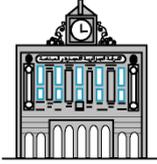


INSTITUTE FOR THE PROMOTION OF ARBITRATION  
AND MEDIATION IN THE MEDITERRANEAN



الغرفة الجزائرية للتجارة و الصناعة  
Chambre Algérienne de Commerce et d'Industrie



مركز تونس  
للمصالحة والتحكيم  
Centre de Conciliation  
et d'Arbitrage de Tunis



ISTANBUL  
CHAMBER OF  
COMMERCE 1882



MILAN  
CHAMBER OF  
ARBITRATION



Lebanese Arbitration Center

**Cour Marocaine d'Arbitrage**

# REPORT ON

## THE CRITERIA FOR SELECTION OF ARBITRATORS

## **ABBREVIATIONS**

### **Centres**

**CACI** - Centre for Arbitration and Conciliation of the Algerian Chamber of Commerce and Industry

**CAM** – Milan Chamber of Arbitration

**CCAT** – Arbitration and Mediation Centre of Tunis

**CMA** – Arbitration Court of Morocco

**CRCICA** – Cairo Regional Centre for International Commercial Arbitration

**ITOTAM** – Arbitration Centre of the Istanbul Chamber of Commerce

**LAC** – Lebanese Arbitration Center

### **International conventions and laws as mentioned in the Rules Comparison Chart and in the Report**

NY Convention - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958

UNCITRAL ML – United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006

UNCITRAL Rules - United Nations Commission on International Trade Law Arbitration Rules, 1976, as revised in 2010

### **ISPRAMED language**

MOU – Memorandum of Understanding signed by the Centres as members of the Network with the intent to promote arbitration and mediation in the Euro-Mediterranean area and to define shared and common principles

Methodology – Operational pattern agreed upon by the Centres in order to define the common practice in the administration of arbitrations in the Mediterranean area

## **Foreword**

The basic purpose of the present report is to condense in a few principles and practices the data and information collected by ISPRAMED among the Centres of the Network<sup>1</sup> on the issue of the selection of the members of the Arbitral Tribunal.

In fact, the Centres have been prompted to liaise with ISPRAMED on their own arbitration rules as well as on their experience on practical circumstances which call into question the constitution of the arbitral tribunal.

The principles and practices so far collected on the issue, thanks to the contributions of all the members of the Network, allow ISPRAMED to illustrate the standards that the Centres generally apply in the cases they manage, when it comes to the arbitrators' selection.

Hence, they represent a shared view of the good administration of arbitration procedures in the Mediterranean area as far as such issue is concerned.

In the process of elaborating the common principles and practices, ISPRAMED has presented a draft which has circulated among the members of the Network. The comments received by the Centres have generally supported the draft report and have been used to arrange it when necessary.

Therefore, in accordance with the goals set forth in the MOU, such principles, as listed in the present report, are hereby acknowledged by the Centres as general standards, being endowed with a certain binding character. The Centres undertake to abide by such principles in their everyday activity in order to ensure a top-notch service.

Accordingly, such principles may provide guidance and help in the decision-making process of institutions dealing with problematic cases of constitution of the arbitral tribunal. Additionally, they offer guidance to international arbitration users, who are able to know beforehand the positions of the Centres on critical issues of arbitration.

Last but not least, such principles and practices are consistent with the international arbitration practice and able to accommodate the legal and cultural differences in the Mediterranean area.

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<sup>1</sup> CMA, ITOTAM, CCAT, CRCICA, CACI, LAC, CAM

## Rules Comparison Chart on the criteria for selection of arbitrators

The selection of the members of the arbitral tribunal by the parties is a quintessential feature of arbitration. As has been pointed out, one of the distinguishing factors of arbitration, as opposed to court proceedings, is that “*Whilst a national court of law is a standing body [...], an arbitral tribunal must be brought into existence before it can exercise any jurisdiction over the dispute*”<sup>2</sup>.

That’s an important step for the parties themselves, being the expression of their autonomy (recognized by the New York Convention and most arbitration laws), as well as for the arbitral process and its outcome, also given that “*the arbitration is only as good as its arbitrators*”<sup>3</sup>.

An arbitration panel usually consists of either one or three arbitrators. If the parties have not specified in their arbitration agreement whether there will be a panel or a sole arbitrator, then the arbitral institution, if any, or the arbitration law will determine the number.

