

Summary / Abstract

This note has been prepared to provide guidance to parties and their advisers when appointing arbitrators. Although it has been prepared by ACICA and is based upon the application of the [ACICA Rules](#)¹ much of this guidance note is of general application to international commercial arbitration. However, where other arbitration rules apply, parties and their advisers should have regard to those rules.

IDENTIFICATION OF APPROPRIATE ARBITRATOR CANDIDATES

The primary sources for the arbitrator's requisite attributes are the arbitration agreement and applicable rules. In addition to any formal requirements, parties should consider:

- the qualifications and expertise that are appropriate for a particular dispute, such as formal academic, technical or professional credentials, and also any other attributes such as familiarity with the parties' culture or jurisdiction, or language skills
- diversity and issues of equal representation, such as gender, age, geography, culture, ethnicity, and professional background of the arbitrator
- the personal and cultural dynamics within a tribunal of three arbitrators, and the ability of the arbitrator candidate to work well with others.

Parties should conduct due diligence on potential arbitrator candidates prior to making a nomination to test not only the above attributes, but also that a potential arbitrator has the required degree of independence and impartiality.

The ACICA panel of arbitrators is available to be used by parties as a resource for party nominations.

APPOINTMENT PROCEDURES

Under the ACICA Rules, parties nominate potential arbitrators, and they are confirmed for appointment by ACICA.

The ACICA Rules provide specific different procedures for the appointment of a sole arbitrator or a tribunal of three arbitrators. However, in both cases if a party defaults or is late in making its nomination, ACICA will appoint an arbitrator.

CHALLENGING ARBITRAL APPOINTMENTS

The ACICA Rules expressly incorporate the widely recognised and applied [IBA Guidelines on Conflicts of Interest in International Arbitration](#). Most notably ACICA may have regard to the IBA Guidelines when deciding on a challenge to an arbitrator's appointment.

¹ A reference to the ACICA Rules in this Guidance Note is to the 2021 edition of the Rules.

1. Introduction

The appointment of arbitrators is a critical element of the arbitral process. A party's choice of arbitrator will invariably influence the outcome, length, cost and character of the proceedings. It will also invariably influence the overall satisfaction of parties with arbitration.

The purpose of this note is to give practical guidance to assist parties with the appointment process. This includes:

1. the identification of potential arbitrators;
2. the process and considerations for nomination and appointment for one member or three member tribunals, with specific reference to the ACICA Rules; and
3. the mechanisms to challenge the appointment of an arbitrator under the ACICA Rules.

2. Identification of Potential Arbitrators

A. THE AGREEMENT

A practitioner seeking to appoint an arbitrator should first review the relevant arbitration clause of the contract. This clause ought to provide whether there is to be a sole arbitrator or more, and set out whether the arbitrator(s) require(s) any specific qualifications or experience, or whether there are any other restrictions on the parties' choice (such as nationality).

If the clause does not provide for the number of arbitrators, the claimant may suggest the number it considers appropriate for the other party's consideration.² If agreement cannot be reached within 30 days of receipt by the Respondent of the Notice of Arbitration, ACICA will determine the number of arbitrators.³

The number of arbitrators is a key factor informing strategy and protocols for appointments. As set out below, the relevant ACICA rules differ depending on the number of arbitrators to be appointed. There are potential advantages and disadvantages attached to having a sole arbitrator, or a tribunal of three arbitrators. In favour of a sole arbitrator are not only the lower cost, but also a potentially shorter duration for the arbitration. While the cost aspect is self-evident, the potential time advantages arise as there can sometimes be significant delays in proceedings conducted by a three person tribunal due to having to coordinate multiple diaries, rather than one, particularly for longer hearings. On the other hand, the key advantage of having a three person tribunal is the inherent diversity that this brings to all aspects of the determination of the dispute.

