Abstract

This article addresses the important issue of the selection of the arbitrator, which is a fundamental right of the parties since the quality of the arbitration depends on the quality of the arbitrator. It examines the selection process and practical considerations in choosing an arbitrator. In this sense, we analyze objective factors of selection, such as the expertise of the arbitrator, number of arbitrators, language of the arbitration, availability of the arbitrator, impact on the selection of the chairman, sex of the arbitrator, independence and impartiality, standing and influence of the arbitrator, and religion of the arbitrator. Then we examine the subjective factors of selection, indicating the types of arbitrator’s personality that should be avoided (egomaniac, superlawyer, White Knight, wimp, superjudge and unemployed opportunist). Finally, we propose some practical steps to select an arbitrator, and some guidelines that should be followed to practice an appropriate pre-appointment interview.

1. INTRODUCTION

A first idea to take into account is that the quality of the arbitration depends on the quality of the arbitrator. Or what is the same, arbitration is as good as the arbitrator. This is why the selection of the arbitrator is the most important and key moment in the development of the arbitral process.

For this reason, it is of fundamental importance that the parties know how to select their arbitrators, since the quality of the arbitral process will depend on the quality of the arbitrators. Given that the arbitrator is the main actor in the field of arbitration, their selection process constitutes, undoubtedly, one of the crucial issues of the arbitration process. A proper selection process is essential for the protection and safeguard of the rights of the parties to the arbitration.

For this reason, we will next establish the various factors to be analyzed and the procedure to be followed for an adequate selection of the arbitrators.

2. OBJECTIVE FACTORS

We will analyze here the objective factors to be considered for a proper selection of the arbitrator.

(1) A first factor to take into account is the number of arbitrators. Normally, this will be established in the arbitral agreement, which specifies whether there will be one or three arbitrators. Choosing an arbitral tribunal composed of either one or three arbitrators has the following advantages and disadvantages.

Among the advantages of selecting just one arbitrator is the speed of the proceedings, starting with the selection of the arbitrator which can be carried out faster than having to select three; and the development of the arbitral process, since one arbitrator will have an easier time coordinating their availability with the parties and lawyers. Another advantage is the lower fees, since the parties would only have to spend about one-third of what it costs for a three arbitrator tribunal.

Notwithstanding, in international practice there is commonly an aversion to the unknown, and consequently, there is a tendency amongst the parties to seek the greatest predictability in the constitution of the arbitral tribunal, therefore choosing three member panels. In this way, if each party has the right to choose one of these arbitrators and has some part in the selection of the third, this reaffirms confidence in the integrity of the arbitral process.

Likewise, a three member tribunal normally has a richer legal background and other experiences that allow greater precision in the development of the process as well as in the
granting of the arbitral award.\(^{(11)}\) However, even though the plural option is often better than the single option, it is not without disadvantages.\(^{(12)}\)

(2) A second factor to consider is the language of the arbitration. The requirement by the parties that the arbitrator\(^{(13)}\) has knowledge of a certain language, or languages, requires consideration of certain basic points.

First, the language selected for the arbitral process is chosen by the parties, who can decide directly (ad hoc arbitration) or indirectly (administering arbitration). If there is disagreement then the arbitral tribunal will do the selection.

Second, the arbitral process may be conducted in more than one language.\(^{(14)}\) This may be necessary due to the nationalities of the parties in controversy, even though resorting to English as a sort of Esperanto is widely in use.\(^{(15)}\)

Third, in accordance with the language of the arbitration\(^{(16)}\) and/or the language of the contract,\(^{(17)}\) the parties may demand that the arbitrators have an adequate level of linguistic skill.\(^{(18)}\) The parties may require the arbitrators to have ample knowledge of English or Chinese Mandarin.