The parties are generally free to determine their own procedure for appointing the arbitrator or arbitrators and they usually do so in the arbitration agreement. Following what they have established in the arbitration clause, the parties may either agree upon the identities of the arbitrator(s) or cooperate in the constitution of the arbitral tribunal. If the parties cannot do that or they decline to specify the mode for selecting the arbitrators, both institutional rules and national laws set out specific principles for a default selection process.

When the tribunal is to consist of three arbitrators, most of the times the arbitration agreement lays down the following procedure: each party appoints one arbitrator and the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal. If the parties have entrusted the matter to an institution, the same institution is entitled to intervene and appoint in case one of the parties or the co-arbitrators do not timely proceed in the appointment.

If the tribunal is to consist of a sole arbitrator, the parties may jointly appoint the arbitrator or, if an institution is administering the proceedings, the appointment is usually made by the institution.

Focusing on institutional arbitration, the present Report will endeavour to compare the sets of rules of the members of the Network, pointing out the basic and recurring characteristics of the arbitrators’ selection process: this will serve the purpose of defining the common practice of the Centres on such an important step of the procedure.

As far as the number of the arbitral tribunal is concerned, some of the Centres specify that the tribunal must consist of an uneven number of arbitrators (art. 13.3 CAM), although it is easy to consider that none of the members of the Network would be prone to accept a tribunal composed of an even number of arbitrator, also based on specific provisions of their national laws.

When the parties do not give directions in the arbitration agreement as to the number of the members of the tribunal, some of the Centres follow the same approach, having a sole arbitrator as the default solution (art. 13.2 CAM; art. 2.5 LAC), although providing for the appointment of a three-member tribunal by their technical body in case there is a complex or high-value dispute. Other Centres provide for a panel of three members (7.1 CRCICA), while not excluding the possibility of appointing a sole arbitrator in case of agreement between the parties within 30 days

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<sup>2</sup> Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009) at 241

<sup>3</sup> Yves Derains & Laurent Lévy (ed.) *ICC Dossier: Is Arbitration Only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator*, Vol. VIII. (Paris: ICC Publishing SA, 2011).

after the receipt by the respondent of the notice of arbitration (7.1 CRCICA) or if no other parties have responded to a party's proposal to appoint a sole arbitrator within the above deadline and the party(s) concerned has failed to appoint a second arbitrator (7.2 CRCICA)

However, there are rules which do not explicitly set forth a default number of members of the arbitral tribunal (art. 2.1 CCAT), also providing for a sole arbitrator or a tripartite panel depending on the nature and the value of the dispute (art. 4.1 CMA). Another Centre (art. 10 CACI) simply establishes that the arbitral tribunal may consist of a sole arbitrator or be a panel of more than one arbitrator. ITOTAM does not provide a default solution and leaves it to the Arbitration Court to decide whether to settle the dispute by a sole arbitrator or an Arbitral Tribunal where there is no agreement upon the parties on the numbers of arbitrators or the parties fail to agree on the number of arbitrators.

Both positions have positive aspects and a few drawbacks: appointing a sole arbitrator, as a default procedure, is a cost-effective solution whereas a tripartite panel usually makes the parties feel better represented within the tribunal. Although it is difficult to strike a balance between these conflicting interests, the need is felt to allow the utmost flexibility in the institution's powers, so that the rules must be able to accommodate different solutions on the composition of the tribunal for any given case.

As for the way of appointment, that is an issue which split the Network: three Centres leave it to the parties to determine the appointment procedure, thus showing that they want to play a limited role, with the intentions of the parties taking precedence, usually expressed in the arbitration agreement (art. 14.1 CAM; art. 8.1 CRCICA; art. 16.1 ITOTAM). The other Centres lay down a predetermined standard procedure for the appointment of the members of the arbitral tribunal (arts. 2.3 and 2.4 LAC; arts. 1 and 2 CCAT; art. 4 CMA; arts. 11, 12, 26 and 34 CACI).

In any event, all the Centres address in detail the procedure for the appointment of the sole arbitrator as well as of the panel.

