

# Setting Up an International Arbitration

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## Constitution of the Tribunal

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- **Arbitration clause / Institutional Rules**
- **1 v 3 Arbitrators**
- **Procedures for Appointment**
  - Party-Nominated Arbitrators
  - Institutional Appointment
  - Strike and Rank

## How to Choose an Arbitrator

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- **Governing Law**
- **Civil law v common law (or both)**
- **Language skills**
- **Familiarity with relevant industry**

## How to Choose an Arbitrator

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- **Academic v. practitioner**
- **Standing and reputation**
  - Relationship with other members of the tribunal
  - Likely disposition
- **Nationality**
  - ICC Rules provide that the sole arbitrator or the chairperson/president of the arbitral tribunal “shall be of a nationality other than those of the parties.” (Article 13(5))

## How to Choose an Arbitrator?

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- **US company v. Italian company:**
  - Supply agreement for specialized components necessary in the manufacturing of cars
  - New York law
  - Swiss seat
  - English language and documents in English
  - Engineers speak Italian

## How to Choose an Arbitrator?

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- **German company v. Argentinian company (state-owned entity):**
  - Wind farm construction agreement
  - Mixed Argentinian and New York law
  - New York seat
  - English language
  - Documents in Spanish

## How to Choose an Arbitrator?

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- **Japanese company v. Taiwanese company:**
  - Patent licensing agreement
  - New York law
  - New York seat
  - English language
  - Mandatory law issues (e.g., antitrust, national security regulations, etc.)

## Disclosures and Challenges

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- **Arbitrators must be independent and impartial**
  - Independence relates to the relationship between an arbitrator and one of the parties (objective test).
  - Impartiality is connected with bias for or against one of the parties or in relation to the issues in dispute (subjective test).



## Disclosures and Challenges

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- **IBA Guidelines: general standards and non-exhaustive lists of circumstances**
  - Non-waivable Red List
  - Waivable Red List
  - Orange List
  - Green List

## Disclosures and Challenges

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- **Disclosure**
  - ICC Rules: prospective arbitrators to sign a statement of acceptance, availability, impartiality and independence. (Article 11(2))
  - What should an arbitrator disclose?

## Disclosure and Challenges – 2021 ICC Rules

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- **Article 14(1):** an arbitrator can be challenged “for an alleged lack of impartiality or independence, or otherwise.”
- **Article 14(2):** time limit for a challenge – within 30 days from:
  - Receipt of notification of appointment or confirmation of arbitrator
  - Date when the party is informed of the facts at the basis of the challenge
- **Objective test**

## Disclosure and Challenges - Standards

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- ***Halliburton v. Chubb* (UK 2020)**
  - An arbitrator must disclose facts and circumstances which would or might reasonably give rise to the appearance of bias.
  - Failure to disclose *may* constitute apparent bias.
  - It is difficult to successfully challenge an award.

## Disclosure and Challenges - Standards

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- ***Dommo Energia v. Enauta Energia* (France 2020)**
  - The circumstances to be disclosed may relate to potential conflicts of interest, relationships or a “stream of business” that the arbitrator may have had with the parties or third parties likely to be interested in the dispute.
  - Failure to disclose should not *in itself* lead to setting aside an award.

## Disclosure and Challenges - Standards

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- ***Commonwealth Coating Corp v Continental Casualty* (US 1968)**
  - No majority decision: Justice Black v Justice White
  - *Morelite v. New York City Dist. Council Carpenters Benefit Funds* (2d Cir. 1984): “evident partiality” is a fact-intensive objective inquiry.
    - Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.

## Disclosure and Challenges – Case Study

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- Sole arbitrator and one of the attorneys at respondent's law firm are both members of the same bar association's committee.
- They also hold executive positions in the same international bar organization.
- Arbitrator and respondent's expert appeared together as panelists at the same seminar.

## Disclosure and Challenges – Case Study

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- Chairperson of tribunal is CEO of non-party company X
- Company X has offices in over 40 countries.
- Chairperson fails to investigate potential business relationship between company X and parent company of a party.
- Chairperson does not inform the parties of his intention not to conduct an investigation.



## Procedural Order No. 1

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- **General procedural rules and timetable**
  - Round of briefs
  - Language
  - Discovery/Disclosure: IBA Rules on Taking of Evidence?
- **ICC Terms of Reference**
  - Scope of dispute
- **Parties' input: meet and confer on schedule and terms**

## Procedural Order No. 1

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- **Bifurcation**
  - Jurisdictional and admissibility issues
  - Liability and damages
  - Specific legal issues
- **Summary Dispositions**
  - ICC 2017 Practice Note: “claims or defenses . . . manifestly devoid of merit or fall manifestly outside the arbitral tribunal’s jurisdiction.”
  - ICC COVID-19 Practice Note: “issues [that] may be resolved on the basis of documents only, with no evidentiary hearing.”

## Bifurcation – Case Study

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- **Company A v. Company B:**
  - Arbitration clause covers “claims arising out of” the Share Purchase Agreement.
  - B sues A for breach of the SPA: “value destruction” (e.g., alleged mismanagement) between signing and closing of SPA.
  - B raises argument that claim is not covered by the arbitration clause

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## QUESTIONS???

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