



Transnational civil litigation and International commercial arbitration

Arbitrators

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APPOINTMENT OF ARBITRATORS

Introductory remarks

- **Constitution of Arbitral Tribunal**
 - No standing “arbitral court”
 - ✓ For having a dispute resolved by arbitration, an arbitral tribunal must be separately constituted for that specific dispute
- **Parties' Autonomy**
 - As a matter of principle, parties are free to select number of arbitrators and mechanism for their appointment
 - ✓ Parties to the same arbitration agreement and arbitral process must be given equal rights to appoint arbitrators - **Principle of the parties' equality in the constitution of the arbitral tribunal**

APPOINTMENT OF ARBITRATORS

Number of arbitrators

- Panel of arbitrators vs sole arbitrator
 - Sole arbitrator – One single arbitrator is given jurisdiction to decide the dispute
 - ✓ Less costly, easier and more rapid appointment. In smaller cases this is the preferred solution
 - ✓ Drawback: parties cannot appoint *their* arbitrator
 - Panel of arbitrators – Three (or more) arbitrators are appointed for deciding the dispute
 - ✓ more expensive and takes longer to appoint
 - ✓ In complex cases, this is the preferred solution as it offers the advantages of collegiality (each party appoint at least one arbitrator, different legal and technical expertise and legal traditions can be ensured, extra set of eyes)

APPOINTMENT OF ARBITRATORS

National laws provisions

- **ART. 809 AND 810 OF ITALIAN ARBITRATION LAW (CODE OF CIVIL PROCEDURE)**
 - ✓ Arbitration Agreement must provide for the numbers of arbitrators and the way in which they must be appointed
 - ✓ Odd number of arbitrators. If an even number of arbitrators is indicated, an additional arbitrator must be appointed
 - ✓ If no indication of numbers, the arbitral tribunal will be composed of a panel of 3 arbitrators
 - ✓ If parties fail to indicate a particular method of appointment, it must be understood that they wanted to give themselves power to appoint arbitrators, then article 810 shall apply as a default mechanism

APPOINTMENT OF ARBITRATORS

National laws provisions

- ART. 12 AND 15 OF SPANISH ARBITRATION LAW (ACT ON ARBITRATION 60/2003)
 - ✓ Odd number of arbitrators.
 - ✓ If no indication of numbers, the arbitral tribunal will be composed of a sole arbitrator
 - ✓ Parties are free to agree on appointing procedure, provided that the principle of equality is ensured
 - ✓ If parties fail to agree on appointing procedure, default mechanism shall apply (art. 15, para 2)
 - ✓ Appointment of arbitrators by state court if the agreed procedure cannot work for whatever reason
 - ✓ Court appointment by lot, after a list of three is formed

APPOINTMENT OF ARBITRATORS

National laws provisions

- **ART. 1444, 1451 AND 1452 OF FRENCH ARBITRATION LAW (CODE OF CIVIL PROCEDURE)**
 - ✓ Arbitration Agreement must provide for the numbers of arbitrators and the way in which they must be appointed.
 - ✓ If no indication of numbers, there's no default provision
 - ✓ Sole arbitrator or uneven number of arbitrators. If an even number of arbitrators is indicated, an additional arbitrator must be appointed
 - ✓ If parties cannot agree on designating the sole arbitrator, state court will provide
 - ✓ If parties agreed on panel of three arbitrators, art. 1452, para 2, shall apply

APPOINTMENT OF ARBITRATORS

National laws provisions

- **ART. 15 AND 16 UK ARBITRATION LAW (UK ARBITRATION ACT 1996)**
 - ✓ Parties may agree on number of arbitrators. If no indication of numbers, the arbitral tribunal shall consist of a sole arbitrator
 - ✓ Even number of arbitrators is contemplated. In such cases, parties are deemed as they have intended that an umpire or a chairman – who will both have a casting vote – must be appointed
 - ✓ If or to the extent that there is no agreement on procedure for appointing arbitrators, default mechanism provided for in article 16 shall apply
 - ✓ If the agreed or default procedure can not work, state courts shall be responsible for appointing arbitrators

APPOINTMENT OF ARBITRATORS

Uncitral Model Law

- **ART. 10**

- ✓ Parties may agree on number of arbitrators. If no indication of numbers, the arbitral tribunal shall consist of 3 arbitrators