Focusing on the methods of appointment of the sole arbitrator, most of the Centres specify that the parties are to make their appointment by mutual agreement, failing which the arbitrator will be nominated by the arbitral institution (art. 14.2 CAM; art. 11 CACI; art. 2.3 LAC; art. 1 CCAT; art.16 ITOTAM; art. 8.2 CRCICA, providing for a multi-tiered process, comprising different steps; CMA)

When it comes to the appointment of a tripartite panel, the primacy of the parties' agreement finds its greatest expression in the arbitration rules perused in the present report. First of all, all the Centres specify that the appointment of the two co-arbitrators must be left to the parties, claimant and defendant, each being entitled to appoint an arbitrator. The third arbitrator appointed to preside over the Tribunal may be nominated either directly by the two co-arbitrators (art. 9.1 CRCICA; art. 2 CCAT; art. 26 CACI; art.16.4 ITOTAM) or by the institution (art. 14.4 CAM; art. 4.1 CMA; art. 2.4 LAC) save for the case where the parties have provided otherwise. When the two co-arbitrators do not proceed with the appointment of the third arbitrator (disagreement or failure), a fall-back solution sometimes is offered, as the chair of the panel is appointed by the institution (art. 27 CACI; art.16.4 ITOTAM).

The principle of the parties' equality in the constitution of the arbitral tribunal is put at risk when the dispute referred to arbitration involves a plurality of parties, more than the basic structure

opposing a claimant to a defendant. The plurality may occur on either the claimant's side or the defendant's one, or may concern each of the opposing parties (e.g. the claimant summons at least two defendants, two or more claimants summon two defendants).

Issues arise when the summoned defendants or the claimants have divergent interests, therefore refusing to proceed with a joint nomination.

Arbitral institutions must be extremely careful when facing a multi-party scenario: in such a case, the rule requiring the appointment of one arbitrator by each party would lead to the constitution of tribunals with too many arbitrators. That is the reason why some of the members of the Network have set forth specific principles governing the appointment of the arbitral tribunal in the so called multi-party arbitration.

The approach of the said institutions is slightly different: in any event, those principles usually do not come into play when the parties have provided in the arbitration agreement for a specific (and workable) mechanism for the appointment of the arbitral tribunal in case of a multiparty situation.

According to ITOTAM Rules Art.17; where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the Claimants shall jointly nominate an arbitrator and the Respondents shall jointly nominate an arbitrator for confirmation by the Arbitration Court. In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court shall appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman.

The same is true for the arbitration rules of CRCICA (art. 10), although only for the first step, concerning the joint appointment by multiple parties as claimant or as respondent. Failing such a method, the Centre shall, at the request of any party, constitute the arbitral tribunal, and in doing so it may revoke any appointment already made, and appoint or reappoint each of the arbitrators.

Finally, as far as CAM Rules are concerned (art. 15), the joint appointment method also apply, with the chairman of the tribunal being appointed by the institution, unless the appointment (of the panel or of the president) has been entrusted by the parties to a third authority. As a fall-back procedure, in case the parties do not align in choosing the arbitrators, the Rules provide for the appointment of the arbitral tribunal by the institution, also without considering any appointment possibly made by the parties.

Another particular case in the appointment process is the one concerning the nationality of the chairman of the arbitral tribunal. Apparently the usual practice in international commercial arbitration is to appoint a sole arbitrator or a presiding arbitrator of a different nationality from that of the parties to the dispute.

Neutral nationality is a specific expression of the arbitrators' independence standard, which serves the purpose of preserving the appearance of a fair and equitable process, as lead by neutral arbitrators. Only some of the Centres follow such a tenet, providing for the appointment of a sole arbitrator or president of the arbitral tribunal of a nationality other than those of the parties (art. 8.4 CRCICA; art. 14.5 CAM; art. 2.6 LAC), unless there is a different consensual provision by the parties. The other Centres (ITOTAM, CMA, CCAT) do not ostensibly abide by the principle, given that they do not envisage in their rules such a change in the nationality of the sole arbitrator or the presiding arbitrator when it comes to disputes involving parties enjoying different nationality.

However, it could be argued that the lack of an express provision would not prevent those Centres to opt for a presiding/sole arbitrator of a neutral nationality in a given case.