To verify the arbitrator’s proper language skill level, and not to leave it just to the arbitrator’s assertion, the parties may carry out an interview, prior to the appointment, as a useful checking mechanism.\(^{(19)}\)

Finally, even though English is still the dominant language in the international arbitration field, today we can see an increase in the use of Spanish.\(^{(20)}\)

(3) A third factor to take into account is the expertise of the arbitrator. Depending on the type of arbitration (equity or law), the subject matter, and/or technical aspects of the dispute, an arbitrator who is a technical expert or lawyer should be designated. Even though some might argue that arbitrators should always be lawyers, as the expert witness provides the technical aspects,\(^{(21)}\) it is obvious that a technical expert within the arbitral tribunal may explain these issues to other arbitrators better than an expert witness, and even determine any errors or failure in the expert evidence. Moreover, whether a technician or a lawyer is chosen, they must have knowledge of arbitration law, because they might incur various errors in procedendo that could result in the annulment of the arbitral award. In this sense, the arbitrators will need to have experience conducting arbitration proceedings effectively and expeditiously.\(^{(22)}\)

(4) A fourth factor to consider is the availability of the arbitrator, a subject of great importance, especially when choosing to designate the most prestigious arbitrators, because they often tend to be the busiest. In addition, availability should be analyzed according to the profession of the arbitrator. In some cases, schedules are not subject to change to accommodate arbitral hearings that extend for several weeks, or they allow this only at certain times of the year, as is the case of full-time professors or government officials. In this sense, a person whose main activity is to practice as an arbitrator, or who is retired, may be a better option than someone who has an active career and practices as an arbitrator sporadically. You must also take care not to choose arbitrators whose full availability is explained only because of their advanced age, since illness or death of an arbitrator\(^{(23)}\) can delay or truncate the arbitral process considerably. Remember that an arbitrator may be excellent but must have time for the case.\(^{(24)}\)

(5) A fifth factor to be analyzed is the impact of the selection of the chairman. It is necessary to seriously consider the party-appointed arbitrator’s likely impact on the selection of the chairman of the arbitral tribunal. The other arbitrators will not only affect the choice of nationality and professional qualifications of the chairman, they will also have undeniable collateral effects. So, a law professor will not accept that the tribunal is chaired by another professor, especially if they are younger. A judge will not accept a judge lower in rank. A lawyer will only accept one of greater prestige or a dean. It is therefore naive to ignore these issues of self-esteem at the time of the selection of the party-appointed arbitrator, as they will necessarily influence the election of the chairman of the arbitral tribunal.\(^{(25)}\)

(6) A sixth factor to consider is the independence and impartiality of the arbitrator. Such conditions are nowadays a common requirement.
in almost all of the national and conventional rules. Experience has shown that the appointment of partial or dependent arbitrators is counterproductive, as the chairman of the arbitral tribunal will soon realize the fact, and the influence of this arbitrator in the deliberations will be greatly reduced. Therefore, a better strategy is to nominate a person who, even though their culture or background is in accordance with the position of the party that designated them, is however strictly independent and impartial. In this regard, the appointment of an arbitrator who is clearly partial to the cause of the party that appointed them works as a sort of blemish, which allows other arbitrators to notice what is going on, making the partial arbitrator’s influence on the tribunal decline rapidly. For this reason, it is preferable to designate someone who, by sharing the same legal and cultural background, is likely to be sympathetic to the position of the party that appointed them, but will be strictly impartial, deciding the case based on the facts and the law, and therefore will have a greater influence on the private deliberations of the tribunal. Also, it is important that the arbitrator is a “fair” person.

A seventh factor to take into account is the standing and influence of the arbitrator. Now, while the standing creates a situation in which the same names always appear, the importance of the rights and interests submitted to arbitration demand the existence and recognition of a body of elite arbitrators. In this case, “elite” can be understood as meaning meritocracy based on ability, honesty and legal experience. It is also possible to contend that experience and talent involve the opposite of favoritism, because the market value of these arbitrators does not stem from the reputation of helping their friends, but from being just and competent. Reputation in this field increases only through the gradual expansion of the evidence of their independence and impartiality, and of their professionalism in their various arbitrations. Another relevant factor for the appointment of the arbitrator is his influence inside the arbitral tribunal. The arbitrator must generate respect amongst the other members of the tribunal, to be persuasive during their private deliberations. Such influence may arise from their reputation and status in the legal community, and partly depends on the appearance of absolute independence and impartiality of judgment.

