



Practice Guideline 16: The Interviewing of Prospective Arbitrators

1. Introduction

1.1 Where arbitrators are appointed by the parties, rather than an institution, the question sometimes arises as to whether and the extent to which it is proper for those about to make the appointment to interview the arbitrators in advance.

1.2 Given that substantial sums of money might rest in the hands of the tribunal, and given the right of each party to choose its arbitrator unless the parties have otherwise agreed, should a party make such choice based solely on CVs, websites or word-of-mouth recommendations? These might not give a complete picture of the appointee. It is common practice, in some jurisdictions but not in others, that the appointor interviews a list of prospective arbitrators prior to making the appointment. Such a practice undoubtedly carries certain risks but practical experience shows that a comprehensive interview can be conducted without jeopardising the arbitrator's neutrality, independence or impartiality. However, there appear to be no institutional ground rules addressing the interview process although the distinguished US arbitrator, Gerald Aksen, has made some suggestions which have been incorporated into these Guidelines.

1.3 In preparing these Guidelines, the Chartered Institute has consulted widely across many jurisdictions and different legal cultures. While there have been statements of strong opposition to the idea of interviews being allowed at all and, therefore, to there being any Guidelines at all, the overwhelming majority of responses have been very supportive. A common theme has been that, since the interview process is not well understood as regards the right/wrong approach but is also open to abuse and manipulation, a Guideline may bring much-needed light where there is presently only murk. The objective is not to lay down "soft-law" but to stimulate discussion as to the right way for prospective arbitrators to behave.

1.4 The Guidelines also apply to the interviewing of prospective sole arbitrators and prospective chairs and include specific suggestions in relation to these (less common) situations.

2. The legal literature and regulatory material

2.1 In an area where there is no caselaw and almost no codification of standards, we have relied heavily on the modest amount of published material on the subject. Two early articles in the subject in the mid-1990s brought the subject of arbitrator interviews into the open. Professor Andreas Lowenfeld, "The Party-Appointed Arbitrator: Some Reflections", 30 *Tex. Int'l L.J.* 59 at pages 61-62 (1995) and Doak Bishop and Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arbitration International* 395 at pages 423-425. Two more recent general reflections on interviewing arbitrators can be found in N Blackaby and C Partasides, *A Redfern & M Hunter, Law & Practice of International Commercial Arbitration*, 5th ed 2009 at paras 4.69-4.71 and Gary Born, *International Commercial Arbitration, Volume 1*, Wolters Kluwer 2009 at pages 1391-1394. Mark Friedman responded to the original publication of the guidelines in "Regulating Judgment: A Comment on the Chartered Institute of Arbitrators Guidelines on the interviewing of Prospective Arbitrators" [2008] *Dispute Resolution International* 288. Extracts from this material appears as an annex to these Guidelines. Copies can be obtained from the Institute.

2.2 The ABA's "Code of Ethics for Arbitrators in Commercial Disputes" (2004) and the IBA Rules of Ethics for International Arbitrators provide some guidance on communications between parties and arbitrators prior to the commencement of an arbitration. Canon III Paragraph B(1) of the ABA Code states as follows:

"When the appointment of a prospective arbitrator is being considered, the prospective arbitrator: (a) may ask about the identities of the parties, and the general nature of the case; and (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from the party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case."

The IBA Rules are similar. Rule 5.1 says:

"... A prospective arbitrator ... may ... respond to enquiries from those approaching him, provided that such enquiries are designed to determine his suitability and availability for the appointment and provided that the merits of the case are not discussed. In the event that a prospective sole arbitrator or presiding arbitrator is

approached by one party alone, or by one arbitrator chosen unilaterally by a party... he should ascertain that the other party or parties, or the other arbitrator, has consented to the manner in which he has been approached. In such circumstances he should, in writing or orally, inform the other party or parties, or the other arbitrator of the substance of the initial conversation. “

Rule 5.5 may also have an application to the question of hospitality and remuneration in connection with an interview. It reads:

“No arbitrator should accept any gift or substantial hospitality, directly or indirectly, from any party to the arbitration. Sole arbitrators and presiding arbitrators should be particularly meticulous in avoiding significant social or professional contacts with any party to the arbitration other than in the presence of the other parties.”

