

Arbitrating in CEE & CIS: Transparency, Accountability and Choice of Arbitrators

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The second edition of the Jeantet "Arbitrating in CEE and CIS" roundtable was held during the Paris Arbitration Week on Thursday 4 April 2019 at the Jeantet offices. The topic of this year's edition was "Transparency, Accountability and Choice of Arbitrators".

An increasing demand of international arbitration users for more transparency, predictability of decisions and diversity in the appointments of arbitrators is met by arbitral institutions with a number of initiatives aimed at meeting the expectations of the users, broadening the spectrum of available arbitrators and achieving more diversity, providing users with more available information when appointing arbitrators, offering more transparency and predictability by publishing decisions, etc. The second edition of the Jeantet "Arbitrating in CEE and CIS" roundtable thus aimed at providing the perspective of some of the most active arbitral institutions in the CEE and CIS region as well as the feedback of the Arbitrator Intelligence on its CEE Campaign. The speakers this year were: *Ivana Blagojević (Deputy Counsel, ICC)*, *Beka Injia (Secretary General, Georgian International Arbitration Centre [GIAC])*, *Anja Ipp (Legal Counsel, SCC)*, *Catherine A. Rogers (Founder of Arbitrator Intelligence)* and *Rinaldo Sali (Vice-Director General, Milan Chamber of Arbitration [CAM])*. The roundtable was once again moderated by *Ioana Knoll-Tudor (Jeantet)*.

The issues discussed are summarized below.

1. **Appointment of arbitrators**

1.1 Arbitrators appointed by the arbitral institutions

In the absence of an agreement between the parties or when appointment by the institution is mandatory, arbitral institutions become the appointing authority. In 2018, the CAM appointed arbitrators in 42% of its cases and the GIAC in 62% of the cases. In 2017, 26% of the ICC arbitrators were appointed by the Court, whether directly or upon a proposal from National Committees.[fn]ICC Dispute Resolution Bulletin 2018, Issue 2, ICC Practice and Procedure, p. 56.[/fn]

Arbitral institutions apply various **formal and substantial criteria** when appointing arbitrators. The criteria relate to the arbitrators themselves (such as their nationality, age and qualifications, availability and ability to conduct arbitration proceedings, previous experiences as co-arbitrators, chairman, sole arbitrator, counsel etc.)[fn]See Article 15(5) of the 2019 CAM Arbitration Rules, Article 17(7) of the 2017 GIAC Arbitration Rules, Article 13(1) of the 2017 ICC Arbitration Rules, and Article 17(7) of the 2017 SCC Arbitration Rules.[/fn] but also to the case at hand (such as the applicable law,

seat and language of the arbitration, subject matter of the dispute, nature and circumstances of the dispute, procedural issues to be covered by the arbitrators, the amount in dispute). Despite the efforts of arbitral institutions to find arbitrators specialized in the industries and subject matters involved in the respective case as well as to promote arbitrators from the relevant geographic zone, the GIAC noted that there is a lack of arbitrators from the CEE and CIS region.

The **availability and time-efficiency** of arbitrators constitute another important criterion. The SCC Arbitration Rules, for example, impose shorter time limits than other institutions to render an award. In this sense, the SCC Board sometimes prefers to appoint less-known arbitrators, who can proceed swiftly with the case, instead of arbitrators with overburdened schedules. The ICC also keeps records of the arbitrators' time-management through regular reports addressed to the Court by the Secretariat, and which include notes on their handling of time (e.g., to convene a Case Management Conference, to establish the Terms of Reference, to render a final award, to notify the parties throughout the procedure, etc.). The CAM, for its part, emphasized the importance of having a member of the Secretariat participating at the hearings and reporting the efficiency of each arbitrator to the CAM Arbitral Council.

The **procedure of disclosure** ensures that each arbitrator considered for appointment is independent and impartial. As the pool of arbitrators from the CEE and CIS region is rather limited and in some cases arbitrators with very specific qualifications are necessary (i.e., need for an arbitrator speaking a particular language), this procedure may sometimes be more flexible than in other cases. Nevertheless, the agreement of the parties is always required prior to any appointment.

Finally, the issue of **administrative secretaries** has been raised by the audience, since they can be appointed by an arbitrator to assist with the administration of a case but often, neither the arbitral institutions nor the parties, have a say in such appointment. The ICC has adopted a very proactive approach in this respect. While it acknowledges that administrative secretaries may be a real added-value in large cases, in small cases, the ICC contacts the arbitrator to enquire about the exact role and time-commitment of the administrative secretary, and ensure that the costs related to such appointment are borne neither by the ICC nor by the parties.

