved will assist avoiding or minimizing criticisms towards arbitration. One would expect this trend to be followed by other arbitration institutions.
- Sharing reasons concerning arbitrator challenges with parties will in the near future have a great acceptance among arbitration institutions. However, disseminating such reasons to public at large may have creeping acceptance.
- Feedbacks are used by some arbitration institutions. Sharing feedbacks with arbitration institutions and arbitrators will in principle foster quality in arbitration.

Although, empirical studies demonstrate that word of mouth from internal colleagues and publicly available information is generally used for the selection of arbitrators, there is room for private initiatives that would objectively assist parties in selection of arbitrators. To this end, private initiatives on selection of arbitrators will be used more often in the near future.