

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Interviews for Prospective Arbitrators

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

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MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair

Andrew Burr

Bennar Balkaya

Ciaran Fahy

Jo Delaney

Karen Akinci

Lawrence W. Newman

Mohamed S. Abdel Wahab

Murray Armes

Nicholas Gould

Richard Tan

Shawn Conway

Sundra Rajoo, ex officio

Wolf Von Kumberg, ex officio

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Introduction

1. This Guideline sets out the current best practice in international commercial arbitration in relation to interviews for prospective arbitrators. It provides guidance on:
 - i. how to respond to a request for an interview by a party prior to an appointment (Article 1);
 - ii. matters that can be discussed at an interview prior to an appointment (Article 2);
 - iii. matters that are not appropriate for discussion at an interview prior to an appointment (Article 3); and
 - iv. specific arrangements for interviews for prospective sole or presiding arbitrators (Article 4).
2. In this Guideline, references to ‘*ex parte* communications’ should be understood to encompass oral or written communications, for the purposes of an interview (1) prior to an appointment, between any party and a prospective arbitrator without the presence of the opposing party, and (2) after an appointment, for the purposes of discussions between an appointing party and its appointee in relation to the selection of a presiding arbitrator to the extent that the agreed or applicable procedure provides for the selection of a presiding arbitrator by the co-arbitrators.

Preamble

1. Two fundamental principles of arbitration are that (1) parties are free to select arbitrators of their own choosing to decide their dispute and (2) the arbitrators are independent and impartial. Most national laws and arbitration rules have specific provisions requiring arbitrators to declare their independence and impartiality at the time of their appointment and to disclose any change to that status if it should occur at any time during the arbitration. Additionally, to avoid creating an appearance of bias or lack of independence during the course of the arbitration, some national

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laws and arbitration rules require that arbitrators should not have any unilateral communications, including conversations, with either of the parties.

2. The issue of bias, either actual or apparent, or lack of independence, is to be determined objectively, from the point of view of a reasonable third person who, with knowledge of the circumstances of the case, would conclude that there is a likelihood that the arbitrator, when making a decision, would be influenced by factors other than the merits of the case.
3. In international arbitration it is common practice to have three arbitrators. Each party appoints one arbitrator and then the agreed procedure, rules and/or law(s) usually provide for the party-appointed arbitrators to select, or to participate in the selection of, a presiding arbitrator. As the selection of arbitrators is one of the most important strategic decisions in arbitration, the parties may want to interview a prospective arbitrator before making an appointment instead of relying solely on publicly available information and personal recommendations.
4. Even though such an interview would take place before any appointment was made, purely because it involves only one of the parties and the prospective arbitrator present, it carries with it a risk that the absent party may later use the fact of the interview to challenge the arbitrator's impartiality and independence, assuming they are appointed. Accordingly, prospective arbitrators should take great care when participating in such an interview to ensure that it does not compromise the integrity of the arbitral process or their impartiality and independence.
5. National laws and arbitration rules rarely address the issue of interviews for prospective arbitrators. A few laws and rules do specify that *ex parte* communications between a prospective arbitrator and an appointing party are permissible for the purposes of discussing the candidate's

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availability, past experience and the general nature of the dispute but give no guidance as to how an interview should be conducted.¹

6. The discrete considerations raised by the practice of participating in interviews prior to an appointment are dealt with in this Guideline with a view to minimising the risks of challenges to arbitrators and/or their awards arising from such interviews. The previous edition of this Guideline provided that arbitrators should tape record the interview and disclose the tape to the other party and to the appointing body, if any, at the earliest opportunity available. As this is no longer the practice in most jurisdictions, the Guideline has been re-drafted to reflect current best practice which is described in detail below.

Article 1 — General principles

1. **Subject to the caveats detailed in this Guideline, arbitrators may agree to be interviewed by a party prior to an appointment as part of the selection process. The mere fact that a prospective arbitrator had been interviewed by one of the parties only, prior to an appointment, should not, of itself, be a ground for challenge.**
2. **When considering a request for an interview, prospective arbitrators should enquire whether the arbitration agreement, including any arbitration rules and/or the law of the place of arbitration (*lex arbitri*) contain provisions prohibiting *ex parte* communications prior to appointment.**
3. **If minded to proceed with the interview, prospective arbitrators should request a copy of the arbitration agreement so that they are informed of the names of the parties and the general nature of the prospective appointment in order to check whether they have any conflict, any experience and qualifications required and any knowledge of the language in which the arbitration will be conducted.**

- 4. After having cleared an initial conflicts check, prospective arbitrators should agree with the interviewing party, and confirm in writing, the basis upon which the interview is to be conducted.**
- 5. Prospective arbitrators should not receive any remuneration or hospitality for agreeing to participate in an interview.**
- 6. Prospective arbitrators should make contemporaneous notes of the matters discussed in the interview.**

Commentary on Article 1

Paragraph 1

Participating in an interview is not a sufficient ground for challenge

The fact that an arbitrator had been interviewed by a party should not of itself provide grounds for challenging an appointee's impartiality and independence. However, since a conversation exceeding the appropriate scope could be a ground for challenge, prospective arbitrators should take great care to avoid any aspect of the interview providing grounds for challenge.