As for the actual choice of the members of the arbitral tribunal, a few members of the Network may want to play a more active role, by compiling pre-defined lists of arbitrators from which the Centre is free to choose when it is involved in the appointment process. The parties, however, are not obliged to choose their arbitrators from the list and their choice is not therefore limited. This holds true for the Moroccan Centre (art. 4.4 CMA), for CRCICA (art. 8.3 for the appointment of the sole arbitrator and art. 9.3 for the presiding arbitrator) and for ITOTAM (Internal Regulation art. 10. When it is the case for the Arbitration Court to appoint arbitrators the court is also not obliged to choose arbitrators from the list): such institutions have a standing list which can be periodically reviewed. The advantage here lies in the availability of a group of arbitrators who are carefully selected by the institution, which enrolls professionals who, by their experience and knowledge of arbitration, are suited for the office.

Quite to the contrary, other Centres (CAM, LAC, CCAT, CACI) do not provide for a list, feeling at liberty to appoint whoever, with his/her background, fits the case at hand. For these Centres, maintaining an approved list of arbitrators may be ill-suited to improve the quality of arbitral tribunals, taking also into account that the attributes needed in the dispute may vary from case to case.

Last but not least, the Centres - and the parties too - should be conscious that the availability of arbitrators, to be intended as their ability to devote the necessary time to hearing the case, is fundamental to the streamlined course of the proceedings. The quality of arbitral tribunals in fact results also from this, as international arbitrators are very often overloaded with work and they may not be available in time and in travelling capacity, thus endangering the celerity of the proceedings. Sometimes the parties select busy men to act as arbitrators in complex disputes because such professionals have standing and experience: however, these persons have many calls on their time and therefore may not be able to efficiently handle the arbitration.

The majority of the Centres took a major step towards transparency as regards the arbitrators' workload. They set forth the principle in their rules according to which arbitrators should be able to devote the necessary amount of time to the arbitration and to conduct the process in a diligent and efficient manner (art.15.2 ITOTAM; art. 4.3 CMA; art. 4 code of ethics CAM; art. 11.4 CRCICA, according to which the arbitrator shall avoid any act or behaviour likely to hinder the deliberations or to delay the resolution of the dispute; in a subtle way, art. 13 CACI). Another Centre, although not specifying it in the rules, requires the arbitrator to state that he/she is available when he/she signs the statement of independence (LAC). ITOTAM though specifying it under its rules requires also the arbitrator to state it in the statement of independence, impartiality and availability. Along the same lines, a Centre expressly sanctions the arbitrator who deliberately delays the commencement or the continuation of the arbitration by possibly removing it, subject to a specific request by a party and after giving the arbitrator and the counterpart the opportunity to express their views in this respect (art. 12 CRCICA). ITOTAM also under the Article 19 sets for similar provisions with regards the replacement of arbitrators. The CCAT is silent on the issue of the arbitrators' availability.

## **PRINCIPLES**

### **1. Way of appointment of the arbitrators**

The Centres all acknowledge the importance of a transparent and clear-cut procedure for the appointment of the members of the arbitral tribunal, based on the assumption that this allows the smooth set in motion of the proceedings. The selection of the arbitrator by the parties is a quintessential feature of arbitration and this is strictly linked to the broad freedom they generally enjoy to construct a dispute resolution system of their choice in the arbitration agreement. Therefore, the Centres agree that the parties should never be deprived of the power to appoint the members of the arbitral tribunal in favour of the institution, unless it is considered appropriate to intervene to break a procedural deadlock in the arbitration. Besides, when appointing the arbitrators the Centres may either draw from an internal list of arbitrators (ensuring that they all enjoy the highest standards of competence) or freely appoint professionals they trust.

### **2. The composition of the Arbitral Tribunal**

All the Centres share the belief that the parties have the last say on the composition of the arbitral tribunal (tripartite arbitration panel or sole arbitrator) as well as on the relevant appointment process. However, some of the Centres may accommodate for a three-member panel or for a sole arbitrator as a default solution, in case the parties are silent or do not reach an agreement, depending also on the peculiarities of the case at hand (value, type of dispute, complexity and so on). In any event, the members of the arbitral panel cannot result in an even number.

### **3. Multiparty arbitration**

Critical procedural issues arise when there are more than two opposing parties taking part in the arbitrators' selection process. The Centres agree that the leading principle in such a case is the equal treatment of the parties, which must enjoy the same degree of involvement in the mentioned step. Therefore, the parties may either split in two opposing groups, appointing each an arbitrator, or jointly appoint the entire panel (or the sole arbitrator). In case of failure of the said mechanism, the Centres agree to take it upon themselves to appoint the panel or the sole arbitrator.

