
Kluwer Arbitration Blog

Interviewing Prospective Arbitrators

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Introduction

It is often said that the choice of a party-nominated arbitrator is the single most important decision a party will make in any arbitration. The right to appoint one of the decision-makers sets the arbitral process apart from litigation, and is touted as a key selling point.

When exercising this right, it is now increasingly common for parties to interview a prospective arbitrator. This is understandable, and will often give a party valuable insight into the candidate, including his personality, technical skills, language abilities and approach to the arbitral process in general. Considering the time and costs associated with a full blown international arbitration, the stakes are high and parties are keen to ensure that the right candidate is appointed.

While arbitrators previously abhorred pre-appointment interviews as unseemly, there is now a growing acceptance of such a practice – but only if the interview is conducted appropriately. Great care is required to ensure that such interviews do not compromise the integrity of the arbitral process, and that the prospective arbitrator remains able to carry out his key role as an impartial and independent third party decision maker.

Guidance

Unfortunately, not as much has been written or decided on this issue as we would have liked. But there are guidelines issued by international organisations such as the IBA and CIArb to assist arbitration practitioners and their clients in staying on the right track.

The IBA Guidelines on Party Representation in International Arbitration (the “IBA Guidelines”) suggest that *ex parte* communications with a prospective arbitrator should be limited to providing a general description of the dispute and obtaining information regarding the suitability of the prospective arbitrator. Guideline 8(a) provides that “A Party representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest”.

As to areas of discussion which are “*out of bounds*”, Guideline 8(d) provides that “*While communications with a prospective Party-Nominated or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute*”. It is therefore inappropriate to seek the prospective arbitrator’s views on matters which may form part of the case.

The Chartered Institute of Arbitrators has also issued Practice Guideline 16: The Interviewing of Prospective Arbitrators (the “CI Arb Guidelines”) – with the stated aim of stimulating discussion on the topic and providing a framework for arbitrators to work within.

Practical Steps

When approaching a prospective arbitrator about a pre-appointment interview, the following pointers (which are by no means exhaustive) may assist counsel:

1. Be aware that all communications with the arbitrator are potentially discoverable, and may form the basis for a challenge of his appointment. Think carefully about what you wish to achieve through the interview, and how this is documented;
2. Prepare an initial briefing note to the prospective arbitrator, which should be sent across in advance of the interview. This should cover the following issues to enable him or her to run the necessary conflict checks and to confirm his or her general availability:
 - a. the identities of the parties and counsel;
 - b. the names of arbitrators who have already been appointed;
 - c. the applicable procedural rules and the quantum of the dispute;
 - d. the seat and/or venue of the arbitration;
 - e. any specific nationality, language and/or other requirements under the arbitration agreement; and
 - f. the estimated timeline of proceedings;
3. Use the IBA Guidelines and/or the CI Arb Guidelines as the basis of the interview and specify any other parameters that you wish to set. Give advance notice to the prospective arbitrator of these guidelines and principles. He or she should read and be familiar with these guidelines and principles before the interview;
4. Give advance notice to the prospective arbitrator of the constitution of the interviewing team, and the details of parties (if they choose to attend in person). Keep the attendees to a core group but ensure that the interview proper is conducted by one individual – typically lead counsel;
5. Give advance notice to the prospective arbitrator of the list of questions / topics to be raised during the interview. This will enable him or her to properly prepare for the interview and also express any reservations about the nature of any questions beforehand;
6. If technical questions are posed, the CI Arb Guidelines make clear that they should be limited to testing the prospective arbitrator’s knowledge and understanding of :

- a. the nature and type of the dispute in question;
- b. the substantive and procedural law applicable to the dispute;
- c. international arbitration principles, practice and procedure;

7. The CIArb Guidelines also make clear that the following issues should not be discussed or raised during the interview:

- a. the specific facts or circumstances giving rise to the dispute;
- b. the positions or arguments of the parties; and
- c. the merits of the case, and in particular an arbitrator's view on an issue in dispute;

8. In an article written by Doak Bishop and Lucy Reed (See Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14(4) *Arb Int* 395 (1998)) - which pre-dated the IBA Guidelines and the CIArb Guidelines-, they observed that it is generally proper to discuss the following matters during the interview:

- a. the identities of the parties, counsel and witnesses;
- b. the estimated timing and length of hearings;
- c. a brief description of the general nature of the case sufficient to allow the prospective arbitrator to determine if he or she is competent to decide the dispute, has disclosures to make, and has the time to devote to the matter;
- d. the prospective arbitrator's background, qualifications and resume;
- e. the prospective arbitrator's published articles and speeches;
- f. any expert witness appearances of the prospective arbitrator, including positions taken;
- g. any prior service as an arbitrator, including decisions rendered (subject to any confidentiality requirements);
- h. whether there is anything in the prospective arbitrator's background that would raise justifiable doubts as to his or her independence or impartiality, and any disclosures that the prospective arbitrator would need to make;
- i. whether the prospective arbitrator feels competent to determine the parties' dispute; and
- j. the availability of the prospective arbitrator (i.e. whether he or she can devote sufficient time and attention to the parties' dispute in a timely manner).

It cannot be emphasised enough that parties and their counsel must avoid any discussion of the merits of the case beyond what is necessary for the prospective arbitrator to determine his or her competence, potential conflicts of interests and availability to hear the dispute. Hypothetical questions about potential arguments and counter-arguments on issues of law and fact should also be avoided. In practice, this is easier said than done, but the rule of thumb is that when in doubt, don't ask the question!

A difficult issue is whether to have a simultaneous tape recording of the interview, so that it can be kept and relied upon in the event of a challenge. Practitioners are divided on the correct approach. The IBA Guidelines are silent on this issue, while the CIArb Guidelines recommend such a practice, while observing that it is not without controversy. This is an important tactical call, and the answer could well vary in each case. But as a rule, even if you choose not to record the interview, both the prospective arbitrator and counsel should keep detailed file notes of what transpires.

This could prove critical evidence to vindicate a party's position, in the event of a challenge by the other side, and to preserve the integrity and reputation of the arbitrator.

Conclusion

The interview of prospective arbitrators is fraught with potential pitfalls which, in extreme cases, may impugn the integrity of the arbitral process and invalidate the award. However, if utilized properly, it ensures that the appointed arbitrator is, as Professor Martin Hunter put it, *"someone with maximum pre-disposition towards my client, but with minimum appearance of bias"* (See Martin Hunter, *Ethics of the International Arbitrator*, 53 *Arbitration* 219 (1987), 222-223).

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The infographic features a dark teal background on the left with a white circle containing the number '77%'. A dashed teal line curves from this circle towards the center, where the text 'Increasing Volume and Complexity of Information' is written in a light teal font. A solid teal arrow points from this text to a green circle on the right containing the text 'Kluwer Arbitration' and 'World's essential online resource for international arbitration research'. At the bottom right, it says 'SURVEY REPORT The 2021 Wolters Kluwer Future Ready Lawyer Moving Beyond the Pandemic Insights'. The Kluwer Arbitration logo is at the bottom left, and the Wolters Kluwer logo is at the bottom right.

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