Paragraph 2

Discretion to accept an interview

When approached with a request for an interview, prospective arbitrators should determine whether it is appropriate, in light of the applicable rules or law(s) and any known requirements, such as, for example, technical expertise, language skills and availability, to accept the request. For these purposes, they should ask the interviewing party to provide in advance a copy of the arbitration agreement, including information about the governing law, arbitration rules or constitutional terms applicable to the proceedings and the place of arbitration, if agreed, and any deadlines for making the final award. Prospective arbitrators should not express any opinion as to the operation,

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effectiveness and/or interpretation of the arbitration agreement.

Paragraph 3

*Subject matter experience and
knowledge of the language of the arbitration*

To determine whether they have the requisite competence and qualifications prospective arbitrators should seek a brief description of the general nature of the dispute. Depending on the nature of the dispute, the type of arbitration and the arbitration agreement, prospective arbitrators may be required to have specific legal and/or technical knowledge, experience and/or qualifications. Knowledge of the language(s) in which the arbitration will be conducted is very important and arbitrators should only accept appointments if they are sufficiently proficient in the language of the arbitration, so that they can understand the dispute and follow what is happening during the proceedings.

Paragraph 4

Conflict checks

- a) When considering whether to accept an appointment, it is important to identify as early as possible any matters that may cause the prospective arbitrator concern as to their impartiality or independence. Prospective arbitrators should disclose to the parties, any circumstances they are aware of that may give rise to justifiable concerns as to their impartiality or independence. For these purposes, prospective arbitrators should consider any past or existing relationship with any of the parties, including affiliates of that party, their representatives and/or the law firm of those representatives. They should also consider any financial or personal interest in the outcome of the case, for example, through some shareholding or office held with a third party who has an interest in the outcome of the case.²

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- b) Depending on the particular circumstances of the case, prospective arbitrators may request additional information regarding the identity of executors, shareholders, investors or third party funders with any interest in the outcome of the case. This may include information as to a party's corporate structure, including a list of the parties' parents, affiliates and subsidiaries. Prospective arbitrators may also consider it necessary to seek identification of any persons who the interviewing party anticipates may be called as witnesses and/or experts. Prospective arbitrators may also ask if any other arbitrator has already been appointed and, if so, who they are.

Third-party funding and conflicts of interest

- c) Third-party funding in international arbitration is a relatively recent phenomenon. If an arbitrator has a relationship with a funder which could create a conflict and interviewing parties may not be aware of that relationship, it would be prudent, prior to the interview, to draw the party's attention to the fact that a relationship of this kind could be grounds for challenge, so that the party can consider whether it is appropriate to make any particular disclosure. This will enable a funded party to raise the issue with the funder and avoid a conflict emerging later in the proceedings.

Paragraph 4

Ground rules

- a) Before accepting a request for an interview, prospective arbitrators should agree in advance the limits of the interview with the interviewing party. The place, the timing, the names and roles of the participants and the scope of matters to be discussed should be set out in an agenda exchanged before the interview takes place. Prospective arbitrators should also ask the interviewing party to agree that any information

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provided as to the nature of the case should be stated in a general manner, avoiding advocacy or misrepresentation of the other party's position.³

- b) This Guideline may, by agreement, serve as the basis upon which the interview is to be conducted, with such additional restraints and safeguards as agreed in advance and as may be appropriate in the specific circumstances of the case.

Nature and place of the interview

- c) The interview may be conducted in person, by telephone or videoconference. The interview should be conducted in a professional manner and, if in person, in the prospective arbitrator's office or other neutral business location rather than the offices of the interviewing party. The interview should not take place in a restaurant, lounge, café, bar, or any similar place, and should not include a meal, drinks or any element which might be considered as hospitality.⁴

The interviewing team

- d) It is good practice to agree in advance the constitution of the interviewing team, including who will lead the interview and how it will be conducted. The interview should normally be led by a senior representative of the interviewing party's legal team.

