THE INVESTMENT TREATY ARBITRATION REVIEW

SIXTH EDITION

Editor
Barton Legum

THE LAWREVIEWS

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review*, like that of last year, goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined many authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This sixth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions that continue to prevail today.

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Part III

Practical and Systematic Issues

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Chapter 18

SELECTION OF ARBITRATORS IN INVESTMENT ARBITRATION

Matthew Buckle[1]

I INTRODUCTION

It is a fundamental principle of resolving disputes by arbitration that parties should enjoy some degree of control over the selection of the arbitrators that will hear their dispute. In a commercial arbitration context, parties retain control over, at least, the process for selecting the arbitrators that will constitute the arbitral tribunal, even if not always over the identity of individual arbitrators themselves.

The flexibility to choose the process that will be followed, including the mechanics and any set of rules or any institutional support for the nomination and appointment of individuals, is a key advantage of arbitration over domestic litigation. In theory at least, these are issues that are open for negotiation between parties when concluding an arbitration agreement.

In the investment arbitration context, however, the claimant investor is never a party to the negotiation of the dispute resolution provision that it relies upon to commence investment arbitration proceedings. The basis of the arbitration agreement that founds the proceedings is instead ordinarily contained within the applicable investment treaty or regional investment and trade agreement, and is negotiated between the state parties to that accord.

Rather than in a negotiated arbitration agreement, the necessary consent to arbitrate in this context is found in:

a the offer to arbitrate made by the respondent state party in the relevant provision of the treaty; and

b that offer being accepted by the claimant investor when taking action (typically filing a request for arbitration or serving a notice of arbitration) that complies with the dispute resolution provisions of the rules specified in the treaty in question.

This means that the choice of applicable procedural rules (and with it the rules for the selection and appointment of arbitrators) is somewhat dictated to the claimant investor. This is mitigated, however, by the fact that investment treaties commonly provide the claimant investor with the option to choose between two or more different sets of rules pursuant to which the arbitral proceedings can properly be commenced.

Set out below is therefore an overview of the arbitrator selection procedures that apply under four of the most commonly incorporated sets of rules: the International Centre for

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Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) and the Stockholm Chamber of Commerce (SCC).

II PROCEDURE FOR ARBITRATOR APPOINTMENT UNDER MAJOR ARBITRATION RULES

Respecting party-autonomy in selecting arbitrators, the arbitration rules of the major arbitration institutions all follow a similar model. This promotes and prioritises an agreement between the parties on the number, process and selection of individual arbitrators, while being supported by a fall-back mechanism to address the possibility of the parties reaching a deadlock at any stage.

Each involves an appointing authority, either chosen by the parties or mandated by the rules, that will act to select an arbitrator in the absence of consensus. Where (as with the UNCITRAL Rules) there is flexibility over which institution might act as appointing authority, a default position is provided, with the identification of an individual office that will act as final decision-maker in the designation of an appointing authority that will then proceed to select an arbitrator.

The general objective of these processes and the default appointment mechanisms is to maintain fairness in the arbitrator selection process and to ensure the effectiveness of the arbitral process by providing certainty and finality in the constitution of a tribunal, circumventing any obstruction or inactivity by any of the parties.

i ICSID

ICSID is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Section 1 (Request for Arbitration) and Section 2 (Constitution of the Tribunal) of Chapter IV of the ICSID Convention address the commencement of ICSID arbitration and the constitution of the arbitral tribunal.

Article 37(2)(a) of the ICSID Convention provides that a tribunal must always consist of a sole arbitrator or any uneven number of arbitrators agreed by the parties. The parties are otherwise free to adopt any workable method of arbitrator appointment that suits their needs, including provisions on time limits and special procedures.

Absent a prior agreement of the parties, ICSID invites the parties to agree on the number of arbitrators and the method of their appointment at the stage when ICSID registers the request for arbitration filed by the claimant investor. From registration of the request for arbitration, the ICSID Convention Arbitration Rules (ICSID Rules) will apply to the dispute.

Rule 2 of the ICSID Rules provides a procedure and a timeline (with deadlines for exchanges of proposals and comments in response) that is designed to assist the parties in reaching an agreement on the number and method of selection of arbitrators to the tribunal.