An eighth factor to be analyzed is the sex of the arbitrator. We must point out that today almost all legal systems, both civil law and common law, recognize the possibility of the arbitrator being a man or a woman.

In the case of Muslim countries that apply Shari’a, following Hanbali doctrine, or other Sunni doctrines, by requiring that the arbitrator has the same capabilities as the judge, this requires that the arbitrator is male. In contrast, those who follow Hanafi doctrine to interpret Shari’a permit both men and women to be arbitrators. Amongst the countries that follow the more traditional systems we find Saudi Arabia. On the other hand, a classic example of those who follow reformist systems is the case of Egypt.

A ninth factor to consider is the religion of the arbitrator. For the majority of legal systems, both civil law and common law, the religion of the arbitrator is irrelevant to their appointment. Nevertheless, in the case of Muslim countries, we must distinguish again two cases. On the one hand, those who apply Shari’a following Hanbali doctrine, or other Sunni doctrines, by requiring that the arbitrator has the same capabilities as the judge, require that the arbitrator is Muslim. On the other hand, those countries that follow Hanafi doctrine to interpret Shari’a, do not require the arbitrator necessarily to be Muslim. Amongst the former we find countries like Saudi Arabia and Oman, and amongst the latter we have countries such as Egypt, Yemen, Iran and the United Arab Emirates.

3. SUBJECTIVE FACTORS

Since the appointment of an arbitrator has an intuut personae character, it is convenient to choose those personalities that are suitable for arbitration work and with whom it is possible to maintain a relationship of trust.

Likewise, the arbitrator must feel psychologically comfortable with people from other countries, feeling at ease with them, and even more importantly, understand their cultures, methods of presentation, and everything that is usual in their culture.
important is their predisposition and familiarity with travel and living abroad.\(^{(37)}\) Also important are the interpersonal dynamics within the arbitral tribunal, particularly between the president of the tribunal and the co-arbitrators, which may have a considerable impact on the results of a case.\(^{(38)}\)

So, certain personalities should be avoided in the selection, such as the following:\(^{(39)}\)

First, the “egomaniac,” who will probably see the arbitration for which they are designated as an opportunity to support and apply their own legal criteria or favorite dogmatic postulates.

Second, the “superlawyer,” who will be unable to resist the temptation to assume the role of attorney of one of the parties, or even both, forgetting their impartial position.

Third, the “superjudge,” who was a bully when they worked in the judicial system, and have taken a liking to it, so they will often make lawyers jump through unnecessary hoops of their creation.

Fourth, the “White Knight,” who in their search for Justice and Truth, decides to use (or not) the applicable procedural framework, and may even want to address issues that the parties have intentionally excluded, or to decide based on issues not discussed by the parties.

Fifth, the “wimp,” who is unwilling, or unable, to maintain a sufficiently firm hand on the development of the arbitral proceedings, in order to make them progress quickly and without problems.

Sixth, the “unemployed opportunist,” who, even though they may have the ability, lack the will to carry the procedure to a quick end, because in reality they have nothing more interesting or remunerative to do.

Indeed, the use of personality tests has been proposed (such as the Myers-Briggs Type Indicator) for the selection of arbitrators,\(^{(40)}\) the most important thing being that the arbitrator is someone with a personality and temperament that is compatible with effective teamwork.

4. PRACTICAL STEPS TO SELECT AN ARBITRATOR

The practical steps to carry out a proper selection of an arbitrator are the following:\(^{(41)}\)

First, an essential step is the review of the candidate’s professional background and biographical information, which will allow the verification of their professional qualifications and the prestige that they have in the arbitration field.

