



The ICDR's Arbitrator Appointment Process - The Institutional Role and Available Options

By Luis M. Martinez

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA) and since its creation in 1996 its focus has been on providing international conflict management services for the global business and legal communities.¹ These services include a full range of international alternative dispute resolution (ADR) processes administered by multilingual staff applying tried and tested international arbitration and mediation rules. The ICDR administrators are divided into regionally specialized teams where their knowledge of local culture, different legal traditions and linguistic capabilities are important components of the administrative regime. This framework provides

a level of procedural predictability under the ICDR system and creates in its users an expectation of a quick, efficient and economical ADR process.²

One of the more crucial phases of an international arbitration concerns the appointment of the arbitrators. While the ability of the parties to select their arbitrators is recognized as one of arbitration's most desired features, the selection phase can be challenging. The ICDR will be guided by the arbitration agreement and the applicable rules while balancing a number of other factors such as the parties' requested qualifications for the arbitrators or their nominations, along with possible disclosures and conflicts, due process and its commitment to the efficiency and integrity of the ICDR dispute resolution system.

Many ICDR arbitrations are based on its model arbitration clause or closely follow its suggested language. Users by incorporating the ICDR's model clause in their contract, in addition to ensuring that the institution is properly designated to administer the case, take comfort in not having to address each and every procedural step with specificity as the ICDR's International Arbitration Rules (ICDR Rules) address all of the procedural issues that may arise and include default mechanisms that when triggered will ensure the completion of the arbitral process and ultimately an enforceable award.

¹ The global leader in conflict management since 1926, the American Arbitration Association (AAA) is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2012, over 250,000 cases were filed with the AAA in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. The ICDR received 996 new international case filings in 2012. The AAA has promulgated rules and procedures for commercial, construction, employment, labor and many other kinds of disputes. It has developed a roster of impartial expert arbitrators and mediators through 30 offices in the United States, and with the ICDR, which has offices in Mexico, Singapore, and Bahrain through the BCDR-AAA.

² See Luis M. Martinez, *ICDR Awards & Commentaries*, in *A GUIDE TO ICDR CASE MANAGEMENT* (Grant Hanessian ed., 2012).



Having said that, experienced users armed with the knowledge of the type of dispute that may be common to their trade or industry will customize their clause accordingly providing for the dispute resolution mechanism that best addresses their needs. One area that users pay special attention to is the method of appointment that will be used for their mediation or arbitration. Pursuant to the ICDR system, parties can select any method of appointment they have agreed to by incorporating it into their arbitral agreement. Failing that, if they do not provide nor agree to a method of appointment, the list method is the ICDR's default mechanism for appointing the arbitrators.

A. *Pros and cons of appointment methods*

Parties have a number of options when appointing their arbitrators. One option used is the party-appointed method. The parties may each designate their own arbitrator and then those two arbitrators may designate the presiding arbitrator, the president of the tribunal. The party-appointed method in recent years has been the subject of great debate. Charles Brower and other advocates of this method argue that it is consistent with party autonomy and as arbitration awards are final and not subject to appeal unless the award is vacated, parties must have a high level of trust and confidence in the arbitrators they nominate.³

Moreover the level of complexity in many of today's international arbitrations require arbitrators with extensive subject matter expertise, cultural sensitivity and a strong foundation in the conduct of an international arbitration proceeding. Counsel and their clients argue that in addition to their research, which includes a review of the arbitrator's writings, speeches, and recommendations

from their colleagues, their ability to interview the prospective arbitrator provides another opportunity to interact and address any concerns that they may have in order to complete their profile and decide whether to proceed with their nomination or not. Of course the parties are hopeful that their nominated arbitrator will see the case their way and will also be able to sway the other members of the tribunal. Unfortunately that is where other commentators have identified potential problems that may arise as it is the norm in international arbitration and required under the ICDR Rules that all arbitrators be impartial and independent.⁴

Critics of the party-appointed method argue that there may be an inherent flaw in the system in terms of the expectations, practice and the *ex parte* interview conducted to select the arbitrator.⁵ In some cases, less experienced arbitrators may not appropriately control the interview process and fail to establish strict parameters regarding the permissible scope of acceptable questions. They may feel that they have to go beyond a party's possible spoken or unspoken expectation or belief that their appointed arbitrator at a bare minimum will ensure that the other two arbitrators understand their appointing party's position.