The contract may mandate that arbitrators hold certain qualifications or have a number of years' experience. While some qualifications may be academic in nature (usually relevant to the subject matter of the underlying contract), the parties may also specify other attributes including language ability, membership of particular organisations (usually professional), or being licensed to practise their profession in certain jurisdictions. In some agreements and under some arbitral rules there may also be a condition as to whether arbitrators can be nationals of the jurisdiction of one of the parties in order to further reinforce the need for tribunal members

² ACICA Rule 11.

³ ACICA Rule 11.

to be independent of the parties. However, it should be noted that parties may agree to substitute or vary contractual requirements by subsequent agreement.

B. IDENTIFICATION OF CANDIDATES

As noted, the choice of arbitrator can have a profound impact on the arbitration and users' satisfaction with the process. In this regard, the following points should be noted:

1. First, it is important for parties to appreciate that the most popular arbitrators will also have the busiest schedules. While it is entirely appropriate for arbitrators to accept multiple simultaneous appointments, managing multiple disputes will often mean they have limited availability for case conferences and the determination of interim matters or hearings. This is particularly so when there are three arbitrators.
2. Secondly, an arbitrator's background is likely to affect the way in which the arbitration proceeds. For example, in Australia, parties often appoint former judicial officers as arbitrators. Former judges can make good arbitrators given their strong background as finders of fact and decision makers. However, procedurally they may choose to conduct arbitration much like domestic litigation. It is important for a party to recognise that such an approach may be more costly and time consuming than more conventional arbitration procedures. Similarly, Australian arbitrators will generally bring their common law experience to the resolution of the substantive issues in dispute. While this is often desirable, it may not always be appropriate where the law governing the dispute is not common law based.

In addition to these two points, parties should consider the qualifications and background of a potential arbitrator, in assessing their suitability against any requirements of the arbitration agreement, as well as their suitability for deciding relevant issues in dispute.

While many parties and their advisers will be aware of a number of potential arbitrator candidates, they may not always be the ones most suited to the particular dispute that has arisen. As explained below, it is recommended that parties go beyond their regular lists of potential arbitrators in order to identify appropriate candidates, as well as to promote arbitrator diversity and equal representation. If parties require assistance in identifying appropriate candidates, ACICA has made available its own [panel of arbitrators](#) to be used by parties as a resource for nominations.

Candidates' qualifications

The first step in this process involves parties and their legal representatives creating an internal shortlist of candidates. These candidates must comply with any qualification requirements in the agreement. Parties should also research a candidate's expertise and background and whether any conflicts are apparent.

This ability to conduct "due diligence" on candidates is a substantial advantage of arbitration, as parties have a degree of control over who is appointed. While parties may not have the benefit of reviewing a candidate's previous arbitral decisions, it is possible to undertake some degree of research into the attitudes and approaches which they tend to adopt. Tools such as "[Arbitrator Intelligence](#)" and the "[GAR Arbitrator Research Tool](#)" also exist to assist parties to undertake this research process.

This due diligence helps to identify whether a potential arbitrator has particular traits, such as having a black letter or commercial approach to legal issues, whether they would be able to handle sophisticated parties or

more eminent practitioners, whether they are procedurally efficient, and whether they are well equipped to deal with the merits of the dispute.

Depending on the nature of the arbitration, the appointment of an arbitrator who is not a lawyer may be appropriate, either as the sole arbitrator or as a member of a tribunal. For example, in construction disputes, engineers and quantity surveyors are often appointed as arbitrators by parties who recognise that the commercial or technical expertise that they contribute to the tribunal would be helpful.

A party's due diligence also extends to contacting potential candidates to confirm their availability, willingness to act and fees.⁴ This contact can be in the form of a telephone call followed up with an email or letter if desired. Parties should provide a realistic estimate of the length of appointment and clarify fees carefully (including whether disbursements will be charged, and whether their fee includes applicable taxes (eg GST, VAT) and whether they have any particular travel requirements (e.g. Business class travel). Parties should also confirm that if an in-person hearing is required, the potential candidate will be able to obtain any required visas. As a general rule, pre-appointment contact should be kept to a minimum as it could cause the perception of bias. While parties may conduct a pre-appointment interview with candidates, this should only be conducted in accordance with any relevant guidelines⁵ and parties should be aware of the hazards in having that contact with the potential arbitrator.