Second, possibly the best means for obtaining information about the candidate is by “word of mouth,” as more pertinent information regarding the arbitrator, including their personal qualities, is still best obtained informally by asking around among their colleagues and others involved in the arbitration field. This helps to understand not only the practical experience of the candidate, but also their management skills.

Third, it is helpful to review (if they are publicly available) previous awards issued by the candidate, because they can give an indication of their professional skills and likely position with respect to the dispute.

Fourth, it is also important to analyze the articles, monographs or treatises published by the candidate, as these can reveal their approach to the management of arbitrations, their knowledge of the applicable arbitral law, as well as their likely legal position regarding the controversy.

Fifth, another fundamental step is to verify that there aren’t any circumstances that could give rise to justifiable doubts regarding the impartiality and independence of the candidate.

Sixth, the only means to verify certain factors, such as the handling of language, personality, physical and mental health of the candidate, or their availability, is through a personal interview, which will have certain limits with regard to topics that are appropriate to consider or discuss in it.

Seventh, the last step is the appointment of the arbitrator, who will be selected on the basis of the balanced analysis of the above considerations.
5. PRE-APPOINTMENT INTERVIEW

The interview can be a tool of enormous utility to verify the linguistic skills, personality and physical and mental health of a candidate, factors which cannot be determined correctly without a personal encounter with them.

Now, obviously that interview should be properly limited, and may not serve to explore the views of the candidate with respect to the dispute or to test the future factual or legal bases of the case.

In this sense, the proper issues that may be brought up by the parties or their lawyers, in the interview with the candidate, are as follows:

(a) the identities of the parties, advisers and witnesses;
(b) the estimated time and duration of the hearings;
(c) a brief description of the general nature of the case, enough to allow the candidate to determine whether they are competent to decide the dispute, if they have any revelation to make, and if they have time to dedicate to the issue;
(d) qualifications and curriculum vitae of the candidate;
(e) articles, texts and speeches published by the candidate;
(f) any appearance as an expert witness, including positions taken;
(g) previous work as an arbitrator, including past awards, according to the principle of confidentiality;
(h) any circumstances that may raise justifiable doubts with respect to their independence or impartiality, as well as any disclosure that the candidate may need to make;
(i) whether the candidate feels competent to settle the dispute of the parties;
(j) availability of the candidate, i.e., if they can devote sufficient time and attention to the parties’ controversy in a timely manner.

In this regard, in order to prevent the interview from leading to a disqualification of the arbitrator, it should be limited strictly to the ten issues discussed. Under no circumstances, either directly or indirectly, must the discussions enter into the merits of the case. To this end, the description of the nature of the case and the issues involved should be neutral and general. Also, questions, even hypothetical ones, as to which position the candidate would take with respect to any of the issues in conflict must be avoided, along with any attempt to prove their case to the candidate.

In this sense, the Fact Sheet Enhanced Neutral Selection Process for Large Complex Cases of the American Arbitration Association, establish that:

The AAA will work with parties to develop an interview protocol in order for the parties to have an opportunity to present questions to potential arbitrator candidates, either through a telephone conference, or in writing. Examples of interview question topics might include: industry expertise, relative experience in similar disputes, the arbitrator’s procedural handling practices, and any other questions that the parties would find helpful to the selection process.

Similarly, in 2007 the Chartered Institute of Arbitrators developed guidelines for interviewing arbitrators (Practice Guideline 16: The Interviewing of Prospective Arbitrators). This Practice Guideline 16 sets forth in section 3, paragraph 9 what can and cannot be discussed in the interview, and this Guideline delineates other matters that either are or are not appropriate for discussion. Also, Guideline 16 provides further guidance on questions, such as the location of the interview, the time period, reimbursement of travel expenses, tape recording or file note, as well as other issues.