### **4. Neutrality of the arbitrators**

The Centres agree that the arbitrator's cultural commonality with one of the parties does not automatically result into partisanship of the same arbitrator. However, the members of the Network may set forth a specific provision on the so called "third nationality rule", establishing that, where the parties have different nationalities, the Centre may appoint as sole arbitrator or chairman of the Arbitral Tribunal a person of a different nationality, unless otherwise agreed by the parties.

### **5. Availability**

The Centres acknowledge the importance of a greater transparency with respect to arbitrators' availability and workload. Therefore, they undertake to require their arbitrators to confirm their ability to devote the necessary amount of time to the arbitration and to conduct the process diligently and efficiently, as well as according to the time limits set in the rules.

## COMMON PRACTICES

The goal of the present report is to study the criteria for selection of arbitrators as well as their practical applications by the members of the Network.

Thus, along with a few principles, defining the position of the Centres towards the above mentioned issue, the report illustrates the actual practices of the same institutions on critical or (simply) important cases concerning the appointment of arbitrators, based on the assumption that offering high-quality procedures to arbitration users is the best way to promote arbitration in the Mediterranean area.

Therefore, the Centres believe that harmonization of good practices concerning the selection of arbitrators allows certainty, reliability, hence a climate of trust among arbitration practitioners and users.

In view of the mentioned harmonization, they have defined and discussed some problematic cases concerning the appointment process.

Although each institution is expected to react to these cases to the extent allowed by the respective rules, the Centres endeavour to take into account the practice and position of the majority of the Centres in the following cases.

### CASES

The Centres have shared a non-exhaustive list of practical examples which are likely to occur in the administration of arbitration procedures. These are some of the most frequent circumstances raising doubts and a variety of procedural problems as to the appointment process. Knowing the position of the Centres towards these situations will be helpful in defining common principles and explanatory cases for arbitration users. The Centres undertake to follow the most recurring relevant decisions on the selection of arbitrators when confronted with such circumstances in the real practice.

#### **1. The composition of the Arbitral Tribunal**

*a. The arbitration agreement lacks any provision or is ambiguous on the number of arbitrators and the parties do not reach any agreement on the matter.*

The case is not that uncommon in the arbitration practice and the Centres' rules allow for different evaluations of it, providing the parties with distinct alternatives. CRCICA opts for a tripartite panel as a default solution whereas others (CAM; LCA) provide for the appointment of a sole arbitrator. However, the latter group and the remaining Centres (CCAT; CMA) all grant a flexible approach (one or three arbitrators), where arbitration can be referred to a panel of three members given the circumstances of the case (also CRCICA, providing for the reverse case, from a tripartite panel to a sole arbitrator). Where the rules do not offer a default solution, the Centre prompt the parties to clarify, within a short time limit, their position as to the composition of the arbitral tribunal; if the parties fail to give any feedback on the issue, the Centre will decide for them (CACI, ITOTAM).

The above referred flexible approach clearly serves the purpose of offering the parties the most appropriate arbitral tribunal for the case at hand, in terms of combined expertise of the panel and

internal exchange of views on controversial issues. The institution has always to strike the balance between possible conflicting position of the parties on the issue and the interests at stake in the case (a high-value dispute is not necessarily a complex one).

Therefore, when facing the parties' disagreement on the number of the members of the Arbitral Tribunal, the Centres endeavour to opt for a customized solution, after careful consideration of the peculiarities of the dispute as well as of the positions of the parties on the composition of the tribunal.

- b. The arbitration agreement provides for a two-step process, where the parties appoint two arbitrators who are required to attempt a settlement between the parties and if they fail to do so a third arbitrator will be appointed to constitute a three-member panel.*

Such case possibly leads to tie decisions, as it undermines the majority rule, threatening deadlocks in the procedure. Arbitration agreements providing for the aforesaid composition of the arbitral tribunal are usually held invalid under many national laws or amended by way of the appointment of an additional arbitrator. The Centres' Rules always provide for an arbitral tribunal comprising an odd number of arbitrators. As for their actual experience, the occurrence is really sporadic in the international practice: only one centre - CAM - faced the case. The institution invited the co-arbitrators, whose independence and impartiality had been controlled, to inform the parties and the centre of any settlement within a reasonable time, failing which, the Arbitral Council would appoint the chair (with a meeting scheduled in two/three weeks). When the date of the Council meeting was approaching and no settlement was announced, the Secretariat informed the parties and the co-arbitrators that the Council would appoint the chair, unless the parties agree on the extension of the time limit for a settlement. However, the co-arbitrators did not settle the dispute, hence the chair was appointed by the institution.