As part of the selection process, parties should consider whether there are any business, professional, economic or social relationships with candidates that might preclude them from accepting an appointment, or being perceived as acting impartially. Care should be taken to avoid nominating arbitrators where there could be a perceived conflict of interest, or apprehension of bias. See the section below on challenging appointments.

C. EQUAL REPRESENTATION

In addition to the factors listed above, in applying the following guidance, practitioners and parties should bear in mind that users of international arbitration are increasingly demanding⁶ that arbitral appointments are made on an equal opportunity basis. This includes not only gender but age, geography, culture, ethnicity and professional background.

The Current Position

Gender diversity in arbitral proceedings has improved significantly in recent years, thanks in large part to the important work of advocacy groups such as the [Equal Representation in Arbitration Pledge](#). Nevertheless, at present, only 13.9% of party appointments to arbitral panels are female.⁷

This underrepresentation is due in part to a lack of visibility of female arbitrators. Many well-qualified female

4 ACICA Rule 20.4.

5 See eg the CI Arb (2015) [International Arbitration Practice Guideline: Interviews for Prospective Arbitrators](#).

6 Queen Mary University London and White & Case (2021) 2021 International Arbitration Survey: Adapting arbitration to a changing world (*Queen Mary International Arbitration Survey 2021*) refers to diversity as an accepted, positive goal of the international arbitration community.

7 International Council for Commercial Arbitration (2020) "Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings" at page 25 https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf.

candidates lack visibility because party appointments are often made from a small pool of mostly male candidates based on parties' previous experience. This is compounded by parties' (and their advisers') reluctance to nominate candidates with less experience sitting as an arbitrator, which also tends to limit the pool, and is a barrier to entry for potential candidates. The confidential nature of arbitral proceedings also reinforces this lack of visibility.

Shortcomings in racial, cultural and geographic diversity are also increasingly being recognised in the arbitral system. While parties to arbitration are increasingly geographically diverse, statistics indicate that the majority of appointments are predominantly resident in the seat of the arbitration.⁸

There are undoubtedly legitimate reasons for this geographic bias, such as familiarity with local practices and reducing travel expenses. However, institutions such as the International Chamber of Commerce acknowledge that the regional diversity of its tribunal appointments is unsatisfactory. The establishment of organisations such as [Racial Equality for Arbitration Lawyers \(REAL\)](#) to address these shortcomings and facilitate greater racial representation in arbitration is particularly notable.

The Benefits of Change

Increasing equal representation has a number of advantages for parties participating in arbitral proceedings. First and foremost, it ensures that arbitral tribunals (and users of arbitration) are benefitting from a diversity of views, experiences and practices. At a practical level, committing to appoint arbitrators on an equal opportunity basis also widens and deepens the pool of talented arbitrators available. Increasing the number of practising arbitrators will make the system as a whole more efficient and deliver better outcomes by improving the availability of arbitrators to conduct hearings and make awards. Additionally, the likelihood of a conflict of interest is also reduced where a diverse group of arbitrators is available.

Therefore, practitioners and parties should make every effort to broaden the pool of arbitrators by making appointments on an equal opportunity basis. This includes ensuring that a fair proportion of appropriately qualified female and otherwise diverse arbitrators are included on internal and shared lists. Parties should also consider signing and adhering to the Equal Representation in Arbitration Pledge.⁹ ACICA is a signatory to the Pledge.

Other initiatives

Corporate social responsibility issues are becoming increasingly integral not only to arbitration users but also to practitioners themselves. One example is the [Green Pledge](#), a pledge for arbitration practitioners to commit to reducing the environmental impact of international arbitration by reducing unnecessary travel, printing and considering suppliers' environmental impact. While Respondents to the 2021 Queen Mary International Arbitration Survey indicated that environmental issues are a positive side-effect but not a primary driver for their decision making throughout the arbitration, this may change over time.