3. The Guidelines

3.1 The following guidelines are to be considered as recommendations and do not carry any implication of being mandatory. As with all the Institute’s Guidelines, they do not represent the minimum acceptable standards in any jurisdiction and it is not expected that they will be relied upon in Court as representing a standard against which the conduct of arbitrators is assessed. The objective is to achieve two things. First, the Institute aims to stimulate open discussion as to how one handles a potential difficult situation. Secondly, for arbitrators wanting a framework in which to operate in this context, these guidelines can provide a degree of comfort and structure. However, failure to follow them in every detail is not grounds for the removal of an arbitrator or the setting aside or refusal of enforcement of the award.

(1) In agreeing to be interviewed, the prospective arbitrator should make the basis upon which the interview is to be conducted, whether it should be these Guidelines or something else, wholly clear and in writing to the interviewing party, its legal advisers, or both.

See Bishop & Reed at 423 and Blackaby & Partasides at para. 4.70.

(2) These Guidelines may, by agreement, serve as the basis upon which the interview is to be conducted, with such additional restraints and safeguards, whether suggested by the interviewer or interviewee and as agreed between them in advance, as may be appropriate in individual circumstances.

(3) It should be clearly understood that appointment as arbitrator does not carry with it any obligations to the appointing party except the generally-accepted obligations of all arbitrators of ensuring (i) that (where provided for) an appropriate chair/presiding arbitrator is selected and (ii) that the parties' arguments are given a fair hearing – this is wholly different from arguing a party's case.

(4) It is reasonable for the parties to interview prospective chairmen or sole arbitrators but such interviews should either be by the parties (or their legal advisers) jointly or, if by one of the parties, be conducted only in the presence of the other or its representative. In any event, each party wishing to participate in the interviewing process should be given an equal opportunity to do so. Any other party should not unreasonably refuse to co-operate.

See Blackaby & Partasides at para. 4.71.

(5) The interviewee arbitrator should be permitted to be accompanied by a secretary or other assistant to take a note of proceedings.

(6) The constitution of the interviewing team should be made known to the prospective arbitrator in advance and, at the outset of the interview, it should be made clear who will lead it and how it will be conducted. The interview should normally be led by a senior representative of the interviewing party's external lawyers.

See Lowenfeld at 62 and Blackaby & Partasides at para. 4.70.

(7) Either a tape recording or a detailed arbitrator's file note should be made of the interview and the tape or the file note disclosed to the other side in the dispute, and to the appointing body, at the earliest available opportunity.

This has been criticised by Gary Born in *International Commercial Arbitration*, 2009 at page 1393 as "not customary nor required and most practitioners would counsel against it". Friedman suggests at pages 289-290 that "many practitioners ... would abhor taping interviews as being intrusive, demeaning and perhaps even likely to provoke more litigation as disgruntled parties pore over every word in search of phrases they might pluck out to support a challenge. The alternative of detailed file notes is less controversial but may not accomplish the same kind of transparency as taping."

The use of taping or indeed even a detailed file note is not a legal requirement (nor are any other parts of these guidelines). This requirement has been attacked informally on similar lines by other practitioners as being excessive. However, in a situation where one party is in

some sense discussing the case with the arbitrator, he or she would be well advised to follow this precaution to avoid any risk of suspicion of impropriety. The view expressed here has an echo in the increasingly common requirements to tape potentially suspicious or sensitive financial transactions.

(8) The mere fact of there having been an interview should not, per se, be a ground for challenge.

(9) The following may not be discussed either directly or indirectly:

(i) the specific facts or circumstances giving rise to the dispute

(ii) the positions or arguments of the parties

(iii) the merits of the case.