- c. The arbitration agreement provides for a sole arbitrator, but the dispute is a big case where a three-person tribunal should be appointed (or the reverse: the dispute is a small claim - less than \$5.000-\$10.000 - and a three-member tribunal is indicated in the clause).*

The overriding principle in arbitration is party autonomy, which has a broad meaning and comprises also the right to determine the composition of the Arbitral Tribunal. As a general rule, the agreement of the parties in this respect is a primacy resource so that the institution administering the case has to abide by it: hence, if the parties decide for a panel or for a sole arbitrator in the arbitration agreement, the Centres have to observe such provision. However, it is also true that the same contract may give rise to a wide array of disputes, each with distinct peculiarities (complexity, value, etc.): when drafting the arbitration agreement, at the time of the execution of the contract, parties are usually not aware of the future developments of their dealings and do not know what kind of conflict they will experience (if any). That is the reason why the original provision on the composition of the arbitral tribunal, as embedded in the arbitration clause, may not be in step with the features of the actual dispute, once it arises. Therefore, in such a case, although the principle of party autonomy cannot be overturned, the Centres, in the parties' interest (time and cost-effective procedures), may suggest them to evaluate a change of the above mentioned provision or to use a different ADR method (e.g. mediation).

## **2. Multi-party cases**

- a. The arbitration agreement provides for two arbitrators appointed by each party and the chairman appointed by the two party-appointed arbitrators. The arbitration involves more than two litigating parties; such parties do not delegate the appointment of the panel to an appointing authority.*

This situation sets a clear limit to party autonomy: the will of the parties, as expressed in the clause, would make the arbitration impractical in case of multiple parties. For those members of the Network which have experienced the case (CAM; CMA), the procedural hurdle has been overcome by way of the joint appointment mechanism (claimants and/or defendants appoint the co-arbitrators). If the parties do not split in two groups, then the institution appoints the panel.

Other Centres (CRCICA) experienced the case of an arbitration agreement in a multi-party contract providing for the appointment of a three-member tribunal by one of the parties only (CRCICA), and had no option but to abide by the parties' agreement after discussing the risk it would entail. In another critical case, where the arbitration clause provided for the joint appointment of the co-arbitrators by the parties, the case was filed by one claimant against two respondents. However, the respondents did not file any brief and remained absent. The Centre (CRCICA) had to decide whether to appoint the arbitrator on behalf of the respondents or to appoint the entire panel, regardless of the selection of the arbitrator made by the claimant. According to CRCICA Practice Notes published in June 2014, in certain multiparty cases, where the parties have agreed to appoint three arbitrators and the multiple respondents fail to appoint the second arbitrator, a question has arisen as to when exactly Article 10(3) of the Rules is triggered and whether an arbitrator could be appointed by the Centre on behalf of the defaulting respondents, in accordance with Article 9(2) of the CRCICA Arbitration Rules. The practice of the CRCICA in this case is to appoint, upon the request of the claimant(s), an arbitrator on behalf of the defaulting respondents pursuant to Article 9(2) of the Rules, as long as the respondents have not made any appointment. Accordingly, in practice, Article 10(3) of the CRCICA Arbitration Rules is triggered only in the cases where the multiple respondents have appointed more than one arbitrator instead of jointly appointing one, thus causing a failure in the constitution of a tripartite arbitral tribunal as per the parties' agreement.

- b. There are arbitration agreements in several connected contracts on the same matter which give rise to several arbitrations with more than two parties. Some of the parties appoint different arbitrators.*

This case occurs very seldom in the Centres' practice. Usually the institution deals with each multi-party arbitration as an individual case and apply the relevant provision of its rules.