8 Gemma Anderson, Richard Jerman and Sampaguita Tarrant (Morrison & Foerster), *Diversity in International Arbitration via Practical Law UK* [https://uk.practicallaw.thomsonreuters.com/w-019-5028?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-019-5028?transitionType=Default&contextData=(sc.Default)&firstPage=true).

9 For further information visit <http://www.arbitrationpledge.com/>.

3. Appointment procedures

A. SOLE ARBITRATOR

ACICA Rule 12 states that parties should attempt to agree on the nomination of a sole arbitrator. The ACICA Rules make provision for the parties to include their proposed sole arbitrator nominee with their Notice of Arbitration or Answer.¹⁰ If the parties are unable to agree upon the identity of the sole arbitrator, ACICA will make an appointment.

Negotiation

After internally coming up with a shortlist of potential candidates, the next step in the process involves each party suggesting candidates to the other side. This can be done by discussion, e.g. telephone, video-conference or at a face-to-face meeting (at which notes are taken and signed by both parties) or in writing, e.g. in a letter or email exchange setting out names, qualifications, backgrounds and a brief statement on their suitability. If possible, the party proposing an arbitrator candidate should also provide the curriculum vitae of that candidate. In practice, it is common for one party to suggest a small number of potential candidates and to allow the other side to choose their preferred arbitrator from a list. A common variation of this procedure is for each side to exchange their short lists, with the arbitrator to be appointed from the candidates common to each side.

Parties should carefully consider candidates suggested by the other side. This will include performing due diligence regarding a candidate's potential conflicts of interest and expertise. It is recommended that parties should not reject a candidate simply because they were suggested by the other side. Doing so may eliminate potentially suitable candidates.

Finalisation of Appointment

Once the parties agree on a candidate they should send a joint notification requesting the arbitrator to accept the nomination for appointment.¹¹ In practice this can be done by one party permitting the other to write to the arbitrator on behalf of them both. Up until the arbitrator has accepted, either party may revoke their agreement to the nomination. A potential arbitrator is under no obligation to accept an appointment and may choose not to do so for any reason. If the nomination is not accepted, the selection process repeats until a candidate is agreed or, failing agreement, an appointment is made by ACICA.

In the interests of transparency the notice requesting the arbitrator to accept the parties' joint nomination should be copied to the other side and to include a request that the nominated arbitrator copy all parties in future correspondence. The relevant arbitration agreement and any relevant contract should be attached to the notice. Care should be taken in drafting the notice as if the arbitrator's remit is described drawn too narrowly this may limit the arbitrator's jurisdiction.¹² For this reason, the arbitrator's remit should be linked to the request or notice of arbitration or other document which defines the issues in dispute. For arbitrations under the ACICA Rules, the notice should also make clear that the arbitrator's appointment is subject to confirmation by ACICA.

¹⁰ ACICA Rule 6.4(b).

¹¹ Practical Law Arbitration (2021) "How do I appoint an arbitrator?" [https://uk.practicallaw.thomsonreuters.com/4-204-0021?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-204-0021?transitionType=Default&contextData=(sc.Default)&firstPage=true).

¹² Ibid.

The parties' agreement on a sole arbitrator should be communicated to ACICA as soon as possible, and in any event within 40 days of when the Respondent received the notice of dispute.¹³ Under the ACICA Rules, an appointment is finalised when the arbitrator agreed upon and nominated by both parties is confirmed by ACICA.¹⁴

The arbitrator is able to exercise any of the tribunal's procedural powers immediately upon their appointment being finalised. The obligation to avoid ex parte communications with the arbitrator also takes effect at this point.¹⁵

Failure to Agree

If the parties to a dispute cannot agree on the choice of an arbitrator within 40 days of the respondent receiving the Notice of Arbitration, ACICA will make the appointment.¹⁶ Pursuant to ACICA Rule 12.3, an independent and impartial arbitrator will be appointed.

