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Arbitrator Style and Preferences
My Questionnaire Responses

Parties deciding whether to select a particular arbitrator will often wonder what to expect from him or her, especially with respect to case management and so-called "soft skills" such as ability to get along well with co-arbitrators, etc. A 2016 article proposes a questionnaire to help reduce surprises. *See* Ema Vidak-Gojkovic, Lucy Greenwood and Michael McIlwrath, Puppies or Kittens? How To Better Match Arbitrators to Party Expectations, part IV-A, at 11 (Vienna International Arbitration Centre Yearbook 2016). [See UPDATE on Aug. 8, 2016 at http://kluwerarbitrationblog.com/2016/08/08/puppies-kittens-better-match-arbitrators-party-expectations-results/ See also the authors' survey-results report.]

Believing that parties can make better decisions in their choice of arbitrators with certain types of advance information in hand, I would like to post my responses to these questions below.

***Please note*: The answers below are limited to what I as a neutral would do, and not what I believe other neutrals may or should do.**

I have also added one new question of my own (15a) which is not on the Questionnaire. It deals with arbitrator nationality.

1. Delegation: do you believe it is acceptable for an arbitrator to delegate work to a junior lawyer who is not a member of the tribunal?

As a sole practitioner and neutral, I do not delegate work.

2. Tribunal secretaries: do you believe that it is acceptable for a

tribunal to appoint a secretary to assist it with the administrative tasks relating to the proceedings?

Thus far I have not had this experience. Hypothetically, in a highly complex case – especially one without any institutional administration or support, a secretary could make sense, but only if the secretary's role is strictly limited to administrative functions. In any case any such appointment would need to be thoroughly vetted with the parties and counsel ahead of time.

3. Preliminary or early decisions: do you believe it is appropriate for tribunals to attempt to identify and decide potentially dispositive issues early in a case, even if one of the parties does not consent to this?

It is normally more economical for the parties in terms of time and cost for a tribunal to rule on potentially dispositive issues ahead of time. However, before doing so I would obtain prior indications of the parties' views on dispositive motions. I would not consider such matters or invite such motions on my own initiative without first communicating with the parties and counsel.

A tribunal may identify one or more issues which could be partially or fully dispositive if ruled upon. However, before making any such rulings, as a tribunal member I would notify and invite all parties to (1) present their views on whether or not the tribunal should entertain such dispositive motions, and if so, (2) brief the tribunal on all issues involved in any such motions.

4. Settlement facilitation: do you believe arbitral tribunals should offer to assist parties in reaching a settlement, and actively look for opportunities to do so?

I have served as an arbitrator and as a mediator, but not in the same case. As an arbitrator I believe my function is to render an award based on the facts and applicable law presented. If the parties wish to discuss settlement, I think this is fine and find it most appropriate for them to do so on their own or with the help of the institution administering the case. To actively get involved in parties' settlement discussions could run the risk of compromising the role of arbitrator, at least in many jurisdictions.

In some other jurisdictions, notably China and Germany, it is acceptable for the arbitrator to act as mediator in the same case with prior express consent of all parties. However outside of these areas at least, there are high risks for the neutral and the parties in doing so.

If the parties do reach a settlement and wish to incorporate it into a consent award to facilitate enforcement internationally, I have done this before as arbitrator and would be open to such a request.

5. Early views of strengths and weaknesses of claims and defenses: do you believe arbitrators should provide parties with their preliminary views of the strengths and weaknesses of their claims and defenses?

It is often premature to provide views without first hearing all the parties' evidence and arguments. If the parties would like an early neutral evaluation of their case, then this is best done as a classic "dry run" mini-arbitration before other neutrals who will not actually decide their case. I have experience with this separate role and understand its importance in evaluating possible settlement.

6. IBA Rules of Evidence: do you believe international tribunals should apply the rules in proceedings even if one of the parties objects to their application?

On questions of discovery or information disclosure, in most cases the final decision will be up to the tribunal, save for those rare cases where the parties' arbitration clause specifically provides otherwise.

The first guide is the parties' own contractual arbitration clause and applicable arbitration rules. If they do not speak to the question, then I do have a preference for utilizing the IBA Rules, even in domestic arbitrations when it comes to matters of document discovery and disclosure. The IBA Rules were thoughtfully prepared and do strike a reasonable medium between Civil Law and U.S. – style Common Law approaches – balancing economy and privacy on one hand with the need for the fullest possible disclosure to all sides so as to prevent surprises at the hearing.

If one of the parties objects to their application, I would do my best to

indicate the benefits of using the IBA Rules.

