



INSTITUTIONS APPOINTMENT OF ARBITRATORS CONSTITUTION OF ARBITRAL TRIBUNALS

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Forms of arbitration

- *Ad hoc* arbitration
- Institutional arbitration

Institutions

- Leading Institutions

- International Court of Arbitration of the International Chamber of Commerce (ICC Court) – 1923
- London Court of International Arbitration (LCIA) – 1891
- International Centre for Dispute Resolution, American Arbitration Association (AAA/ICDR) – 1996
- Singapore International Arbitration Centre (SIAC) - 1991
- Permanent Court of Arbitration (PCA) – 1899

- Specialized Investment Arbitration

- International Centre for Settlement of Investment Disputes (ICSID) – 1966

Institutions (Cont.)

- Regional systems

- Arbitration Institute of the Stockholm Chamber of Commerce (SCC) - 1917
- Arbitration under North American Free Trade Agreement (NAFTA) – 1994
- Arbitration under the MERCOSUR Agreement – 1991
- Hong Kong International Arbitration Centre (HKIAC) - 1985
- Swiss Chambers' Arbitration Institution – 2007
- International Commercial Arbitration Court of the Russian Chamber of Commerce and Industry (ICAC) - 1932
- Vienna International Arbitral Centre (VIAC) – 1975
- Dubai International Arbitration Centre (DIAC) - 1994
- etc.

Arbitrators

- Areas of expertise
- Legal background
- Nationality
- Language
- Availability
- Moral standard
- Authority
- Age

Constitution of the Arbitral Tribunal

- Underlying principle – party autonomy
 - to select arbitrators
 - to agree on number of arbitrators
- Institutional Rules
- *Ad hoc* arbitration:
 - Parties may decide on appointing authority.
 - Secretary General of the PCA designates an appointing authority (Art. 6 (2) UNCITRAL Arbitration Rules)

Exception:

Appointment of arbitrators through state court at place of arbitration failing an appointment by the parties (Art. 11 (2, 3) UNCITRAL Model Law)

Constitution of the Arbitral Tribunal

- Party autonomy, e.g.:
 - Art. 11(6) ICC Rules: “*insofar as the parties have not provided otherwise*” ... ICC Rules are applicable
 - Art. 13(1) SCC Rules: “*The parties may agree on a different procedure for appointment of the Arbitral Tribunal than as provided under this Article*”
 - Art. 5.9 LCIA Rules: “*The LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties*”

- Lists of arbitrators
 - Open
 - Closed

What do users say:

Chart 1: By what method do you favour selection of the two co-arbitrators in a three-member arbitral tribunal?

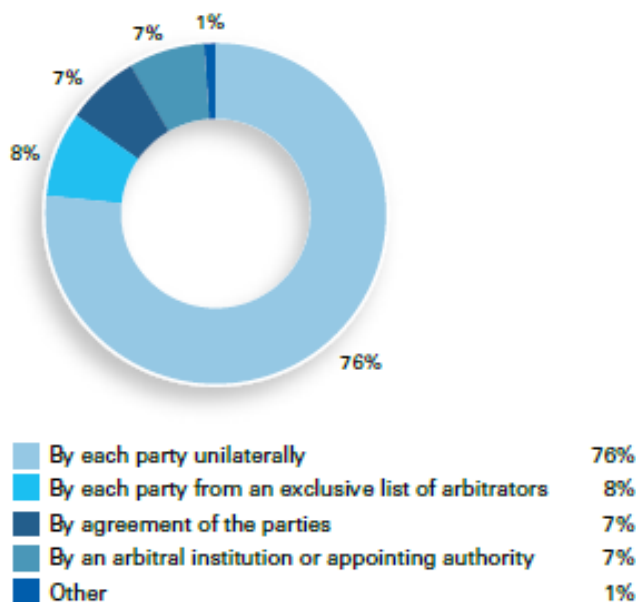
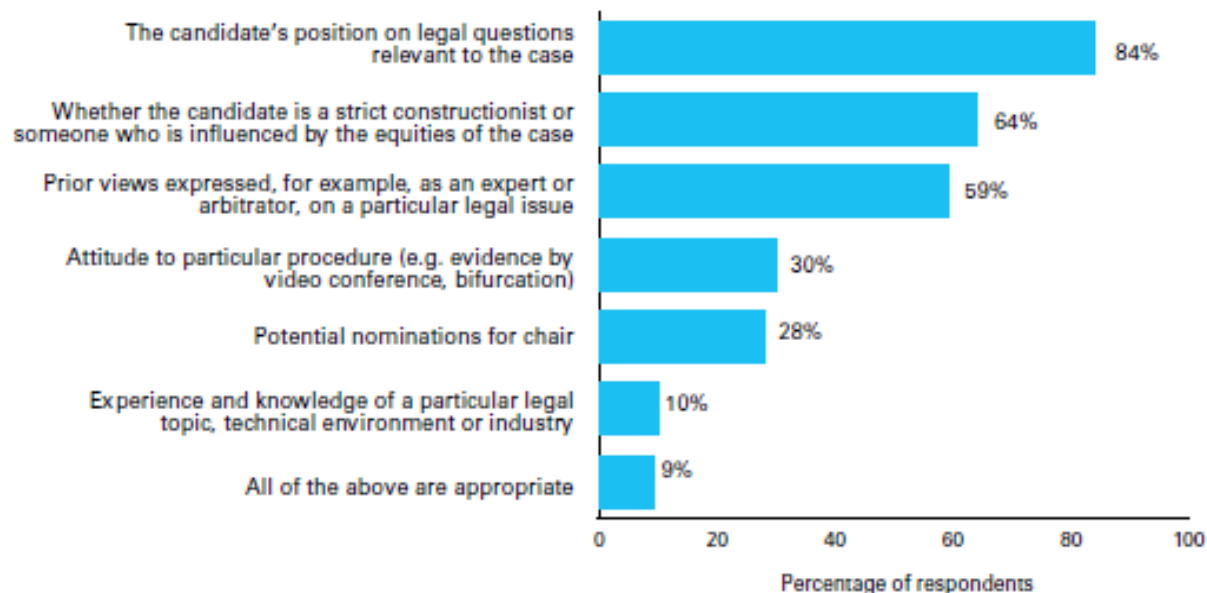