In section 3, paragraph 9 of Practice Guideline 16, it is stated:

The following may not be discussed either directly or indirectly: (i) the specific facts or circumstances giving rise to the dispute; (ii) the positions or arguments of the parties; (iii) the merits of the case.

In section 3, paragraph 10 of Practice Guideline 16, it is stated:

in order for the interviewee’s suitability (expertise, experience, language proficiency and conflict status) to be assessed, the following may be discussed: (i)
the names of the parties in dispute and any third parties involved or likely to be involved; (ii) the general nature of the dispute; (iii) sufficient detail, but no more than necessary, of the project to enable both interviewer and interviewee to assess the latter’s suitability for the appointment; (iv) the expected timetable of the proceedings; (v) the language, governing law, seat of and rules applicable to the proceedings if agreed, or the fact that some or all of these are not agreed; (vi) the interviewee’s experience, expertise and availability.

Section 3, paragraph 11 of Practice Guideline 16 states:

in assessing the interviewee’s experience and expertise, questions may be asked to test his or her knowledge and understanding of (i) the nature and type of project in question; (ii) the particular area of law applicable to the dispute; (iii) arbitration law, practice and procedure. Such questions should be general in nature and neutrally put in order to test the interviewee and should not be put in order to ascertain his or her views or opinions on matters which may form part of the case.

Finally, with regard to the development of the interview, here are some practical guidelines that we consider useful: (1)

(1) The interview must be conducted in the office of the candidate.
(2) The delegation responsible for the interview should be headed by an external attorney hired by the party concerned with the designation.
(3) The interview cannot be conducted during a lunch or similar gathering, no matter who covers the expenses.
(4) The interview should be restricted to a time limit, which will normally be of thirty minutes.
(5) The candidate must take note of the discussion, which may be revealed to the other arbitrators and parties.
(6) If they are appointed, the arbitrator must inform the other arbitrators of the content of the interview which they held with the party that appointed them.
(7) All these previous issues should be discussed before the interview with the representative of the designating party.

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1 Professor of Arbitration Law at the University of Saint Martin of Pones and at the Pontifical Catholic University of Peru. Arbitrator and Consultant. [www.cmfarbitration.com](http://www.cmfarbitration.com).
3 In this sense, Serge Lazareff, L’arbitre est-il un Juge? in Liber Amicorum Claude Raymond, Autour de l’arbitrage 177 (L’itec 2004), states that: “the arbitrator lives and survives off of their reputation, and this is the reason why they are alert to any and all criticism.”
5 The selection process is based on the cornerstone of arbitration, which is, party autonomy. Similarly, Fabien Gélinas, Independence and Impartiality in International Adjudication, in Judicial Independence in Context 513 (A. Dodek & L. Sossion eds., Irwin Law 2010), states that: “but since international tribunals are always based on consent, the parties are necessarily involved, directly or indirectly, in their constitution.”
6 See generally Carlos Alberto Matheus López, La Independencia e Imparcialidad del Árbitro 150–61 (Instituto Vasco de Quiroga 2009).
8 Peter, supra n. 7, at 114–15.
9 Ibid., at 115.
states that: “The objection to a non-Muslim being an arbitrator is
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Ibid., at 117–18, states that: “One of the clear potential
disadvantages of a panel of three arbitrators is the risk of abusing the
process through one of the party-appointed arbitrators. This can
extend from unethical collusion to outright obstruction of the arbitral
process. However, the risk of frustrating the process does not
outweigh the advantages of thorough analysis of the issue of
confidence and assurance that important issues are not overlooked or ignored.”

Catherine A. Rogers, The Vocation of the International
Arbitrator, 5 American U. Int’l L. Rev. 958 (2005), states that:
“International arbitrators are exceptionally talented individuals. Most
speak multiple languages.”

See Serge Lazareff, The Language of Institutional Arbitration, 1

Similarly Lazareff, supra n. 14, at 18.