In ICSID arbitration cases, the parties agree to the dispute being heard by three arbitrators, with the most common agreements for the selection of three-member tribunals being that:

a each party appoints one co-arbitrator, and the parties attempt to agree on the third arbitrator, the President of the Tribunal. If the parties fail to agree, the Secretary-General (or the Chairman of the Administrative Council) of ICSID appoints the President; or

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b each party appoints one co-arbitrator, and the co-arbitrators attempt to agree on the third arbitrator, the President of the Tribunal. If the co-arbitrators fail to agree, the Secretary-General (or the Chairman of the Administrative Council) of ICSID appoints the President.

If no agreement on the number of arbitrators and the method of their appointment is reached within 60 days after registration of the request for arbitration, either party may request the application of the default selection formula under Article 37(2)(b) of the ICSID Convention.

According to that default formula, the tribunal will consist of three arbitrators where each party appoints one co-arbitrator and the parties attempt to agree on the third arbitrator who shall be the President of the Tribunal (once again preserving party autonomy at the heart of the process).

Rule 3 of the ICSID Rules then sets out further guidance, providing that the first party to appoint an arbitrator shall also propose a candidate to serve as President of the Tribunal. The other party then appoints an arbitrator and either agrees to the appointment of the arbitrator proposed for President by the other side or else proposes another candidate. If a counter-proposal is made, the party making the first appointment then indicates whether it agrees to the counter-proposal.

It is only at this stage, if the parties remain deadlocked, and the tribunal cannot be appointed within 90 days after notice of registration of the request has been dispatched by the Secretary-General, that the Chairman of the Administrative Counsel shall, at the request of either party and after consulting both parties as far as possible, appoint any arbitrator or arbitrators not yet appointed (Article 38 of the ICSID Convention).

To ensure impartiality of the panel, arbitrators appointed by the Chairman pursuant to Article 38 shall not be nationals of the state party to the dispute or be of the same nationality as the claimant investor. Further, while parties do not need to appoint arbitrators from the ICSID Panel of Arbitrators, arbitrators appointed by the Chairman pursuant to the default procedure under Article 38 must be members of the ICSID Panel (Article 40 of the ICSID Convention).

ii UNCITRAL

The Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Rules) contain extensive provisions setting out the procedure for the appointment of arbitrators and are a common alternative to institutional arbitration in many investment treaties.

Unlike the rules of ICSID, the ICC or the SCC, arbitrations under the UNCITRAL Rules are not by default administered by any arbitral institution and an investment arbitration under a treaty providing for the resolution of disputes under the UNCITRAL Rules is commenced by notice from the claimant investor to the state respondent (under Article 3). Article 3(3)(g) of the UNCITRAL Rules requires that, unless the parties have reached prior agreement, the Notice of Arbitration shall contain a proposal as to the number of arbitrators. Depending on the number of arbitrators proposed, a Notice of Arbitration may contain a proposal for the identity of a sole arbitrator; a proposal for the designation of an appointing authority (to assist in the event of deadlock) or notification of a nomination of arbitrator if three arbitrators are to be appointed (Article 3(4)).

The state respondent is required to communicate its response to the Notice of Arbitration under Article 4(1) within 30 days of receipt. This must include a response to any

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proposal on the number of arbitrators (Article 4(1)(b)) and may include counter-proposals for the nomination of a sole arbitrator and designation of an appointing authority or may notify of a nomination of an arbitrator if three arbitrators are to be appointed.

Pursuant to Article 8 of the UNCITRAL Rules, if the parties have agreed that a sole arbitrator is to be appointed, but they have not, within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator, reached agreement upon the identity of the sole arbitrator, that sole arbitrator shall be appointed by the appointing authority.

If three arbitrators are to be appointed, the default procedure under Article 9 of the UNCITRAL Rules is that each party has a right to appoint one arbitrator. The two arbitrators thus appointed then choose the presiding arbitrator of the arbitral tribunal. If, within 30 days after the receipt of a party's notification of the appointment, the other party has not notified the first party of its choice of an arbitrator, the first party may request the appointing authority to appoint the second arbitrator. Finally, if the two arbitrators reach a deadlock in choosing the presiding arbitrator, the latter will also be selected by the appointing authority.