1.2 Party-appointed arbitrators

The available information on arbitrators is scarce and parties must rely on their own network and resources to find such information. This lack of information was the starting point of the **Arbitrator Intelligence (AI)** project, which was launched with the aim of promoting more transparency and offering international arbitration users more information about arbitrators, prior to appointing them.

AI aims also at contributing to the appointment of more diverse arbitrators, both by the parties and by the arbitral institutions. Although arbitral institutions are actively encouraging diversity in their appointments, almost no parties from the CEE and CIS region appoint local arbitrators. Therefore, there is a reduced pool of appointed arbitrators originating from the CEE and CIS countries: only 6% of ICC arbitrators in 2017. By comparison, 54% of the ICC arbitrators are from North & Western Europe.

2. Tools used for more transparency by arbitral institutions

2.1 Publication of the names of the arbitrators

The approach of arbitral institutions to the publication of the names of the arbitrators is not unanimous. While the CAM, GIAC and the ICC (to some extent) publish the names of their arbitrators, the SCC chose not to.

Although it does not provide an official list of arbitrators, the CAM publishes since 2016 the names of

all its arbitrators, as well as the composition of the tribunals and their appointing authorities. Consent of the parties is not required for such publications however arbitrators can opt out from having their names disclosed.

The ICC website lists arbitrators seating in ICC cases registered after 1st of January 2016. Such publication is subject to the parties' consent and practice shows that arbitrators are very favorable to it, even asking the parties for their consent to appear on this list when in presence of a confidentiality agreement.

The SCC chose not to publish the names of its arbitrators but nevertheless holds an informal database of every person who was appointed as arbitrator or appeared as counsel in SCC proceedings.

2.2 Publication of the decisions on challenges of arbitrators

The SCC was the first major arbitral institution to publish **summaries of arbitrator challenges** decided by the SCC Board, beginning in 2005. It recently went a step further and, since 1 January 2018, provides reasoned decisions for all arbitrators' challenges decided by the Board, unless the parties agree otherwise.

Upon request of any party, the ICC Court may also communicate the reasons for a decision on the challenge of an arbitrator or for a decision to initiate replacement proceedings. This possibility has been specifically mentioned in the newest version of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration which entered into force on January 1st, 2019 ("2019 ICC Note"). Between 2014 and 2018, the Court communicated reasons to parties in 14 cases, out of which 7 cases only in 2017.

The CAM also publishes every year on its website between 15 and 20 relevant summaries of decision for challenges, in an anonymized format.

2.3 Publication of awards

Although not provided in the ICC Arbitration Rules, the publication of awards was mentioned in the 2019 version of the 2019 ICC Note in a rather novel manner: "*[p]arties and arbitrators in ICC arbitrations accept that ICC awards made as from 1 January 2019 may be published [...] no less than two years after [its notification to the parties and arbitrators by the Secretariat]*".^[fn] ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2019), paras. 41-42.^[fn] Parties are free (i) to object to the publication, (ii) to require that the award is in all or in part anonymised or pseudonymised and (iii) to agree to a longer or shorter time period for publication.^[fn] ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2019), paras. 42-43.^[fn] However, this publication operates a major shift from an "opt-in" mechanism to an "opt out" one.

The systematic publication of awards is not on the agenda of the SCC in the near future. The SCC underlines confidentiality as one of the most important features sought by its users. The SCC however translates and publishes all Swedish courts' decisions relating to arbitration (which often include the corresponding arbitral awards as appendices).

Finally, it shall be noted that the CAM drafted a series of Guidelines for the anonymous publication of arbitral awards.

Conclusion

The demand for more transparency, more predictability and more diversity in international arbitration

is met by arbitral institutions with several initiatives such as publication of the names of arbitrators or of decisions and arbitral awards. It also gives rise to private initiatives such as AI.

While all these measures allow the users to have more information about arbitral proceedings and arbitrators and therefore to make more informed decisions, the respect of confidentiality must be the threshold shaping these initiatives. The different approaches of arbitral institutions towards confidentiality will certainly create various degrees of transparency depending on each institution. Parties willing to benefit from more confidentiality will have to include the appropriate clauses in their contracts or ensure that they raise the red flag at the end of their proceedings.

As the AI project is concerned, it will help users gather more information about potential candidates as arbitrators and therefore enlarge the arbitrators pool. It will also certainly enhance the performance and efficiency of the currently appointed arbitrators.