B. THREE ARBITRATOR TRIBUNAL

The ACICA Rules provide a separate protocol where the arbitration agreement provides for the dispute to be resolved by three arbitrators. Each party is to nominate one arbitrator for confirmation by ACICA, after which the two appointed arbitrators must nominate a chairperson for confirmation by ACICA (unless they cannot agree, in which case ACICA will appoint the chairperson).¹⁷

As with the process for appointing a sole arbitrator, parties should draw up a shortlist of appropriately qualified candidates (as per the terms of the arbitration agreement) for their nominated arbitrator. Parties should include diverse candidates, insofar as possible, in their shortlist and also make enquiries regarding the availability of those candidates, their independence, their willingness to act, an indication of their fees and/or potential conflicts. Communication pre-appointment may also include ascertaining the candidate's views on a suitable chairperson. The identity of the chairperson is particularly important to ensure the parties' satisfaction with the process.

As the tribunal will be composed of three arbitrators, there is more scope for the parties to give thought as to issues of diversity amongst the tribunal members, and what attributes they would prefer to have in their nominee for the tribunal, bearing in mind the issues in dispute. Parties should also consider the ability of their nominee to function within a team, and how they may relate with the other members of the tribunal, particularly if they are not the chairperson. In this regard, issues such as language and the arbitrator's background and sensitivity to cultural issues may be important factors to consider.

Under the ACICA Rules, parties are able to include details of the arbitrator they have nominated in their Notice of Arbitration or Answer. If they have not done so, the parties should move swiftly to nominate an arbitrator. There is no value in delaying the process, and doing so might result in a suitable candidate becoming unavailable or,

¹³ ACICA Rule 12.2.

¹⁴ ACICA Rule 12.1

¹⁵ ACICA Rule 20.4

¹⁶ ACICA Rule 12.2.

¹⁷ ACICA Rule 13.3.

in an appointment being made by ACICA, unless the parties agree to extend the nomination period.¹⁸ Once a suitable candidate has been identified and accepted their nomination, the party who nominated them should promptly inform the other party, noting that their appointment will be subject to confirmation from ACICA.

Once ACICA has confirmed the appointment of the parties' nominated arbitrators (or has made one or more appointments in default of a nomination from one or both parties), the two confirmed or appointed arbitrators must proceed to agree upon the identity of the chairperson of the tribunal and, once agreed, to nominate that person for confirmation by ACICA. If the two arbitrators are unable to reach agreement within 30 days, then ACICA will proceed to appoint the chairperson.

The appointment of the arbitral tribunal is finalised upon the confirmation of the appointment of the chairperson by ACICA. The first and second arbitrator, even if confirmed, do not have procedural powers until the chairperson is appointed. While the rules regarding correspondence with the tribunal should be observed as soon as the appointment is finalised, it is best practise for parties and their representatives not to engage in correspondence with any of the arbitrators once they have been nominated in the absence of the other party.

It is common practise for the parties to enter into a multilateral agreement with the tribunal members to confirm the terms of their engagement, and for that agreement to deal with administrative matters such as the tribunal's fees and expenses, and also substantive matters such as the tribunal's immunity from suit. Parties should be aware that under the ACICA Rules, the tribunal's fees and expenses are determined exclusively by ACICA in accordance with the cost provisions in the ACICA Rules. The ACICA Rules provide that separate fee arrangements between any of the parties and the Arbitral Tribunal are contrary to the ACICA Rules.¹⁹ Terms of engagement that incorporate the deposit setting and cost fixing provisions of the ACICA Rules²⁰ by reference are possible.

As in the case of the appointment of a sole arbitrator, care should be taken in drafting the agreement to ensure that the description of the tribunal's remit does not adversely impact the tribunal's jurisdiction.