Pursuant to Article 6 of the UNCITRAL Rules, if the parties fail to agree on the choice of appointing authority, within 30 days after a proposal has been received by all other parties, then any party may request that the Secretary-General of the Permanent Court of Arbitration at the Hague (the PCA) designates an appointing authority. The Secretary-General of the PCA may designate a substitute appointing authority if the first appointing authority fails or refuses to act to select an arbitrator within 30 days after a party's request to do so. The Secretary-General may also act as appointing authority, if the parties agree.

When acting as the appointing authority and tasked with appointment of a sole or presiding arbitrator, the Secretary-General will generally follow the list-procedure as set out in Article 8(2) of the UNCITRAL Rules. This procedure is to be used by any appointing authority required to select an arbitrator, unless otherwise agreed by the parties, or determined to be inappropriate in the discretion of the appointing authority in the circumstances of the case.

This procedure commences by the appointing authority communicating to each of the parties an identical list containing at least three names of proposed appointees. Within 15 days from receipt of the list, each party may return it to the appointing authority after having: (1) deleted the name (or names) to which it objects; and (2) numbered the remaining names on the list in the order of its preference. The appointing authority will then appoint the arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties.

The appointing authority's selection of arbitrator (following the list-procedure or otherwise) is not limited to any list or panel, and the Secretary-General is free to choose the most appropriate person for the matter at hand.

iii ICC

Arbitration under the Arbitration Rules of the International Chamber of Commerce (the ICC Rules) is commenced by filing a request for arbitration with the ICC Secretariat pursuant to Article 4 of the ICC Rules. This requires that the claimant investor include all relevant particulars and any observations concerning the number, process for appointment and choice of arbitrators. The state respondent is thereafter required to provide (under Article 5 of the ICC Rules and within 30 days) any observations of its own in response.

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As with the other arbitration rules discussed above, the procedure for the nomination and appointment of arbitrators differs depending on whether the parties have agreed to appoint a sole arbitrator or a three-member tribunal.

If the parties have agreed to a sole arbitrator, they may nominate an arbitrator by agreement within 30 days of the Request, failing which the ICC Court (as the default appointing authority under the ICC Rules) appoints an arbitrator (Article 12.3).

If three arbitrators are to be appointed, the parties must each nominate an arbitrator in their Request and Answer, respectively. The third arbitrator is then selected by the ICC Court unless there is an alternative procedure agreed for nomination (Article 12.4).

Article 12.2 contains default provisions if the parties do not agree on the number of arbitrators. In such a scenario, the ICC Court appoints a sole arbitrator, unless it considers that the circumstances of the case warrant the appointment of a three-member tribunal. In the latter case, the ICC Court requests that each of the parties nominates one arbitrator and the ICC Court then proceeds to appoint the third. If any party fails to nominate an arbitrator, the appointment is simply made by the ICC Court.

Prior to appointment, the arbitrator must sign an extensive statement of 'acceptance, availability, impartiality and independence'. The nominee must also disclose in writing to the Secretariat any facts or circumstances that might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality (Article 11.2).

Article 13.1 of the Rules prescribes that when appointing or confirming arbitrators, the ICC Court must consider the proposed arbitrator's nationality, residence and other connections to any particular country. Furthermore, under Article 12.9 of the ICC Rules, notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the ICC Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.

It is notable that the scope of the ICC Court's powers in appointing arbitrators is broad and extends beyond the usual competencies of an appointing authority under other arbitral rules, with less prioritisation of party autonomy. Under the ICC Rules, all arbitrators nominated by the parties are subject to confirmation by the ICC Court.

iv SCC

The procedure for appointing arbitrators pursuant to the Stockholm Chamber of Commerce Arbitration Rules (SCC Rules) is set out in Articles 16 and 17.

Article 16 deals with the number of arbitrators to be appointed and contains the general rule providing that the parties may agree on the number between themselves. Failing such agreement, the board of directors of the SCC (the Board) may decide whether the tribunal shall consist of one or three arbitrators. In making this decision, the Board must consider the complexity of the case, the amount in dispute and any other relevant circumstances.