- **ART. 11**

- ✓ Parties are free to agree on procedure for appointing arbitrators
- ✓ Failing any agreement, default mechanism shall apply
- ✓ If agreed or default procedure cannot work, state court shall have the power to appoint arbitrators on behalf of defaulting party

APPOINTMENT AND CONFIRMATION OF ARBITRATORS

Institutional rules

- **Milan Chamber of Arbitration (CAM Rules)**
 - ✓ Articles 14 and 15
- **Swiss Rules of International Arbitration 2021**
 - ✓ Articles 10 and 11
- **Icc Rules 2021**
 - ✓ Article 12
- **SIAC Rules 2016**
 - ✓ Articles 9, 10 and 11

APPOINTMENT OF ARBITRATORS

Qualification of arbitrators

- **MANDATORY SUBJECTIVE REQUIREMENTS (INCAPACITY TO ACT AS ARBITRATOR)**

Art. 812 Italian code of civil procedure - *A person who, in whole or in part, has no legal capacity to act cannot be arbitrator.*

Art. 13 Spanish Arbitration Act 2003 - *Persons in full possession of their civil rights may be arbitrators.* At least one arbitrator must be an attorney

Art. 1450 of French Code of civil procedure - *Only a natural person having full capacity to exercise his or her rights may act as an arbitrator.*

- **ADDITIONAL SUBJECTIVE REQUIREMENTS**

- Parties may expressly agree (in the arbitration agreement or on other written document prior to the appointment of the arbitrators) on particular qualifications of arbitrator relating, for example, to
 - ✓ Expertise (legal or technical background and qualification)
 - ✓ Nationality (equality of the parties)
 - ✓ Language (less costly and smoother procedure)

INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

- **GENERAL PRINCIPLE**

- Arbitrators must be and remain independent and impartial throughout arbitration
 - ✓ **Independence** – *absence of a close personal, financial or professional relationship between the arbitrator and any of the parties of the arbitration or its counsel; absence of any material connection of the arbitrator with the dispute*
 - ✓ **Impartiality** – *absence of prejudice or bias towards the parties*

- **LAW PROVISIONS**

- UNCITRAL Model Law (art. 12) – Circumstances giving rise to justifiable doubts as to impartiality or independence – **open clause**
- Spanish Arbitration Act 2016 - Circumstances likely to give rise to justifiable doubts as to impartiality or independence – **open clause**
- Italian Law - Specific circumstances (art. 815, para 1, c.p.c.), supplemented by general and open clause (art. 815, 2 para, c.p.c. “*serious reasons of convenience, such as to affect the independence or impartiality of the arbitrator*”)

INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

Duties of arbitrators

• DUTY OF DISCLOSURE

- Before accepting any appointment, arbitrators must disclose the existence of any circumstance that are likely to give rise to justifiable doubts as to their impartiality or independence
 - ✓ **Italian Law - Art. 813 c.p.c.** *“The acceptance of the arbitrators is given in writing, by the signing of the compromise or the minutes of the first session, and shall be accompanied, under penalty of nullity, by a declaration stating any circumstances relevant under Article 815, first paragraph, or the non-existence thereof. The arbitrator must renew the declaration if there are any circumstances that have arisen”*
 - ✓ **French Law - Article 1456 c.p.c.** *“Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate”*
 - ✓ **Spanish Law – Article 17 Arbitration Act 2003** *“Persons proposed to act as arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. From the time of their appointment, arbitrators will without delay disclose any such circumstances to the parties. At any time during arbitration, a party may ask arbitrators to clarify their relationships with any of the other parties”*
 - ✓ **Institutional rules**

INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

Challenge and removal of arbitrators

• CHALLENGE OF ARBITRATORS

- Parties have the right to challenge the appointment of arbitrators who may lack independence or impartiality
 - ✓ Grounds for challenging arbitrators are those provided for by the *lex arbitri* or by the institutional arbitration rules applicable to the arbitration
 - ✓ Courts of the state where the arbitration is seated is competent
 - ✓ Challenge procedures are aimed at removing arbitrator
 - ✓ Party-appointed arbitrator can be challenged by the appointing party only for circumstances unknown at the time of the appointment – **Party appointed are subject to the same standard of impartiality and independence ?**
 - ✓ Unsuccessful challenge is not final. Parties may challenge the award or the enforcement or recognition of the award due to the serious lack of independence or impartiality of the arbitrators unsuccessfully challenged