Duration of the interview

- e) The length of the interview should be determined and agreed in advance. The longer an interview lasts, the greater the risk that it will stray into matters which should be avoided (see Article 3 below). Appropriate time will depend on the particular circumstances of the case, but 30 minutes should be sufficient for most interviews.

Paragraph 5

Reimbursement for participating in an interview

Prospective arbitrators should not charge or accept any remuneration or gift for their participation in an interview. If the interview takes place in a business location other than the prospective arbitrator's office and they have to travel to the meeting, they may be reimbursed for their reasonable travel expenses or, if it takes place by telephone and/or videoconference, they may be reimbursed for any reasonable communication expenses. Any such reimbursement should be agreed in advance and in writing.

Paragraph 6

Disclosure of the fact of the interview

- a) There is no general duty to disclose the fact that an interview has taken place. Interviews are routine in some jurisdictions and less common in others.⁵ As a result, parties may have different attitudes to the acceptability of interviews with prospective arbitrators and different expectations as to the need to disclose or be informed that an interview has taken place. Prospective arbitrators, prior to agreeing to be interviewed, should consider whether it would be appropriate to disclose the fact that an interview took place, if appointed. If they decide in favour of disclosure, the prospective arbitrators should inform the interviewing party what they will disclose, if appointed.

Taking notes or recording interviews

- b) There is no general duty to keep a record of the content of an interview, however, it is good practice for prospective arbitrators to make a contemporaneous note of the matters discussed in an interview in order to address any later suggestions that inappropriate matters were discussed. A prospective arbitrator who considers it would be

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appropriate to make a recording of an interview should first obtain the agreement of the interviewing party before doing so. Alternatively, a prospective arbitrator may consider it appropriate to bring a secretary or other assistant to take notes in the interview, in which case they should first obtain agreement of the interviewing party.

Disclosure of the content of the interview

- c) There is no general duty to disclose the content of an interview. Any note or recording of the interview taken by the candidate is primarily for their own recollection. An arbitrator who considers it is appropriate to disclose the note or the recording of the interview should do so promptly after their appointment and to all parties, any co-arbitrators and any arbitral institution in order to show the integrity with which the interview was conducted and thereby reduce the risk of challenges.

**Article 2 — Matters to discuss
at an interview prior to an appointment**

Matters to be discussed at an interview should be clearly defined and agreed with an agenda exchanged in advance. In any event, the content of an interview should be limited to the following:

- i. past experience in international arbitration and attitudes to the general conduct of arbitral proceedings;**
- ii. expertise in the subject matter of the dispute;**
- iii. availability, including the expected timetable of the proceedings and estimated timings and length of a hearing; and/or**
- iv. in *ad hoc* arbitrations, the prospective arbitrator's reasonable fees and other terms of appointment, to the extent permissible under the applicable rules and/or law(s).**

Commentary on Article 2

- a) Prospective arbitrators should explain to a party requesting an interview that, if appointed, the fact or content of an interview may give rise to challenges to the arbitrator or any award. For these reasons, it is good practice to establish an agreed procedure and an agenda in the event that an interview is to take place. The purpose of an interview should be to enable a prospective arbitrator and a party to discuss the candidate's suitability and availability for the appointment. Therefore, it should be limited to these specific matters in order to reduce the risk of a challenge to the candidate, if appointed, and/or to any award.
- b) The topics to be discussed should be agreed in writing in advance. This allows the prospective arbitrator and the interviewing party to prepare for the interview. It should also enable any concerns to be raised in advance and thereby reduce the risk of straying into areas that should not be discussed such as the candidates' views on issues likely to arise in the course of the arbitration. Also, when discussing the agreed topics the prospective arbitrator should not give any advice and the interviewing party should not ask the candidate to give advice. Any questions asked at the interview should be neutral and general in nature.

Past experience as an arbitrator

- c) Prospective arbitrators may discuss with the interviewing party their knowledge and understanding of arbitration law, practice and procedure. For these purposes, prospective arbitrators may provide details of their past experience to demonstrate that they possess the necessary knowledge and understanding, subject always to the duty of confidentiality owed to the parties involved in any previous arbitrations.

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General conduct of arbitral proceedings

- d) Prospective arbitrators may discuss their approach to procedural issues but they should not discuss specific questions as to the procedural aspects likely to arise in the arbitration they are being interviewed for. It is permissible to discuss questions phrased in general terms relating to the candidate's ability to manage and progress arbitral proceedings, including questions seeking the arbitrator's view on generic procedural issues.

Availability

- e) Before deciding to accept any appointment, prospective arbitrators should determine whether they can devote the necessary time and attention to remain available throughout the proceedings and ensure expeditious and efficient conduct of the arbitration. Prospective arbitrators may ask and respond to questions relating to any estimated schedule of the arbitral proceedings in order to ensure that they are available and have sufficient time to devote to the case.