Article 17 is concerned with the appointment process and, once again, gives precedence to the parties' consensus with regard to their preferred appointment procedure. Where the parties have not agreed on any such appointment procedure, or fail to appoint the tribunal within the agreed time period, the default appointment procedure is triggered.

Under the default mechanism, where the tribunal consists of a sole arbitrator, the parties are given 10 days to jointly agree upon and appoint the arbitrator. If the appointment is not made within this time frame, the Board acts as the appointment authority.

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Where the tribunal consists of more than one arbitrator, the parties are required to appoint an equal number of arbitrators. Although the SCC Rules hold that the Board will be responsible for appointing the chairperson, it is common practice for the parties to act jointly to select the chair and for the Board to accept this nomination.

Article 17(4) also stipulates that if the parties fail to appoint arbitrators within the required time, the Board will also appoint one or more of the required arbitrators.

When appointing the arbitrators, the Board must take into account the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties.

The SCC Rules further require that the sole arbitrator elected is of a different nationality to both parties unless agreed otherwise or approved by the Board.

III THE CHOICE OF A PARTY-APPOINTED ARBITRATOR

At the heart of the key procedural rules outlined above remains a respect for the fundamental principle that the parties to the arbitration should retain control over the selection of arbitrator (albeit with the safety net of fall-back provisions to prevent strategic recalcitrance or procrastination).

However, while the rules explored above address the procedure for nominating and appointing an arbitrator under different rules likely to apply to an investment arbitration, there remains the fundamental question in this context of who to select?

Parties will naturally want to choose an individual who might be sympathetic to their case, or at the very least understanding and aware of particular legal, cultural or political sensitivities that might be relevant to the issues to be explored. But there is also a need for an effective decision-maker, someone able to manage the arbitration process efficiently and effectively, with the requisite experience and expertise to reach a binding award, and an even broader need to ensure that the system achieves outcomes that are just and impartial, and perceived to be so.

To balance these seemingly conflicting objectives, arbitral rules also impose certain restrictions on who might be able to act as arbitrator and requirements as to the need of all arbitrators appointed to be independent and impartial.

It is, for example, common for arbitral rules to restrict the nationality of arbitrators (to avoid national biases). Under Article 39 of the ICSID Convention, for example, arbitrators must be nationals of third states (i.e., a state other than the state party to the dispute and the state whose national is the investor party to the dispute).

Further, all major international arbitration rules require that each arbitrator (whether party-appointed or not) must be 'independent', 'impartial' or 'neutral'. By way of exmaple:

a the ICC Rules 2017 and 2021 impose obligations of both independence and impartiality, and provide that an arbitrator may be challenged for 'an alleged lack of impartiality or independence, or otherwise' (Article 14.1);

b Articles 14(1) and 40(2) of the ICSID Convention require that all arbitrators (including those appointed from the Panel of Arbitrators or others) be 'of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment'; and

c the UNCITRAL Rules 2013 provide that 'When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or

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> independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances'. (Article 11)

The importance of impartiality and independence should be considered in a holistic manner, not merely in the interests of justice but also in the interests of the parties to the dispute. These two requirements are essential in ensuring confidence in the process and outcomes of arbitrations in general of course, but also because real impartiality is productive to a party's case. An arbitrator that is biased or partisan will quickly lose influence within a tribunal, potentially skewing the decision in favour of the opposing side.

There are of course other critical, practical considerations relevant to any arbitrator appointment:

a Availability. Unlike national judiciaries, funded from the public purse and assigned by a central court administrative system, arbitrators are privately funded and often not full-time arbitrators. They work on multiple cases simultaneously and often have other areas of professional interest, including as counsel. Ensuring the nominee has requisite availability and a manageable caseload to sit as an effective arbitrator is an important consideration.

b The relevant experience and expertise. Clearly, it is important that the selected arbitrator is suitably qualified for the role, even if not legally trained, the individual should ideally be sufficiently well-versed in the process and procedure that they are not learning 'on-the-job' and are capable of (and seen to be capable of) reaching conclusions and a determination of the dispute in an effective award.

c Effectiveness as a communicator. It is essential that an arbitrator (particularly a sole arbitrator and a president of a tribunal) is an effective communicator, with the gravitas to give effective directions in the tribunal and ensure its efficient conduct.

