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# AD HOC ARBITRATIONS: SELECTION OF APPLICABLE RULES AND GUIDELINES FOR INTERVIEWING PROSPECTIVE ARBITRATORS

As arbitration rules, procedures and awards have become standardized and accepted in commercial transactions, contracting parties have increasingly moved to the use of ad hoc arbitrations (i.e., arbitrations that are not administered by an arbitral body such as the American Arbitration Association (AAA) or International Chamber of Commerce (ICC) but by the arbitral tribunal itself). The principal motivation behind the increased use of ad hoc arbitration is avoidance of the expense associated with administered arbitrations. Requirements such as review of proposed awards by administering institutions can also extend the period of time for obtaining a final award, which parties prefer to avoid.

## IDENTIFYING RULES TO GOVERN AN AD HOC ARBITRATION

The increased use of ad hoc arbitration raises issues for both the contract drafter and the practitioner managing the arbitration. An initial challenge for the contracting drafter contemplating an ad hoc arbitration is to determine the rules that will be utilized by the parties to both appoint an arbitrator or panel of arbitrators and whether those rules will be used to govern the ad hoc arbitration proceedings. Although not necessary, parties typically designate a set of arbitration rules to provide a framework for the arbitrators to resolve procedural issues. In the United States, the AAA's Commercial or Construction Industry Rules are often chosen as such a framework for ad hoc arbitrations. Set forth below is a typical clause identifying a set of arbitration rules that would govern in an ad hoc arbitration:

*"[t]he arbitration shall be conducted in accordance with the then current Rules of the American Arbitration Association for Commercial Disputes, but the arbitration shall not be submitted to or administered by the Association."*

Contracting drafters should evaluate the extent to which the designation of a particular set of rules may give rise to a dispute regarding enforceability of the arbitration agreement. In a case involving a "hybrid" arbitration clause (i.e., a clause providing that a specified arbitral body would administer the arbitration using the rules of a different arbitral institution) the Singapore Court of Appeal upheld a clause that provided that, "all disputes should be finally resolved by arbitration before the Singapore International

Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce[.]"[1]

Suspension and debarment actions can be authorized by statute or regulation. While statutory-based suspension and debarment is usually mandatory and intended as a punishment, administrative suspension and debarment is discretionary and may not be imposed for the purpose of punishment. Authority for administrative suspensions and debarments is found in FAR Part 9.4 (procurement-based), 2 C.F.R. Part 180 (nonprocurement-based), and individual agency regulations.

While the Singapore court gave effect to the parties' clear intent to arbitrate in that case, the selection of the ICC arbitral rules resulted in a court challenge that delayed the arbitration. Notably, in the 2012 revisions to the ICC Rules and potentially in response to the Singapore court, the ICC has made clear that it has sole jurisdiction to administer an arbitration using the ICC Rules, mandating that: "[b]y agreeing to arbitration under the [ICC] Rules, the parties have accepted that the arbitration shall be administered by the [International Court of Arbitration]."[2] Thus, contracting parties should pay particular attention to the contents of any proposed rules in either a hybrid or ad hoc arbitration clause in order to avoid fodder for a court challenge to the arbitration agreement itself.

## ARBITRATOR SELECTION IN AD HOC ARBITRATION

A primary concern in an ad hoc arbitration is the method of selection of the arbitrator or panel of arbitrators, with the most significant question being whether the parties will appoint the arbitrators or use an appointing authority. In the case of a single arbitrator, an appointing authority as either a starting point or a fallback position is necessary in order to avoid the decision defaulting to a court in the event of the parties' deadlock on the selection of the arbitrator. Many arbitral institutions are willing to act as only an appointing authority in exchange for payment. Thus, parties might agree to identify the appointing authority in their contract and then select the sole arbitrator from a list of qualified arbitrators provided by the appointing authority, either by striking or ranking the potential arbitrators. A clause describing that process is set forth below:

*"[t]o select the arbitrator, the Parties shall alternately strike names from a list of arbitrators knowledgeable or experienced in the industry obtained from the AAA or other agreed upon source, with the Party furnishing the Notice of Arbitration striking first, until one Person's name remains on such list. Such Person shall become the arbitrator of the matter."*

In the case of a panel of arbitrators, it is commonly accepted in most jurisdictions and under the majority of current arbitral rules that party-appointed arbitrators are required to act as neutrals in the arbitration and rendering of the final award. "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration."[3] Neutral party-appointed arbitrators who then select a chairperson between themselves are becoming increasingly common in ad hoc arbitrations. These clauses are straight-forward and typically provide for the following:

*"[e]ach Party shall appoint one Party-neutral arbitrator, and the two arbitrators shall mutually agree on the appointment of the third arbitrator who shall have at least fifteen (15) years of relevant experience and who shall act as the chairman of the panel."*

## EX PARTE COMMUNICATIONS WITH PROSPECTIVE ARBITRATORS

In the event that the arbitration agreement provides for party-appointed arbitrators, the practitioner in an ad hoc arbitration will have to consider whether to contact a prospective candidate regarding his or her potential appointment. This decision is easiest when operating under rules that make clear that such contacts are appropriate if they are limited in scope. For example, Rule 21(a) of the 2009 Construction Industry

1. *Insigma Technology Co. Ltd. v. Alstom Technology LTD* [2009] SGCA 24.
2. See ICC Rule 6.2.
3. See ICC Rule 11.1 (2012).

Rules and Rule 18(a) of the 2009 AAA Commercial Arbitration Rules provide that a potential arbitrator may be contacted about qualifications, availability, independence, and potential chairperson candidates:

*"[n]o party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party,* ***may communicate ex parte with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator*** *where the parties or party-designated arbitrators are to participate in that selection."*

The AAA Rules recited above codify the recommended practice that has been propounded by several international and domestic arbitral institutions. Canon III of the 2004 revision of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes provides for limited ex parte communications, restricted to identity of the parties, general nature of the case, suitability for appointment, and the choice of the chairperson. Rule 5.1 of the International Bar Association (IBA) Rules similarly provides that, "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."

The Chartered Institute of Arbitrators addresses the interview process of prospective arbitrators in its lengthy Practice Guideline 16, which provides in pertinent part that the following topics may not be discussed: the specific facts or circumstances giving rise to the dispute; the positions or arguments of the parties or the merits of the case. Guideline 16 goes on to outline the merits of tape recording the interview session and taking steps to maintain the professional and objective nature of the exchange of information in order to avoid a potential challenge to the arbitrator's partiality.

On May 25, 2013, the IBA council adopted the "IBA Guidelines on Party Representation in International Arbitration." The guidelines are not binding, but are intended to provide guidance in matters of party representation in international arbitration, particularly where different "norms and expectations may threaten the fairness and integrity of the arbitral proceedings."[4] Ex parte communications are addressed under Guideline 8, which approves ex parte communications with prospective party-nominated arbitrators and prospective presiding arbitrations for the purpose of determining "his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest."[5]

The commentary states that Guideline 8 is intended to "reflect best international practices and, as such, may depart from potentially diverging domestic arbitration practices that are more restrictive or, to the contrary, permit broader Ex Parte Communications." The commentary further describes the topics of discussion that are permissible. While the IBA Party Representation Guidelines are not binding absent agreement of the parties to the arbitration, they evidence the best international practices and support the propriety of such communications.

## CONCLUSION

With the increasing popularity of ad hoc arbitration, sophisticated contracting parties will continue to refine the do-it-yourself arbitration process. Informed selection of appropriate rules and an understanding of the best practices and ethical considerations in the arbitrator selection process are essential to ensuring an enforceable agreement and enforceable award in such arbitrations.

4. IBA Party Representation Guidelines at 12.l
5. IBA Party Representation Guidelines at 15..

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