

# Kluwer Arbitration Blog

## Does Nationality Matter in Designations to the ICSID Panel of Arbitrators?

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On September 9, 2019, the Federal Republic of Germany designated Professor Franco Ferrari to serve on the [ICSID Panel of Arbitrators](#), pursuant to Article 13 of the ICSID Convention. Professor Ferrari is the only arbitrator designated by Germany who does not have German nationality, the exception that proves the (unwritten) rule of Contracting States predominantly selecting their own nationals for designation on ICSID Panels.

Arbitrators in ICSID-administered cases do not need to be selected from the Panel members. (Article 40(1) of the Convention) However, if the parties fail to constitute the tribunal, or if any arbitrator resigns without its tribunal's consent, the Centre shall fill any vacancy by appointing Panel arbitrators only. (Articles 38, 56(3) and 40(1) of the Convention) Moreover, and more importantly, *ad hoc* annulment committees shall be entirely made of members of the Panel. (Article 53(3) of the Convention) Thus, the composition of Panels is far from inconsequential.

According to Section 4 of the Convention, each Contracting State may designate up to four persons to their Panel, providing the designee meets the following requirements:

- high moral character;
- recognized competence in the fields of law, commerce, industry or finance; and
- reliability to exercise independent judgment.

Although not necessary for designation, additional "*highly desirable*" attributes are: knowledge of and experience with international investment law; knowledge of and experience with public international law; experience and expertise in international arbitration or conciliation; ability to conduct an arbitration or conciliation and write an arbitral award or report in one or more of the Centre's official languages (English, French and Spanish); availability to accept appointments in cases as of the date of designation; availability and willingness to travel for case proceedings.

The above requisites aside, the process followed to identify and select a Panel designee is entirely within the discretion of the Contracting State.

In its latest phase of designations, Germany selected German arbitrators, in addition

to Franco Ferrari, Patricia Nacimiento, Sabine Konrad, and Stephan Schill. Their tenure at the Panel is set to expire on September 12, 2025, barring renewal. The designation of Professor Ferrari is of particular interest. Although he has a German mother and was raised and educated in Germany, Franco Ferrari is in fact an Italian national. Article 13(1) of the Convention provides that a Contracting State's designees "**may but need not be its nationals.**" Given the borderless nature of international arbitration, the often-loose links between its practitioners and their State of origin, and its relatively cohesive community, one might expect designations to result from individual reputation rather than nationality.

However, that does not appear to be the case.

Although the busiest treaty arbitrators tend to come from a small group of jurisdictions (e.g. Australia, Canada, France, Germany, Italy, Spain, Switzerland, the United Kingdom and the United States, which account for a significant number), the field of Panel members appears more levelled. Only 10.2% of the past and present Panel members are non-nationals. Half are US nationals. French, English and Italian arbitrators are the next largest minorities among those that were not appointed by their State of origin. Dual-nationals designated by one of the contracting States whose nationality they hold were excluded from this calculation.

In short, it is actually common practice for ICSID Contracting States to appoint their own nationals. The reasons for this are not obvious. The Convention precludes the appointment of arbitrators having the same nationality as the parties in the case to avoid any conflict of interest, meaning that a State could not draw any supposed direct benefit from designating its own nationals on the Panel. Of course, a domestic vetting procedure should be expected to result in a mainly domestic field of candidates. For instance, Latvian arbitrators are more likely to apply for designation with the Latvian authorities than arbitrators of any other nationality. Likewise, Malaysian arbitrators are more likely than arbitrators of any other nationality to satisfy the requirements that the Malaysian authorities may establish for the designation.

However, exceptions exist, and Professor Ferrari is one of them.

Others are:

- Yves Derains, French national, designated by Albania;
- Franco Ferrari himself, before being designated by Germany, had already been designated by St. Lucia.
- Paul Friedland, US national, designated by Georgia;
- Hamid Gharavi, Iranian/French national, designated by Cambodia;
- George Kahale III, US national, designated by Albania;
- Rolf Knieper, German national, designated by Georgia;
- Carolyn Lamm, US national, designated by Uzbekistan;
- Alexis Mourre, French national, designated by North Macedonia;
- Jan Paulsson, Swedish/French national, designated by Bahrain;
- William Rowley, Canadian/English national, designated by Mongolia;
- Giorgio Sacerdoti, Italian national, designated by Seychelles;
- Stephen Schwebel, US national, designated by Bahrain;

- Brigitte Stern, French national, designated by Georgia;
- Nassib Ziadé, Chilean/Lebanese national, designated by Kuwait;

Two trends can be detected from this list. First, with the exception of Germany, the above designations were all made by relatively small nations. Second, many of them stem from the same Contracting States, such as Georgia, Bahrain and Albania.

Accordingly, there seems to exist a strong inclination of most ICSID Contracting States to designate nationals only. Until Germany's designation of Professor Ferrari, the exceptions to this practice have been attributable to a (small) contingent of (small) Contracting States, who have seized the opportunity to avail the Panel not just of their highly qualified nationals, but also of highly qualified non-nationals.

That designation may lead to other States giving serious consideration to non-nationals as well as nationals for their ICSID Panels.

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