Egyptian perspectives on arbitral tribunals

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An event in Cairo heard **Karim Hafez** spell out provocative criteria for arbitral appointments and **Georges Abi-Saab** criticise ICSID's procedure for deciding challenges.

Hafez, founding partner of the Hafez arbitration boutique in Cairo, outlined a "strict hierarchy" of criteria that inform his selection of arbitrators, in a speech he declared would be "shamelessly direct".

He said the most important consideration was to "select arbitrators to win". "If you get the appointment of an arbitrator wrong, you're done for. No amount of lawyering over the next two years will right that wrong."

As a result, Hafez said, his lawyers will read everything a potential candidate has written, enquire as to his or her prejudices, and go "further than most people would think reasonable" to establish whether the candidate has professional, social or personal ties to the other arbitrators, counsel or parties in the case.

His team applies "a very low threshold of disqualification" during the vetting process. "If in doubt, we will not choose him. If that person happened to be co-counsel with opposing counsel on some remote island in some remote time, they're out. That's not a risk we're prepared to take."

Winning qualities

Hafez said he expects arbitrators to be "knowledgeable and sociable" because an awkward arbitrator "is unlikely to retain the affection of, and therefore stay in communion with, the one person that matters on the tribunal – the chair."

His desired arbitrator would also be robust. "I'm not after someone who's belligerent but I don't want a wet rag either, who folds at the slightest hint of a counter-argument. I'd like to appoint someone who will stand his ground if and when they think it is right and proper to do so." The arbitrator must have the "ingenuity and intellectual and emotional resources to argue if necessary at great length and at a certain cost to himself in order to see justice done."

He admitted that the selection process often involved "hazarding guesses", since as claimant's counsel his firm is often called upon to make an appointment long before the respondent names its own arbitrator or (where the parties fail to agree) the administering institution has made a default appointment.

The tendencies of different institutions regarding arbitrator nationality are also a factor in deciding on that issue, he said. "If we think an institution is likely to appoint a non-national, we'll be much more comfortable appointing a non-national ourselves. If we think an institution systematically gives preference to nationals, then we are much more likely to appoint a national."

Appointing to impress and to recognise

More provocatively, Hafez suggested a second-tier criterion for lawyers is to appoint arbitrators whom they wish to impress. "We'll appoint people before whom we wish to market our skills in the not unreasonable expectation that when they come to make appointments of their own, they will not forget the very able counsel before them."

Third, "we appoint people because we like them." The international arbitration community is "a small select group of practitioners and some of them are good friends who we will wish to assist as best we can. One way we can do this is by appointing them. Sometimes we do it out of recognition because they have given us a leg up along the way when we've most needed it. Sometimes we'll do it because we simply like them as a friend."

Hafez emphasised that these three criteria were in a "strict hierarchy" of descending importance – to win, to impress and to give recognition to past assistance.

Appointing chairs and seeking client input

Asked whether he would expect to be consulted by his client's appointed arbitrator over the selection of the tribunal chair, Hafez said he would be "completely traumatised" if his appointee failed to do so.

"There seems to be no agreement on this issue but I think the better practice is for the arbitrator to inquire. How far you inquire is a matter of judgement. Does counsel have an automatic veto on particular individuals? Does counsel get to lay down a proactive profile of the individual he thinks ought to be sitting as chair? The practice varies."

Hafez said he would expect to be consulted because "I need to have faith in the ability and integrity of the individual appointed as chair and he may not be the best person for the case for reasons that are not challengeable." For instance, the chair of a tribunal might be acting as opposing counsel in another case in which you are involved. "I do not wish to have that individual sit in judgment over my client, regardless of whether I'm able to challenge him successfully."

On the question of whether to involve the client in the selection process, Hafez said he would only do so if he had no other choice. Apart from large clients with sophisticated general counsel regularly involved in arbitral proceedings, the majority of clients are "lousy choosers of arbitrators and appoint unfit individuals most of the time."

Sometimes counsel must "defer to some degree to the decision-making dynamics in the client's organisation", he said. For instance, Egyptian state-owned agencies "like nothing better than to see a former judge or member of the teaching faculty appointed as an arbitrator." Such candidates do not always make the best arbitrators.

Faced with an insistent client, Hafez said he would be prepared to walk away – "no questions asked, fees returned" – if he had concluded that his client's choice would be a bad appointment.