Ibid., at 19, states that “By the expression ‘language of the
arbitration’ we mean the official language(s) of the procedure, in
other words the language(s) used by the tribunal and the parties for
communicating orally and in writing.”

Lazareff, supra n. 14, at 18, states that: “the language of the
contract plays an important role in the choice of the language of the
arbitration...the language is an essential key to understanding the
law applicable to the substantive issues of the case.”

Emilia Onyema, Selection of Arbitrators in International
Commercial Arbitration, 2 Int’l Arbitration L. Rev. 50 (2005), states
that: “The arbitrator must be reasonably familiar with the language(s)
of the arbitration proceedings. Each language has connotations and
anecdotes, the understanding of which comes with familiarity. This
would help the arbitrator understand the dispute and the position of
the parties. It of course is cost effective, as the additional costs (as
per additional expenses and billable time) of interpretation would be
avoided.” Similarly Christopher R. Drahozal, Arbitrator Selection and
Regulatory Competition in International Arbitration Law, in Towards a
Science of International Arbitration. Collected Empirical Research
172 (Kluwer Law International 2005), states that: “Requiring
translation of all written documents and oral proceedings, while
sometimes done, increases the cost of the proceeding substantially,
as well as increasing the risk of mistakes.”

Tibor Várady, Language-Related Strategies in Preparing
Arbitration, 2 Across Languages & Cultures 224–25 (2006), states that:
“most arbitrators, however, who have an excellent command of
several languages cannot present formal evidence of their linguistic
skills—language degrees or tests passed. Still, the question
remains whether linguistic aptitude is simply a matter to be left to
the conscience of the prospective arbitrator.”

See Vesna Jaksic, In Arbitrations, Use of Spanish is Growing,

Robine, supra n. 10, at 328.

See Charles J. Moxley, Jr. Selecting the Ideal Arbitrator, 60

See generally Mirèze Philippe, Difficultés Procédurales Causées
par les Clauses Compromisoires Partiaires et les Tribunaux
Arbitraux Tronqués, Gazette du Palais 24–25 (Nov. 5–6, 2003).

Moxley, supra n. 22, at 5.

Matheus, supra n. 6, at 334.

See Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine
Partasides, Teoría y Práctica del Arbitraje Comercial Internacional
303–4 (Editorial Aranzadi 2006).

Peter Morton, Selection and Appointment of Party-Nominated
Arbitrators, Lecture to K & LNG International Arbitration Symposium
5 (Mar. 23, 2006).

See David Winter, The Selection of Arbitrators, 13 Amicus

See generally Jan Paulson, Ethics, Elitism, Eligibility, 4 J. Int’l

Morton, supra n. 27, at 4–5.

See Thomas Clay, L’arbitre 388 (Dalíez 2001); similarly Arthur J.
Gemmell, Commercial Arbitration in the Islamic Middle East, 1
Hanbali School, a decision made by an arbitrator has the same
binding nature as a court’s judgment. Thus, the award made by an
arbitrator (who must have the same qualifications as a judge) carries
a res judicata effect upon both of the parties since it was they who
chose him.”

Matheus, supra n. 6, at 117–118.

Ibid., at 118.

Faisal Kutty, The Shari’a Factor in International Commercial
states that: ‘The objection to a non-Muslim being an arbitrator is
based on the classical view that only a Muslim can judge between two Muslims by applying the Shari’a.”

35 Matheus, supra n. 6, at 124–25.
36 See Winter, supra n. 28, at 5.
38 See Moxley, supra n. 22, at 2.
41 Morton, supra n. 27, at 5–6.
42 Ibid., at 6.
43 See Redfern, Hunter, Blackaby & Partasides, supra n. 26, at 301.
48 See Redfern, Hunter, Blackaby & Partasides, supra n. 26, at 302. See generally Morton, supra n. 27, at 8. See Bishop & Reed, supra n. 44, at 425.