As Friedman points out (at page 290), there is a consensus about (iii). However, the first two items are difficult because the interviewer is entitled to assess the arbitrator's suitability for the appointment. That process, though, can amount to a probing of the specific facts or circumstances giving rise to the dispute. There is, though, a distinction between asking questions designed to elucidate familiarity with a legal topic or a technical environment and a presentation of the facts of the case or the issues expected to arise and an enquiry as to the arbitrator's views on them. It is acceptable to enquire as to the arbitrator's knowledge of a particular area in dispute. It is not acceptable to enquire about his or views on it.

The difficulties involved here may particularly justify the taping of the conversation to ensure that all parties know the extent of the probing that has occurred.

See Lowenfeld at 61-62, Bishop & Reed at 424-425, Born at 1393, Blackaby & Partasides at para. 4.69, ABA Code & IBA Rule 5.1.

(10) Subject to (9), in order for the interviewee's suitability (expertise, experience, language proficiency and conflict status) to be assessed, the following may be discussed:

(i) the names of the parties in dispute and any third parties involved or likely to be involved

(ii) the general nature of the dispute

(iii) sufficient detail, but no more than necessary, of the project to enable both interviewer and interviewee to assess the latter's suitability for the appointment

(iv) the expected timetable of the proceedings

(v) the language, governing law, seat of and rules applicable to the proceedings if agreed, or the fact that some or all of these are not agreed

(vi) the interviewee's experience, expertise and availability.

See Lowenfeld at 61-62, Bishop & Reed at 424-425, Born at 1393, Blackaby & Partasides at para. 4.69, ABA Code & IBA Rule 5.1.

(11) Subject always to the overriding provisions of (9), in assessing the interviewee's experience and expertise, questions may be asked to test his or her knowledge and understanding of

(i) the nature and type of project in question

(ii) the particular area of law applicable to the dispute

(iii) arbitration law, practice and procedure.

Such questions should be general in nature and neutrally put in order to test the interviewee and should not be put in order to ascertain his or her views or opinions on matters which may form part of the case.

Questions concerning the interviewee's publishing history (if any) may be put subject to the same proviso.

See Lowenfeld at 61-62, Bishop & Reed at 424-425, Born at 1393, Blackaby & Partasides at para. 4.69, ABA Code & IBA Rule 5.1.

(12) The interviewee should decline to answer any question on the grounds that it goes beyond what is categorized in (10) and (11) above, and this should be accepted in good faith by the interviewer.

(13) Conversely, the prospective arbitrator should not ask any question of the interviewer that if asked by the interviewer would contravene (9) above.

(14) In the event that the interviewee comes to the conclusion that the interviewer is really seeking a partisan arbitrator or one who will not be impartial, he or she should terminate the interview forthwith and should not accept the appointment.

Mark Friedman suggests as an alternative here that the candidate could just explain that he or she will not act “as a partisan and will remain independent and impartial”. It would then be for the appointing party to decide what it wants to do.

While that is a reasonable point of view, such is the sensitivity of a private interview process, we prefer the original guideline. It is an open question as to how desirable it is to accept an appointment as an arbitrator from a party that is expecting a “service” that the arbitrator cannot deliver.

(15) The interview should be conducted in a professional manner in a business location that is ideally the arbitrator’s office and is not in any event the interviewer’s premises, and not over drinks or a meal.

See Lowenfeld at 62, Born at 1394, Blackaby & Partasides at para. 4.70, Born at 1394. See also IBA Rule 5.5.

(16) A time limit should be agreed for the interview.

See Bishop & Reed at 425.

(17) Any failed interviewee may be reimbursed his or her reasonable travel expenses for attendance at the interview but should not be reimbursed for his or her time save in exceptional circumstances.

(18) The appointee should not be reimbursed his or her travel expenses or time for attendance at the interview but, once the tribunal is constituted and arbitral proceedings under way, the appointed arbitrator should submit his or her travel expenses for reimbursement in the normal way but clearly separated and identified as relating to the interview.

See IBA Rule 5.5.

Annex: Literature review

1.1 Two early articles in the subject in the mid-1990s brought the subject of arbitrator interviews into the open. Professor Andreas Lowenfeld, "The Party-Appointed Arbitrator: Some Reflections", 30 Tex. Int'l L.J. 59 at pages 61-62 (1995) gave the first serious presentation on this subject.