Chart 4: Which of the following subjects are inappropriate for discussion with arbitrators at interviews?



2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, Queen Mary and White & Case

Selection of arbitrators under the ICC Rules

- Nomination of arbitrators
by the parties (Art. 12(3), 12(4))
- Confirmation of arbitrators
by the Court or the Secretary General,
(Art. 13(1)&(2))
- Appointment of a sole arbitrator or a president of the Arbitral Tribunal
by the Court (see Art. 13(3)&(5))
the role of the National Committees/Groups

IBA Guidelines on Conflicts of Interest in International Arbitration

(2) Conflicts of Interest

- (a) 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 doubts as to his or her ability to be impartial or independent.
- (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence ...
- (c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.
- (d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

IBA Guidelines on Conflicts of Interest in International Arbitration (non-exhaustive lists)

1. Non-Waivable Red List

- 1.1. An identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.
- 1.2. The arbitrator has a similar controlling influence in one of the parties.
- 1.3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
- 1.4. The arbitrator regularly advises the appointing party or the arbitrator or his or her firm derives a significant financial income therefrom.

2. Waivable Red List

- 2.1. Relationship of the arbitrator to the dispute
- 2.2. Arbitrator's direct or indirect interest in the dispute
- 2.3. Arbitrator's relationship with the parties or counsel

3. Orange List

- 3.1. Previous services for one of the parties or other involvement in the case
- 3.2. Current services for one of the parties
- 3.3. Relationship between an arbitrator and another arbitrator or counsel
- 3.4. Relationship between arbitrator and party and others involved in the arbitration

4. Green List

- 4.1. Previously expressed legal opinions
- 4.2. Previous services against one party
- 4.3. Current services for one of the parties
- 4.4. Contacts with another arbitrator or with counsel for one of the parties
- 4.5. Contacts between the arbitrator and one of the parties

Criteria of appointment and confirmation of arbitrators pursuant to the ICC Rules

(non-exhaustive list):

- Independence and impartiality (Art. 11(1)-(3))
 - “*in the eyes of the parties*” (Art. 11(2));
 - relevance of the IBA Guidelines
- All prospective arbitrators are asked to fill in :
 - Statement of Acceptance, Availability, Impartiality and Independence
 - Qualified
 - Unqualified
 - *Curriculum Vitae*
- Availability (Arts. 11(2) and 13(1))

Criteria for appointment and confirmation of arbitrators under the ICC Rules (cont.)

- “Nationality, residence and other relationships with the countries” (Art. 13(1))
- Ability (Art. 13(1))
- Members of the Court cannot be appointed as arbitrators, except when nominated by the parties (Annex II, Art. 2(2)).