## **3. The appointment process**

- a. The arbitration agreement refers to an appointing authority other than the institution administering the arbitration.*

The Rules of the Centres generally allow for the appointment process to be managed by other institutions (except for LAC, which considers the arbitration an ad hoc one and do not administer

the case); when this happens the parties have to inform the Centre of the selection of the arbitrator/s made by a third institution

It has to be clear, however, that although admitting such possibility, the Centres ought not step down from the impartiality and independence control of the arbitrators appointed by another authority.

A critical issue arise when the arbitration agreement refers to a non-existent appointing authority or the said authority fails to select the arbitrators. In practice, CRCICA made the appointments in such cases in light of Article 8.1 of its Rules, according to which the appointment shall be made by the Centre if the arbitral tribunal has not been appointed (according to the agreed upon different procedure for appointment) within the time agreed upon by the parties, if any, or within 30 days after receipt by the Centre of a party's request for appointment. In such case the Centre should be in charge of the appointment process, to avoid any standstill in the proceedings.

*b. The parties have not specified in the arbitration agreement who will appoint the arbitrators in case of failure of the parties.*

Usually the Centres' Rules provide for the default appointment of arbitrators by the institution administering the case, when the interested party/ies do not proceed in that respect.

*c. The parties have identified a professional as arbitrator in the arbitration agreement, specifying his name, but the chosen professional is unavailable when the arbitration starts (e.g. he is dead or incompetent).*

That is an outstanding issue and a characteristic example of pathological clause, as a poorly drafted arbitration agreement which runs counter to the setting in motion of a proceeding. Although the validity of the defective arbitration agreement has to be finally checked by the arbitral tribunal only (kompetenz-kompetenz), the point is how to proceed with the arbitration, as the arbitrator's selection may be made on *intuitu personae* basis. The Centres' Rules do not explicitly refer to the case at hand but they may take into account the arbitrator's inability to perform his/her duties (art. 19.2 ITOTAM). When the pre-selected arbitrator has died or become unable to perform the task, the Centre may invite the parties to jointly amend the arbitration agreement, so that an alternative path is set for the constitution of the arbitral tribunal. Failing an agreement of the parties, the Centres may be in charge of the appointment.

*d. The parties fail to respect the time limits for the appointment of the arbitrators as set forth in the arbitration agreement.*

This is not a recurring case in the Centres' practice and may be a matter of negotiation between the parties: the parties may agree on the extension of the said period, before it elapses. In any event, in case one of the parties do not respect the time limit to appoint the arbitrator, as set forth in the arbitration agreement, the counterparty may either raise an objection to any late appointment or agree on the extension of the time limit.

In the former case, given the circumstances of the case, the party will be considered to have waived his/her right to appoint the arbitrator and the Centre will deal with such appointment: then the arbitral tribunal will be in charge of the final decision on the valid constitution of the arbitral tribunal itself.

- e. *According to the arbitration clause the chairman of the arbitral tribunal is to be appointed by the co-arbitrators but they do not reach an agreement on the third arbitrator. The Centre, being in charge of the appointment of the chairman, requires the co-arbitrators to disclose the selection of professionals discussed by them in order to avoid undue repetition and understand the selection criteria appreciated by the parties.*

In the above described case, the Centres are involved in the appointment process as a substitute player for the selection of the third arbitrator. By way of introduction, all the Centres of the Network appoint the arbitrator(s) through their technical body (court, council, committee, etc.): it is important to highlight that such body is composed of many professionals so that the Centres always stand for a collective decision-making process. Accordingly, the Centres would never allow the appointment of arbitrators to result from the decision of one person within the institution.

When appointing the third arbitrator each Centre, as an independent body, will freely choose a qualified professional who possesses the skills and expertise required by the given case. However, although the need is felt to preserve the Centre's full integrity and independence in the selection process - without undue influence exercised by the parties/co-arbitrators - the institution may avail itself of the thoughtful considerations made by the same parties/co-arbitrators when trying to appoint the chairman. In that regard, it is true that the co-arbitrators may liaise with the parties in the selection of the third arbitrator, in order to better know their needs and requirements: therefore, it may be appropriate for the Centres to be informed about the selection criteria as dealt with by the co-arbitrators.