Some party appointed arbitrators may have the mistaken belief that they have an obligation to the party that appointed them which will impede their ability to be impartial and independent and they may engage in

⁴ For a review of the impartiality and independence requirement of the arbitrators and the permissible scope of communications between the arbitrators and the parties, see ICDR Rules Article 7.

⁵ Hans Smit, *The pernicious institution of the party-appointed arbitrator*, COLUMBIA FDI PERSPECTIVES, No. 33, Dec. 14, 2010.

³ Paulsson and van den Berg Presume Wrong, Says Brower, *Global Arb. Rev.*, Feb. 6, 2012.



dilatory tactics or, as some scholars have suggested, draft a dissenting opinion in support of their parties' position.

For example Jan Paulsson discussed two ICC studies observing that in over 95% of the dissenting opinions the authors were party-appointed arbitrators.⁶ This troubling statistic may suggest that a disproportionate number of party-appointed arbitrators lack impartiality or independence in arriving at their final decision.

In another article this trend was further confirmed by a review of dissenting opinions in the International Centre for Settlement of Investment Disputes (ICSID) investment-treaty arbitration awards where Albert Jan van den Berg examined 150 awards and found that nearly all of the 34 dissenting opinions were issued by the arbitrators appointed by the party that lost the case.⁷

These findings they argue support the trend to move away from the direct appointment by a party method towards appointments being made by the institutions either directly or from their panels using the list method thereby creating an important buffer between the arbitrators and the parties, thus removing the potential for the aforementioned problems. Anecdotally more than one party-arbitrator has noted that, while they understand the ICDR Rules require they be impartial and independent, on occasion during the course of the arbitration they were going to pose a question and before doing so paused and considered the question's impact on the case of the party that appointed them. They added that the issue never arises when they are appointed via the list method; in fact they were not aware of which parties' selections

from the list led to their appointment. Finally as the ICDR (or for that matter any other administrative institution) has little or no control over the party-appointed arbitrators by virtue of their not typically being on the institution's lists, these arbitrators do not have an expectation of future appointments and are less concerned about the institution's policies but may have a greater motivation to establish the track record of an arbitrator that has as their primary consideration the position of the party that appointed them and this may affect predictability and problems during the course of the arbitral proceedings.

B. *The ICDR List Method*

While the party-appointed method can and is used effectively with safeguards in place, the ICDR's default method of appointment, where the parties have not specified the use of the party appointed method in their contract, is the list method. This method has a number of benefits within the ICDR system and can provide the parties with options while minimizing the aforementioned risks. It removes the *ex parte* contact between the parties and the arbitrators and any confusion over their role or responsibilities towards the party that selected them. This can be a significant advantage in an international arbitration especially during any enforcement proceedings where these contacts may later be used to establish the foundation for possible bias or evident partiality during an action to vacate an arbitral award.⁸

⁶ Jan Paulsson, *Are Unilateral Appointments Defensible?*, KLUWER ARB. BLOG, Apr. 2, 2009.

⁷ Albert Jan van den Berg, *Dissents and Sensibility*, GLOBAL ARB. REV., Feb. 28, 2011.

⁸ For further analysis and discussion regarding disclosures and evident partiality, see AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, revised and effective March 1, 2004. See also *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994); *Positive Software v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007).



Arbitrators selected from the ICDR's roster have been vetted and their qualifications scrutinized in advance by a number of training programs highlighting "best practices" in a mock complex international arbitration and the application of the ICDR Rules and its Guidelines for Arbitrators Concerning Exchanges of Information along with its administrative system and policies.⁹ Such training reduces the risk of procedural errors or other failures such as the improper completion of the clearing of conflicts phase or failing to comply with the ICDR's expectations regarding time deadlines and the management of the arbitration.