What do users say:



Chart 20: Top reasons for corporations' disappointment with arbitrator performance



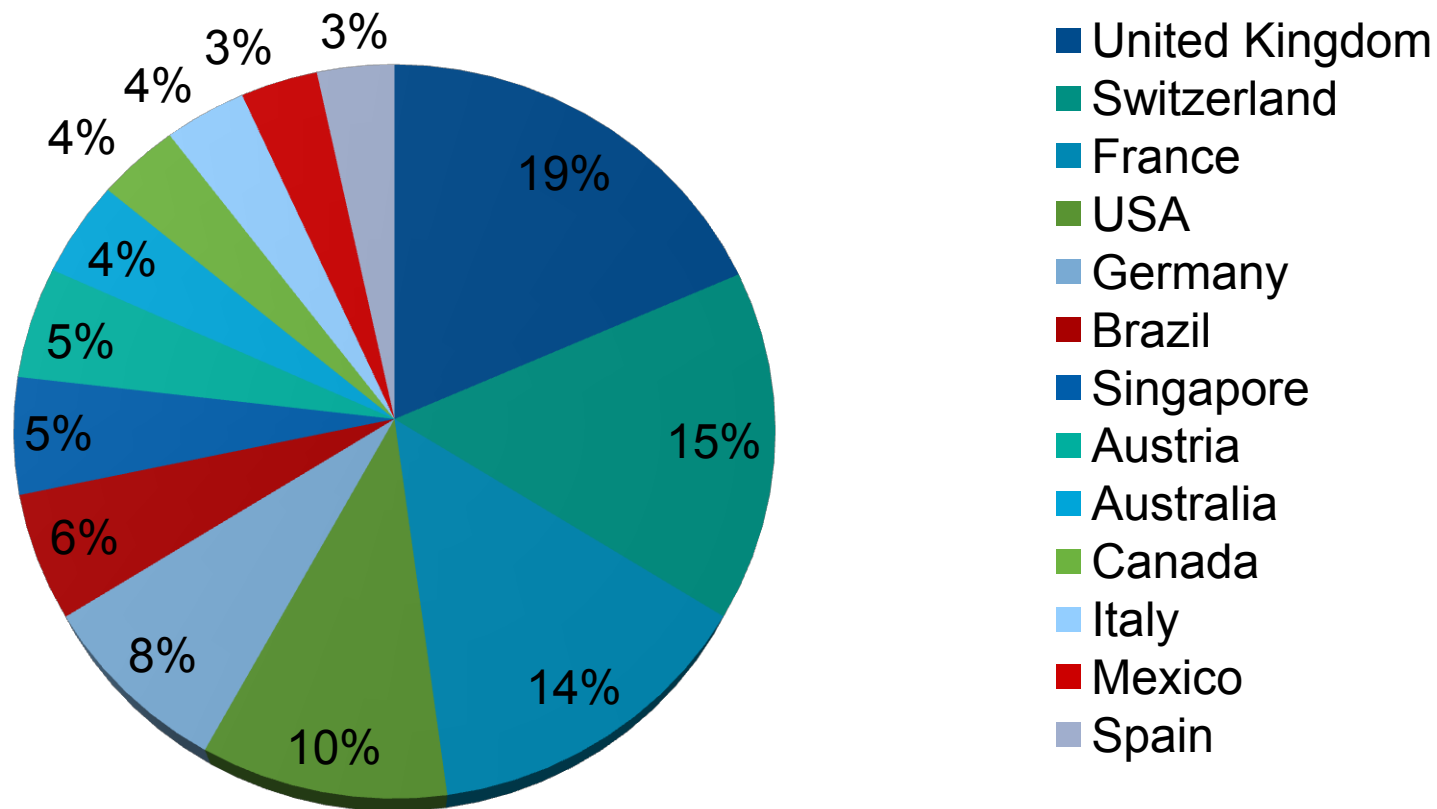
2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary and White & Case

Challenge of arbitrators

- Conflicts of interest/impartiality
- Time-limit (e.g., Art. 14(2) ICC Rules)
- The decision-making body
- As a general rule, a decision on admissibility and the merits

ICC Statistics – Nationality of arbitrators

Leading nationalities of arbitrators in 2013 (at least 2%)



Replacement of arbitrators and resignation

- On the party/ies' initiative
- On the appointing institution's initiative

Emergency arbitrator

- Time-line
- Appointment process
- Independence, impartiality, availability
- Scope of mandate
 - As a rule, decisions on interim/conservatory measures of protection
 - See
 - ICC Rules Art. 29, Appendix V
 - SCC Rules, Appendix II
 - LCIA Rules, Art. 9B

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