Moral hazard

Hafez concluded by adding his voice to the chorus calling for a code of ethics for arbitrators. "Many arbitrators will act with appalling levity and lack of integrity. In this jurisdiction and others, there are significant commercial interests at stake in the practice of arbitration and the moral hazard is real".

"Without a rule-based system to which you can refer to remove an arbitrator when circumstances so warrant, it becomes extremely difficult to reach that objective," he said. "The more defined the rules, the more assuredly one would rid the tribunal and in due course, the arbitral community of those who see fit to act in ways that no arbitrator should."

Ensuring party confidence

The comments were part of a roundtable discussion on arbitrator independence and impartiality that brought together arbitrators, counsel and representatives of regional arbitral institutions to give their different perspectives.

Another member of the roundtable, Egyptian arbitrator **Ahmed Sadek El-Kosheri**, advised colleagues to make "the fullest possible disclosure" before accepting an arbitral appointment – emphasising that the parties' confidence in the integrity of the process is paramount.

He cited an ICSID case brought by African Holding Company of America against the Democratic Republic of the Congo in 2005, in which he had been appointed as tribunal chair. When the claimant alleged a potential conflict based on his participation in an ICSID case against Egypt that raised similar issues, he resigned from the Congo panel immediately – even though he did not believe the challenge was justified.

"ICSID was not happy but where a party has doubts about an arbitrator it is the most appropriate response," he said.

Challenging arbitrators at ICSID

Another Egyptian arbitrator, **Georges Abi-Saab**, a professor of public international law and former member of the World Trade Organization Appellate Body, complained that ICSID's method of deciding challenges to arbitrators placed an unwelcome burden on tribunals and risked souring relations.

The procedure by which two tribunal members decide on a challenge against their co-arbitrator is unproblematic only if the pair are able to agree "cordially" to uphold or dismiss it, he said.

If the two arbitrators are divided, the matter is referred to the chair of ICSID's administrative council. In the event that such a challenge is dismissed, there will be a "bad atmosphere" on the tribunal – with the arbitrator who survived the challenge regarding one of his colleagues as "an adversary". This deprives the whole process of the "spirit of teamwork" required.

Abi-Saab's comments came just weeks after he and **Judge Kenneth Keith** of New Zealand dismissed a challenge against their Canadian co-arbitrator, **L Yves Fortier CC QC**, in the *ConocoPhillips v Venezuela* case. The pair held that Fortier did not break ICSID rules by failing to disclose that his then law firm was engaged in merger talks with a firm pursuing multiple claims against Venezuela.

In the *Cemex v Venezuela* case in 2009, meanwhile, Abi-Saab and **Gilbert Guillaume** of France dismissed a proposal to disqualify US arbitrator **Robert von Mehren** based on his links to Debevoise & Plimpton, holding that the challenge was time-barred.

Abi-Saab is not the first publicly to question the way ICSID handles arbitrator challenges. At the *GAR Live* event in London in November 2011, the chairman of the ICC Court **John Beechey** said, "I'm uncomfortable with the ICSID approach when two fellow arbitrators have the misfortune of dealing with a challenge made against the person with whom they're supposed to continue sitting. There must be a better way of doing things."

Mediterranean collaboration

The roundtable was part of a conference on 29 April organised by the Cairo Regional Centre for International Commercial Arbitration and the Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED) – an offshoot of the Milan Chamber of Arbitration.

Delegates from Italy and countries across the Middle East were welcomed by **Nabil Elaraby**, secretary general of the League of Arab States and chair of the board of trustees at the Cairo Centre. He emphasised that "the most important element for the success of arbitration is the arbitrator himself" but noted that different cultures have different criteria for independence and impartiality.

The conference also heard introductory remarks by Egypt's minister of justice, **Adel Abdel Hamid**, who said he supported the idea of a code of ethics for arbitrators.

The conference was sponsored by Italian law firms Pedersoli e Associati and Ughi e Nunziante and the Italian offices of Curtis Mallet-Prevost Colt & Mosle and Cleary Gottlieb Steen & Hamilton. During the event, representatives of ISPRAMED and six Mediterranean arbitral centres (in Milan, Cairo, Tunis, Morocco, Istanbul and Algiers) signed a memorandum of understanding aimed at providing an arbitral network with harmonised procedures across the region.

ISPRAMED and ICSID will hold two joint seminars in the autumn in Tunis and Casablanca. An event is also planned to coincide with the next annual meeting of ISPRAMED in Istanbul in spring 2013.