It is *sine qua non* that the list method is only as good as the quality of the members who comprise that list. Recognizing the need for these exceptional international arbitrators, the ICDR has established a demanding set of qualifications for potential arbitrators seeking admission to its international panel. Openings on the panel are limited depending on the ICDR's caseload needs which may in turn drive the needs for a particular nationality, expertise or linguistic capability for that particular year. Applicants undergo a two-tiered review process that has resulted in a panel of eminently qualified international dispute resolution specialists from nations all over the world.¹⁰

When appointing the arbitrators by using the list method the ICDR will raise the issue with the parties during the administrative

⁹ The ICDR Guidelines for Arbitrators Concerning Exchanges of Information can be found on the ICDR's website at www.ICDR.org and reflect the ICDR's policies on document exchange and are required to be applied by the arbitrators serving on ICDR cases.

¹⁰ For information on the ICDR application, see the ICDR's web site at www.ICDR.org.

conference call and will consider all of the qualifications they have requested including a specific nationality, type of expertise or experience in a particular industry or perhaps fluency in a particular language or substantive law. Combining this party input with its own views from its review of the case, the ICDR creates a balanced list of potential arbitrators for consideration and selection by the parties.

The list of names will be transmitted along with their corresponding *curriculum vitae* which provide the arbitrator's professional work and ADR experience, as well as education, publications, affiliations, language capabilities and rate of compensation. Parties are asked not to exchange these lists and are allowed to object to anyone listed without providing any reasons. The parties must rank the remaining arbitrators with number 1 reflecting their first choice down to their last acceptable arbitrator remaining on the list. Once the parties return their lists to the ICDR, the arbitrators with the lowest combined rankings are invited to serve and once they clear the conflicts stage their appointments are confirmed by the ICDR.¹¹ While rare, parties seeking a broader range of options may request a second list.

The list method offers additional options; for example, lists can be customized for the selection of the presiding arbitrator only, an option which can significantly reduce the time that may otherwise be required to agree on that selection. The lists can be divided in the case of a tri-partite panel where the parties are seeking to have a panel that is comprised of an attorney, an engineer and an architect perhaps for an international construction case.

The ICDR can also make administrative appointments. If within 45 days from the date of the commencement of the arbitration, the parties have not mutually agreed on a

¹¹ For an example of the list strike and rank method, see *supra* note 2.



procedure for appointing the arbitrators, or have not designated their arbitrators by following their agreed upon procedure from the clause, the ICDR, at the written request of any party, shall complete the appointment process.¹²

In the event of multiparty cases, the ICDR applies ICDR Rules Article 6(5) and, absent the agreement of the parties, will make all appointments. This Article was drafted to avoid the potential problems that could occur as was the subject of the *Dutco* case where an ICC arbitration award was found to be contrary to public policy as not all of the respondents were allowed to appoint their own arbitrator.¹³ While the ICDR can appoint the entire tribunal in reality this hardly happens as the parties usually agree to coordinate and agree on the appointment mechanism.

C. Conclusion

The ICDR provides users with choices and allows them to utilize an arbitrator selection method that fits their needs and expectations. The ICDR is accustomed to and experienced in administering arbitrations in which the parties select their own party appointed arbitrators. But the ICDR also offers a carefully selected and trained list of international arbitrators from which users can choose the arbitrators in a process that insulates all of the arbitrators from any risk of even unconscious bias towards one of the parties, a selection method many users find preferable.

¹² See ICDR Rules Article 6 (3), which includes an administrative pause should the parties be conducting settlement discussions, as the ICDR requires a written request to complete the appointment process.

¹³ Stefan Kröll, *Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*, ITA BLOG, Oct. 15, 2010.

For any questions or comments regarding this article please contact Luis M. Martinez at Martinezl@adr.org. The opinions made are solely attributable to the author. They do not necessarily represent the views of the International Centre for Dispute Resolution, the International Division of the American Arbitration Association or the Inter-American Commercial Arbitration Commission.

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