4. Challenging appointments

The appointment of any arbitrator may be challenged for not meeting a required qualification or due to concerns about the arbitrator's impartiality or independence. Under the ACICA Rules, a party may only formally challenge the arbitrator that it has appointed for reasons that a party becomes aware of after the appointment has been made.²¹

Protocols are in place to identify and avoid conflicts of interest as soon as possible. Prior to accepting the appointment, the arbitrator candidate must sign a statement of availability, impartiality and independence and return it to ACICA.²² This statement is also provided to the parties. If the appointment is accepted, the arbitrator

¹⁸ Under ACICA Rule 13.2 if a party has not nominated an arbitrator within 30 days of receiving notification that the other party has done so, ACICA may make the appointment of the second arbitrator itself.

¹⁹ ACICA Rule 50.6.

²⁰ ACICA Rules 49 and 50.

²¹ ACICA Rule 21.2.

²² ACICA Rule 20.3.

has an ongoing obligation to provide written disclosure of any circumstances that might give rise to a conflict.²³ Any disclosure made by the arbitrator must be passed on to ACICA by the parties.

The test for conflict of interest is whether circumstances exist which objectively give rise to a justifiable doubt as to impartiality and independence of the arbitrator.²⁴ This test is based on article 12 of the UNCITRAL Model Law.²⁵

The IBA Guidelines on Conflicts of Interest in International Arbitration provide standards and practical guidance for parties when considering potential conflicts of interest. These Guidelines are not mandatory but are generally accepted and followed in international arbitration. However, Rule 12.4 of the ACICA Rules expressly provides that ACICA, the tribunal and the parties may have regard to the IBA Guidelines, including for the purpose of ACICA determining a challenge to an arbitrator under Rule 22.4.

The IBA Guidelines provide four categories of potential conflicts of interest:

- *Non-waivable Red list*: describes situations where an arbitrator would effectively be a judge in their own cause.
- *Waivable Red list*: describes situations where an arbitrator has provided an opinion on the dispute itself, has a direct or indirect interest in the dispute, or has a close relationship with one of the parties.
- *Orange list*: describes situations where an arbitrator has served as counsel for a party in the last three years, currently serves as counsel for one party on an unrelated matter, or has a personal or professional relationship with one of the parties.
- *Green list*: describes situations where an arbitrator has published opinions relevant to the issue in dispute, is a member of the same organisation as one of the parties, or has had contact with one of the parties prior to appointment regarding their availability and qualifications to serve as arbitrator.

Arbitrators must disclose Red list matters to the parties, and are not required to disclose Green list matters. Orange list matters (the majority) are to be assessed on a case-by-case basis.

If the appointment of an arbitrator is challenged, the other party has an opportunity to agree to this challenge or the arbitrator may elect to resign of their own accord.²⁶

If the arbitrator chooses not to resign, ACICA will determine the challenge.²⁷ The ACICA Executive decides whether the arbitrator may continue to serve, on the basis of a recommendation from members of the ACICA Council.²⁸

²³ ACICA Rule 20.3.

²⁴ ACICA Rule 21.1.

²⁵ ACICA Rule 2.3 expressly provides that the parties have not intended to exclude the operation of the UNCITRAL Model Law.

²⁶ ACICA Rule 22.3

²⁷ ACICA Rule 22.5

²⁸ For detailed information regarding conflicts of interest and challenging arbitrators, see: <https://acica.org.au/wp-content/uploads/2021/05/Protocol-for-decisions-on-consolidation-joinder-and-challenges-under-the-ACICA-Rules-2021.pdf>

Conclusion

The procedures by which arbitrators are appointed and challenged are an integral element of the arbitration process as a whole. The outcome, length, cost and character of the proceedings will be affected by parties' choice of arbitrator.

This note sets out practical guidance in relation to the appointment and challenge of arbitrators. It also notes the importance and practical benefit of adopting an equal opportunity approach to the appointment of arbitrators.