Judgements on these kinds of qualities are subjective and based on individual perceptions shared and filtered down through experiences in particular cases. They can be dangerously false, incomplete or outdated.

The wider context here is also important. The past two decades have seen a dramatic rise in investment arbitration cases. The public nature of most investment treaty awards, coupled with the lack of any binding system of precedent, mean that competing lines of jurisprudence have evolved in relation to certain common and fundamental issues. Further, this allows for positions on controversial issues to be attributed to individuals.

It is only natural in this context for parties with an interest in a dispute to want to try to ensure that any say and control that they have in the process of selecting arbitrators is exercised in favour of the appointment of individuals on record as supporting that party's view of what are anticipated to be the important issues in the case.

This is a reality that parties to an investment arbitration need to be alive to. To address these issues, the leading firms are well-resourced to thoroughly research a potential nominee's credentials and decision-making record as part of the process of selecting an arbitrator. It is important that the arbitrator chosen has both the legal background and intellectual disposition to suit the party's case, and the availability and demeanour to manage it effectively. Research that goes further than the curriculum vitae into prior engagements as an arbitrator as well as any publications and reputation is an essential step.

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IV CONCLUSION

The issues identified herein, among other considerations, have led to criticism of the investment arbitration system as a whole for the development of a 'clique' of arbitrators and counsel who are commonly appointed (with the same people frequently acting as both), by claimants and by respondents, respectively. These are people who have not only the requisite experience and skill but who, in some instances, might be understood to have previously expressed a helpful view on a topic of importance in a particular case.

Broadly, it is the arbitral institutions that are leading the way in facing up to this criticism of the 'closed-shop' of investment arbitration with initiatives to promote transparency, widen the pool of arbitrators and increase diversity among the appointment of arbitrators who possess the requisite experience and skill to act as effective and impartial decision-makers.

Arbitrator appointment statistics produced in 2020 by both the ICC and ICSID show encouraging trends towards improved diversity and greater numbers of first-time appointees. The 2020 ICSID annual report showed that FY2020 saw 44 different nationalities represented among appointments made in that year, the greatest nationality diversity in ICSID's history, with 15 per cent of arbitrators being first-time appointments. ICSID reported that 42 per cent were nationals of low- or middle-income countries and that 19 per cent were women.

Underlining that it is the institutions that are leading the way in improving arbitrator diversity, however, are the statistics around who selected the female appointments. Despite the focus of the ICSID Rules being on party autonomy in the selection of arbitrators, 53 per cent of women appointed in FY2020 were appointed by ICSID, 34 per cent were appointed by respondent parties, 10 per cent by the parties jointly, and only 3 per cent by the claimant investor that commenced the proceedings, with no female arbitrators selected by party-nominated co-arbitrators.

These are, at least, steps in the right direction. The number of investment arbitration cases is expected to continue to rise. It is important that the pool of talented and representatively diverse arbitrators able to meet the challenge of deciding these cases fairly, efficiently and impartially grows with it.

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Appendix 1

ABOUT THE AUTHORS

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Matthew Buckle is a dispute resolution lawyer and solicitor advocate based in London, specialising in international commercial and investment arbitration. He is an experienced advocate having appeared before both ICC and LCIA Tribunals.

Matthew has a breadth of experience in cross-border disputes, particularly in the energy, mining, technology and telecommunications sectors. He advises in investment disputes arising under bilateral and multilateral treaties and commercial disputes arising among contractual counterparties, project stakeholders and joint venture shareholders. He has led teams in both pursuing and defending claims under the arbitration rules of the major arbitrational institutions including LCIA, ICC, DIAC, SCC and in ad hoc arbitrations under the UNCITRAL rules. He also has experience of and Higher Rights of Audience before the English Commercial Court in both standalone and ancilliary litigation, enforcement proceedings, challenge proceedings, winding-up petitions, interim and injunctive relief and proceedings for the compulsion of witness evidence and information on company assets.

He has led on settlement negotiations, mediations and other alternative dispute resolution processes and advises on settlement terms. He regularly advises colleagues on governing law, arbitration and jurisdiction clauses, and in relation to investment treaty considerations.

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