"Some years ago, at a conference on international arbitration, an eminent lawyer with great experience both as arbitrator and as counsel in major cases, said That counsel should never nominate an arbitrator without interviewing him or her first. ...

Not long thereafter, I received a call From a lawyer I know telling me of an important arbitration in which he had just been retained.... A few days later, the ... lawyer called again, to say that he had passed my name on to this client, but that Mr. X, inside counsel for the client was coming to New York and would like to meet with me before making a decision. ..

When Mr. X arrived – in my office – the conversation ... soon ... turned to the industry in which his company was engaged, though not the particular controversy. ... Mr X had a right to find out for himself whether I was quick or dull, realistic or dreamy, a scholar mired in books or someone who understood or could be made to understand the ways of business. I was not uncomfortable when he asked me what other arbitrations I had been involved in, and who the counsel and the other arbitrators had been....

If... one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel, some basis for that confidence needs to be established. Sometimes that confidence can be based on mutual acquaintances, without direct personal contact; some potential arbitrators become well-known through published writings, lectures, committee work or public office. Others are not so well-known and I understand that lawyers or clients or both want to have a firsthand look. I think, however, some restraint should be shown by both sides. ...

Discussion of the dispute in all but the most general terms – it involves claims under a patent, it has to do with commodities, or with negotiable instruments, or with claims for extras in a construction projection – should be avoided. ... It is all right for the candidate to say, "I am familiar with the oil industry," or "I am comfortable with

patent controversies” or “I have had experience with the law of Patria” but not “You will need a good expert”....

1.2 In 1998, Doak Bishop and Lucy Reed provided a review of the rules and canons on the subject:

“Pre-appointment interviews with prospective arbitrators are not per se forbidden or unethical, although some arbitrators will refuse an interview as unseemly. Although not prohibited, interviews are regulated to a certain degree by common sense, common practice and by the relevant codes of ethics.

The AAA International Rules prohibit any ex parte communications between a party or its counsel and a prospective arbitrator except: (1) to advise the candidate of the general nature of the controversy and the anticipated proceedings, and (2) to discuss the candidate’s qualifications, availability or independence. ... The IBA Ethics goes on to permit the potential arbitrator to respond to questions about his or her availability and suitability for the arbitration, but enjoins any discussion of the merits of the case with the appointing party or its counsel...

Under the various rules and the general practice of international arbitration, it would be proper for a party, or its counsel, to raise and discuss the following matters in the initial interview with a potential arbitrator:

- (1) the identities of the parties, counsel and witnesses;
- (2) the estimated timing and length of hearings;
- (3) a brief description of the general nature of the case sufficient to allow the candidate 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;
- (4) the arbitrator's background, qualifications and resume;
- (5) the arbitrator's published articles and speeches;
- (6) any expert witness appearances of the arbitrator, including positions taken;
- (7) any prior service as an arbitrator, including decisions rendered (subject to any confidentiality requirements);

(8) whether there is anything in the arbitrator's background that would raise justifiable doubts as to his or her independence or impartiality, and any disclosures that the arbitrator would need to make;

(9) whether the arbitrator feels competent to determine the parties' dispute; and

(10) the availability of the arbitrator (i.e., whether he or she can devote sufficient time and attention to the parties' dispute in a timely manner).

It must be emphasized that in international arbitration practice, parties and their counsel should avoid any discussion of the merits of the case beyond a description of the nature of the dispute and the issues involved sufficient for the candidate to evaluate his or her competence, disclosures and time commitments. The description of the nature of the case and the issues should be stated in a neutral fashion, avoiding advocacy or misrepresentation of the opposing party's position. Any questions, including hypothetical ones, about what position the prospective arbitrator might or would take on any of the issues in dispute between the parties should be strictly avoided.