7. Document disclosure: do you believe it is appropriate for international tribunals to grant a party's request for e-discovery?

Again, the first sources to look at will be the parties' own agreement and the applicable arbitration rules. E-discovery is authorized by the rules of several institutions. Even so, it needs to be refined carefully and tailored to what the case requires in order to avoid opening an endless electronic Pandora's box. Some jurisdictions are legally and technically more comfortable and familiar with e-discovery than others which must also be taken into consideration.

Regarding the scope of permitted document discovery, whether traditional or electronic, the more specifically focused, the better. Very broad document requests, while sometimes understandable to avoid surprises at the final hearing, can place undue, heavy burdens on the other party and drive up arbitration costs without proper justification.

For international arbitrations, I would add that it is rare to allow U.S.-style written interrogatories or pre-hearing depositions, even if both parties request them. In my view there must be a compelling reason to allow pre-hearing oral depositions in international arbitrations – especially with today's availability of witness testimony via videoconference.

8. Skeleton arguments: do you prefer for parties to provide a summary of their arguments to the tribunal before the hearing?

This is helpful. The summary can include the material and relevant facts to be relied upon, the basis for asserting these facts, what the applicable law is to these facts, and how it should be applied to the facts being asserted.

In addition, as an arbitrator I would be interested to know in advance of the hearing, for each relevant issue in the case, what each side's burden and quantum of proof is, whether that party has or has not met the applicable burden and quantum of proof on that issue, and why or why not? These questions are best dealt with in the parties' pre-hearing briefs.

I also would like to see each side lay out with specificity its claim or counterclaim for damages, including the bases for their calculations.

At the start of the case I also find most helpful a timeline of relevant events prepared by each party, as well as a list/cast of important characters.

Early presentation of the basic lines of argument can help the parties and the tribunal identify points of possible mutual agreement (stipulated facts) as well as potentially dispositive items for certain issues in the case. It also helps to narrow and focus subsequent information exchange/discovery between the parties, all of which can significantly reduce arbitration time and cost.

9. Chair nominations: do you believe co-arbitrators should consult with the parties who appointed them before proposing names for a chair to the other co-arbitrator?

Institutional rules or in some cases the parties' own arbitration clause or agreement may determine the procedure. In some jurisdictions this practice is more limited than others. As a co-arbitrator I would be very sensitive to any such limitation requiring a party-appointed arbitrator to be neutral or cease contact with the appointing party. Absent any such restrictions, I would not be opposed to this kind of consultation, but neither would I say that such consultations **should** be made.

10. Arbitrator interviews: are you available to be interviewed by the parties before being appointed (in accordance, for example, with the Guidelines for Arbitrator Interviews published by the Chartered Institute of Arbitrators)?

Yes, I have been interviewed by telephone several times and am available to do so. If possible I would prefer a prior communication requesting an interview so a suitable date and time can be arranged.

11. Arbitrator interviews: if you are appointed as a co-arbitrator, do you think parties should interview a prospective chair that you and the other co-arbitrator have identified, before agreeing [to] the

appointment?

This question is not complete, as it does not state whether in this situation the co-arbitrators are each party-appointed in some manner, or appointed by an institution. If the arbitrators are party-appointed, then I would refer back to question 9 above to be aware of any possible limitations on the co-arbitrators' communications with the parties appointing them.

I do not see any "right" answer to this one. There are many variables here including applicable institutional rules and practices, local custom, party preferences, etc. In my own experience I have never seen a party request such an interview.

12. Counsel misconduct: for a counsel that has engaged in misconduct, do you generally take steps while the proceedings are underway, or include consideration of the misconduct in a subsequent award of costs, or do you believe it is not within the responsibility of the arbitral tribunal? (choose only one)
(a) Discipline during proceedings, immediately when misconduct occurs
(b) Discipline both during proceedings and in subsequent award on costs
(c) Take misconduct into consideration in cost award
(d) Do not believe counsel misconduct is responsibility of the tribunal

It depends on the level of misconduct. If serious, then I would procced along the lines of option (b) above. Of course I would give counsel for both sides full and fair notice and opportunity to be heard – in sidebar if appropriate under the circumstances – before imposing discipline. At the same time I would take all possible steps to keep the arbitration moving on schedule.

13. Costs: do you believe it is appropriate for a party to recover all of its reasonable costs (including counsel fees) if it has prevailed on its claims or defenses?

First I would look to the parties' arbitration agreement, arbitration rules and law of the seat of arbitration to see what they may provide about

awarding costs and counsel fees. If there are no impediments there, then I would be open to hearing arguments from both sides as to why costs/counsel fees should or should not be awarded under the circumstances present in the case, including conduct of the parties.