#### **4. Selection criteria**

- a. *The arbitration agreement is silent on the qualification of the arbitrators and the parties do not agree on the profiles of the prospective arbitrators. The selection of the arbitrators is made according to the following criteria: ..... (e.g.: nature and circumstances of the dispute, applicable law, seat, language, procedural issues to be managed by the arbitrators, identity and nationality of the parties, their counsels and the co-arbitrators, value of the claims, age of the co-arbitrators, academic and/or professional titles, "personal" features, previous appointments - turn over need- previous experiences as co-arbitrator, chairman, sole arbitrator, counsel, secretary, etc.).*

Some of the Centres, having an internal list of arbitrators, appoint the arbitrators among the professionals included in the said list; the arbitrators are selected and included in the list for their expertise and experience in the field of arbitration (CMA).

Those Centres which do not have a list may freely choose the arbitrators from the international community of renowned arbitration experts. In so doing, the Centres take into account a lot of selection criteria, in order to appoint the best professional for the given case. They may consider: the subject matter of the dispute (by spotting the experts of that very field), the nature of the dispute, as well as any procedural issues to be covered by the arbitrators, the rules of law applicable to the case at hand, the seat of the arbitration, the linguistic skills required by the case

(the language of the arbitration and the contract), nationalities of the parties, the amount in dispute (a small claim would barely attract a well-known and busy professional, while a junior expert could perform the task at his/her best), the age and any academic title of the co-arbitrators, and of the parties' counsels (to prevent any undue unbalance inside the panel or when conducting the procedure), the availability of the arbitrator (in terms of time to be devoted to the case), previous experience as arbitrator, failure of the arbitrators in previous cases managed by the Centre to comply with the Rules, etc.

- b. The arbitration agreement provides for a panel composed of professionals with non-legal background, whereas the dispute shows that legal qualifications are fundamental.*

There is no question that arbitrators may have the most diverse education and professional background, being lawyers, accountants or members of all industries, with different professional experience and from all parts of the world. There are indeed cases in the international practice where the panel comprises professionals lacking any legal qualifications (provided that they have a significant experience in arbitration), but it is also true that most of the times the appointed arbitrators are jurists (lawyers, law professors, judges, etc.) or have combined expertise. The rationale for preferring legal experience rests on one main assumption: most disputes involve legal matters, therefore legal experience is necessary to bring these matters to a satisfactory conclusion and guarantee justice. Choosing an arbitrator with a background and extensive training in legal principles and procedures can help in the conduct of the procedure and in drafting the award. Nevertheless, some of the members of the network (CMA) holds that the institution has always to abide by the will of the parties as expressed in the agreement, or try to make aware the parties of the possible consequences of such choice (CACI).

Some of the Centres believe that one of the arbitrators of the panel must have legal qualifications in order to be able and qualified to render the award (LAC; ITOTAM) or where none of the arbitrators has legal background they make sure that the parties are fully aware of the situation (CAM, ITOTAM) and that the appointed professionals do have experience in arbitration (CCAT, ITOTAM). Another Centre (CRCICA) experienced the reverse case, where the arbitration agreement was silent on the qualifications of the arbitrators and the parties appointed sitting judges as co-arbitrators, which was forbidden by the law of the seat (similar case where the arbitration agreement required the appointment of sitting judges and the law of the seat prohibited such appointment). In such case, CRCICA threatened to reject the appointment of the co-arbitrators based on Article 8.5 of its Rules, according to which the Centre may, upon the approval of its Advisory Committee, reject the appointment of any arbitrator due to the lack of any legal requirement. This reaction led to the appointment of new co-arbitrators.

- c. In the arbitration agreement the parties select a person of a particular religious belief or seek to impose certain restrictions on individuals who may be appointed as arbitrators (e.g.: very specific qualifications required by the parties which make extremely difficult to find an arbitrator who meets those conditions).*

This is an uncommon situation and none of the Centres has ever experienced it (although it has recently occurred in the international practice and hotly debated after the decision on the Jivraj

case<sup>4</sup>). One Centre (CAM) has faced cases where the religious belief of one of the parties had to be taken into consideration when selecting the arbitrators while another Centre would take a rigorous approach, by considering the provision null and void as contrary to the national Constitution and international treaties as well (ITOTAM).

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<sup>4</sup> Jivraj v Hashwani [2011] UKSC 40 is a English Court of Appeal's decision where it was considered the validity of an arbitration agreement which required the parties to select a person of a particular religion (an Ismaili) to be an arbitrator.