Certainly, the potential arbitrator should not express his or her beliefs or opinions on the merits of the dispute. As a matter of common sense, the more extended the interview, the more reasonable the assumption that the bounds of propriety were exceeded. The ICC Court refused to confirm a party-appointed arbitrator who spent approximately 50-60 hours with the nominating party reviewing the case before appointment. A slightly more difficult question is whether an appointing party can attempt to ascertain a potential arbitrator's general position in generic terms, meaning without reference to the facts of the specific case. For example, can the party ask a potential arbitrator his or her general views on enforcing a contract as written as opposed to application of the doctrine of changed circumstances? The answer should be "no," although such views may sometimes be ascertained by reference to the potential arbitrator's writings, speeches, expert witness opinions, or positions taken in published arbitration awards.

Some experienced international arbitrators who consent to interviews attempt to control the process by limiting the amount of time for the interview, by limiting the topics they will discuss consistent with those described above or by taking notes of

the interview and making the notes available to all parties. Of course, it should be made known in advance to the interviewer that the candidate will make notes of the interview, and those notes will be tendered to the other parties.”

1.3 Two more recent general reflections on interviewing arbitrators can be found in Redfern & Hunter’s and Gary Born’s books.

1.3.1 N Blackaby and C Partasides, A Redfern & M Hunter, *Law & Practice of International Commercial Arbitration*, 5th ed 2009 says at paras 4.69-4.70:

“It is common for counsel to draw up a list of prospective party-nominated arbitrators who are invited to interviews by representatives of party. A number of eminent European arbitrators have declined to participate in such events on the grounds that they were at best demeaning, and at worst improper. However, it is hard to perceive the practice as being objectionable in principle provided that it is not done in a secretive way and that the scope of the discussion is appropriately restricted. In particular it is quite appropriate for a prospective arbitrator to be questioned in person on matters relating to the existence of conflicts of interest. In this regard, the candidate should be supplied with the name of the parties and counsel. He or she may also be questioned on their experience in the relevant field, qualifications for the case in hand, as well as availability. It is also reasonable for a party representative to have an opportunity to assess the candidate’s physical and mental health. However, there should be no probing of the prospective arbitrator’s views on the merits of the case, nor should party representatives take the opportunity to test their forthcoming submissions of fact and law.

One distinguished US arbitrator has identified his own guidelines, having informed the interviewers of them in advance. First, other than in exceptional circumstances, the interviewers must travel to see him in his office (ie he will not respond to a ‘summons’ to the premises of the party concerned or their representatives). Secondly, the interviewing delegation must be led by an external lawyer retained by the party in question (ie he will not see the party’s employees on their own.) Thirdly, the meeting should not be conducted over lunch or other event involving hospitality – regardless of who will pay the bill. Fourthly, the meeting should not last for more than half an hour. Fifthly, he will take a note of the discussion that he will regard as disclosable to interested parties if appropriate. Sixthly, if appointed, he will inform

the arbitrator nominated by the other party of both the fact and the content of the discussion with the party that appointed him. These are eminently sensible guidelines that should avoid any real risk of impropriety; and prospective arbitrators would be wise to adopt a similar system, or to adapt them in a way that seems appropriate to the circumstances of individual cases.

1.3.2 The authors deal also with the interviewing of sole or presiding arbitrators (at para 4.71):

“Again, there can be no objection in principle provided both parties’ representatives are present and the discussion is carefully controlled. There is indeed much to recommend the practice since proceedings will at least start on a sound footing if the person who is to preside over the hearings commands the respect and confidence of both parties.

1.3.3 Born writes of interviewing in *International Commercial Arbitration, Volume 1*, Wolters Kluwer 2009 at pages 1391-1394 says:

“That term is a misnomer and mischaracterizes the process, by wrongly suggesting an inquiry into the arbitrator’s views on the substance of the dispute or on the issues which will be raised in the dispute; instead, discussions with a prospective co-arbitrator must be limited to the individual’s experience, availability, interest, compensation and, where the co-arbitrators have a role in selecting a presiding arbitrator, the constitution of the tribunal.

The IBA’s Guidelines address the appropriate scope of contracts between a party and potential co-arbitrators.