14. Costs: do you believe it is appropriate for a party to recover the reasonable costs of any in-house counsel who conducted or assisted the party's conduct of the arbitration?

Disclosure: Much of my legal career prior to serving as arbitrator has been as in-house counsel, although I did not conduct or assist in conduct of arbitrations during that time. In any event I do believe that if an in-house lawyer acts as a counsel in the arbitration, then his or her costs should be handled in the same manner as outside counsel because the in-house counsel's has incurred extra time and expense which have taken counsel away from his or her normal company responsibilities.

15. Do you view yourself as conducting proceedings more in the style of the common law, the civil law, or no preference / depends on situation?

This is an excellent question which often arises in international arbitrations with parties and arbitrators coming from different legal traditions. To these we can also include Chinese law, Islamic law and other non-Western legal traditions. I have no preference and believe how proceedings are conducted will depend on the situation presented in the case – the seat of arbitration which normally governs procedure, the locations of the parties and witnesses, legal background of counsel and the arbitral tribunal, type of evidence to be presented, etc.

What I do think important is a certain amount of flexibility by the arbitrator to take all these factors into consideration and not be strictly limited by his or her own legal background or personal preference.

I was formally trained in the common law system and also studied international law with Professor Stephen Schwebel (former ICJ Chief Judge) and Continental European Law with Prof. Federico Mancini of Italy (former Judge of the European Court of Human Rights). My law school training

included Comparative Law. I spent 15 years as Legal Director/Latin America, Caribbean, Canada and Russia for multinational information technology companies Digital Equipment, Oracle, and 3Com, working with a variety of legal systems in these countries. This also included travel and work in Western Europe on selected projects in France, the Netherlands, Spain and the U.K. I have lived and worked in Brazil for many years beginning in 1971. For all these reasons I am quite familiar with the civil law system.

15a. How important do you think the nationality of an arbitrator is in his or her decision-making process? [*N.B.* – this question is my own and not in the Questionnaire, because I think this issue needs to be addressed openly.]

In most commercial cases, if an arbitrator is truly high-calibre and neutral, nationality should not influence his or her decisions. But what happens at times is that for purposes of maintaining an outside perception or image of neutrality, nationality gets taken into account as a major factor in arbitrator selection which is often unrelated to his or her real abilities. I can only understand this for cases with state entities such as territorial disputes, investor-state cases or sports disputes where an arbitrator candidate comes from one of the states the entity of which is a party to the dispute.

16. Please provide a statement of how you prefer to conduct arbitration proceedings in cases in which you have been, or could be, appointed:

To help streamline the proceedings and make them as cost-effective as possible, I would like to see active participation by the parties themselves in the process to the extent they are able to do so. I realize that this is not always possible because of other commitments by executives, managers and in-house counsel, but active participation in management of the case is the best way for a party to understand and have impact on the arbitration process affecting the status of its case.

DOCUMENT INFORMATION EXCHANGE: Please see questions above on this.

OTHER FORMS OF DISCOVERY: In U.S. domestic arbitrations, some depositions may be allowed, though usually fewer than in court litigation.

Depositions are normally not used in arbitration as discovery or testimony impeachment mechanisms. Interrogatories, requests for admission and other U.S. court discovery mechanisms are not generally used in arbitration. In international arbitration, depositions are usually not used.

DISCOVERY DISPUTES: For purposes of economy, these are usually resolved by the tribunal chair alone, unless parties request the full tribunal to get involved.

EVIDENCE: My approach is to allow and hear evidence which is not unduly repetitive or irrelevant, then consider the weight it should be given.

EXPERTS: My preference is to receive expert testimony regarding damage claims and counterclaims. I am open to having experts consult with each other prior to the hearing to clarify areas of agreement and difference, and to testify in a "panel" format at the hearing at the same time, if agreed, so they can address each others' points directly.

POST-HEARING BRIEFS: I usually ask for these briefs to focus primarily on what changed from the situation presented in the parties' prior submissions as a result of witness testimony, other evidence, or arguments presented at the Final Hearing.

AWARD ISSUANCE: I try to sit with my co-arbitrators immediately after close of the Final Hearing to exchange ideas while they are still fresh. For the same reasons I prefer to start drafting the award as soon as possible after post-hearing briefs are reviewed by the tribunal. When the tribunal chair has been very busy and the issues in the case lend themselves to it, as co-arbitrator I have suggested the drafting of the award be divided among the tribunal members with each one tackling the issues he or she feels most familiar with. Final revision is then usually done by the chair. This approach has saved considerable time in several arbitrations in which I have participated.