Remuneration and other terms of appointment

- f) In institutional arbitrations the arbitrators' fees are usually set and supervised by the relevant institution, in which case there is no need to discuss remuneration at the interview. In *ad hoc* arbitrations, on the other hand, the candidates' reasonable fees and other terms of appointment may be discussed at the interview, provided that such a discussion is not prohibited or limited under any applicable law(s) and/or rules.⁶

Article 3 — Matters that should not be discussed

The following matters should 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; and/or**
- iv. the prospective arbitrator's views on the merits, parties' arguments and/or claims.**

Commentary on Article 3

Prospective arbitrators should explain to the interviewing party that an interview should not be used to explore their views with respect to issues which may form part of the case, to test the party's submissions of fact and/or law or to explore what they are likely to decide on the merits of any aspect of the case. Prospective arbitrators should therefore decline to answer any questions, including hypothetical ones, seeking to test their position on specific issues likely to arise in the arbitration they are being interviewed for. In the event that a prospective arbitrator comes to the conclusion that the interviewing party is seeking a partisan arbitrator or one who will not be impartial, they should consider, if necessary, terminating the interview and declining the appointment.

Article 4 — Interviews for prospective sole or presiding arbitrators

If a prospective sole or presiding arbitrator is invited to an interview by one party, they should only agree to be interviewed by all parties jointly. If, however, a candidate is satisfied that a party who chooses not to attend such an interview was invited to attend and given reasonable notice of the interview, and does not object to the interview and/or the agenda, the interview may proceed in the absence of that party. In these circumstances, the prospective

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arbitrator should make a contemporaneous note of matters discussed in the interview and send it to all of the parties, any co-arbitrators and any institution, promptly after their appointment.

Commentary on Article 4

Interviewing prospective sole or presiding arbitrators

- a) Generally, an interview with a prospective sole or presiding arbitrator, in cases of pure *ad hoc* arbitrations or where the arbitration agreement including any arbitration rules and/or the *lex arbitri* require parties to appoint a presiding arbitrator, should be conducted jointly by all parties and by reference to an agenda agreed in advance. If, however, a party chooses not to attend but does not object to the interview and/or the agenda, a candidate may be interviewed solely by the attending party or parties.⁷

Discussions with party-appointed arbitrators

in relation to the selection of a presiding arbitrator

- b) Where the presiding arbitrator is selected by the party-appointed arbitrators, a party-appointed arbitrator may discuss with the party that appointed them a list of criteria that a party-appointed arbitrator should look for in a presiding arbitrator suited for that role in that arbitration and/or a list of possible candidates that they consider have the requisite criteria. The party-appointed arbitrators should share any such lists with each other with a view to assisting them both in selecting a presiding arbitrator who has the requisite experience and qualifications that the parties want.⁸
- c) Articles 1 to 3 of this Guideline equally apply to any interviews with prospective sole or presiding arbitrators.

Conclusion

The selection of arbitrators is one of the most important strategic steps in arbitration. Interviews with prospective arbitrators prior to appointments allow parties to obtain a more complete picture of candidates they are considering appointing. Such a practice undoubtedly carries risks that may be perceived as undermining the arbitrators' impartiality and independence. This Guideline seeks to highlight best practice so as inform prospective arbitrators how to prepare for and conduct interviews with a view to reducing the risk of a later challenge as a consequence of the interview.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

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Endnotes

1. See e.g., Rule 13(6) SIAC Rules (2016), Article 13(5) LCIA Rules (2014) and Article 11(5) HKIAC Rules (2013).
2. When deciding what to disclose, arbitrators may consult the IBA Guidelines on Conflicts of Interest in International Arbitration (2014), available at <www.ibanet.org>.
3. Doak Bishop and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14(4) *Arbitration International*, pp. 395 *et seq.*
4. Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), para 10.36.
5. See QMUL and White & Case LLP, 2012 International Arbitration Survey 'Current and Preferred Practices in the Arbitral Process Survey Findings', p. 6 ("Those most experience with pre-appointment interviews are from North America, Latin America and Western Europe, while those least experienced with them are from Africa and the Middle East.") See also, Niklas Eloffsson, 'Ex Parte Interviews of Party-Appointed Arbitrator Candidates: A Study Based on the Views of Counsel and Arbitrators in Sweden and the United States' (2013) 30(4) *Journal of International*, pp. 381 *et seq.*
6. See generally, 2016 CI Arb Guideline on Terms of Appointment including Remuneration.
7. Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015), p. 164.
8. Lew and others, n 4, para 10.37.