“the arbitrator [is not disqualified by, or required to disclose.... Initial contact ... if this contact is limited to the arbitrator’s availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

The IBA Ethics also permit the prospective arbitrator to “respond to enquiries from those approaching him, provided that such enquiries are designed to determine his or her suitability and availability for the appointment as arbitrator and provided that the merits of the case are not discussed. Other sources, including a variety of

descriptions of customary practice and international arbitration rules are to the same effect.

The foregoing contacts between parties and prospective co-arbitrators are important to the arbitral process and, with appropriate safeguards (including disclosure as to their existence and equal opportunities for both parties to have such contacts) do not undermine or taint that process. They serve as a constructive and valuable form of quality control, to ensure that a co-arbitrator has genuine experience with arbitration or a particular substantive field, does not have relations with an adverse party or law firm, is actually available and interested in serving, and has the personal and intellectual abilities to function well on a tribunal.

These matters can (and should) be explored through other means (such as publicly available records of past cases and inquiries with others in the arbitration community), but there is usually no substitute for hearing things first-hand. In practice, it is striking how frequently unanticipated problems – conflicts, scheduling problems, lack of experience or interest and the like – only emerge after discussion with a prospective co-arbitrator. It bears emphasis that one of the defining characteristics and attractions of the arbitral process is the parties' ability to select a tribunal that will decide their dispute in a competent, expert manner (rather than relying on random selection of a national court judge) Essential to achieving this process is determining first hand, what a prospective arbitrator's actual experience, commitment and availability are.

Likewise, pre-dispute contacts perform the legitimate function of reminding the co-arbitrator of the seriousness of his or her mandate. ... The immediacy of personal contact with counsel or a party serves to underscore the gravity of the co-arbitrator's mandate, which is entirely appropriate and desirable.

At the same time, it is important to ensure that the co-arbitrator's obligations of impartiality and independence are not compromised by contacts with the nominating party. As the IBA Guidelines provide, there may be no discussion of the merits of the dispute, other than a general description sufficient to allow the party and prospective co-arbitrator to consider issues of experience and suitability. In particular, there should be no "pleading" of the case by a party nor any indications (however subtle) of predisposition by the prospective nominee. As a rule, parties

and co-arbitrators should conduct themselves as if the other party were present during their discussion. Equally important, both parties must be aware of the existence of discussions between counsel and the co-arbitrators and have the opportunity to engage in such discussions.

In addition to ensuring that the co-arbitrator's impartiality and independence are preserved, it is also important not to appear to be partial. Although matters such as the location of discussions, or who pays for a meal or trip, can appear trivial, they should be treated with care and discretion. Parties should consider such matters from the position of their opponent, reviewing matters after a hypothetically unfavourable arbitral award. Elementary efforts to avoid needless suspicions, such as meeting in the co-arbitrator's premises and avoiding any hint of financial contributions should be observed."

Mark Friedman responded to the original publication of the guidelines in "Regulating Judgment: A Comment on the Chartered Institute of Arbitrators Guidelines on the interviewing of Prospective Arbitrators" [2008] *Dispute Resolution International* 288. Most of his comments deal with individual guidelines. So, they are discussed in the guideline text in that context. He makes some general points as well at pp. 288, 289 & 292-293:

"It is generally considered permissible to explore a prospective arbitrator's suitability, but not to engage him on the merits of the particular dispute; it is permissible to learn about the arbitrator's approach and perhaps predispositions, but not to compromise his impartiality and willingness to decide based on the arguments and evidence....

If these Guidelines were not followed – no time limit agreed, questioning by two lawyers with no apparent leader, meeting at [a] hotel lounge during an arbitration conference with refreshments served – should we understand that the interview process has been compromised and the prospective arbitrator is now prone to be biased? For many, it is the substance of the discussion that should matter, not the setting....

It is not clear that there is a pressing need for regulation of the arbitration interview process. ... How much damage can actually be done in a pre-appointment interview? Between... a lot happens that is likely to blunt the impact even of comments that go too far. .. An arbitration who believes in the process and the fundamental

requirement to remain impartial is unlikely to need detailed guidelines; one who does not ... is unlikely to heed them... There is some danger that prescriptive guidelines may fuel ... challenges.”