



INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

1 July 2018

# NOTE TO NATIONAL COMMITTEES AND GROUPS OF ICC ON THE PROPOSAL OF ARBITRATORS

## I - Purpose of the Note

1. This Note explains the role of National Committees and Groups of ICC (“Committees and Groups”) in the appointment process pursuant to the ICC Rules of Arbitration (“ICC Rules”), in particular the desired interaction between Committees and Groups, the ICC International Court of Arbitration (“Court”) and its Secretariat (“Secretariat”).
2. The term “ICC Rules” in this Note refers to the 1998, 2012 and 2017 ICC Rules of Arbitration. The term “president” refers indistinctly to the chairman of the arbitral tribunal under the 1998 ICC Rules and to president of the arbitral tribunal under the 2012 and 2017 ICC Rules.
3. For ease of reference, a practical Checklist on Proposal of Arbitrators is annexed for Committees and Groups to use when they are invited to propose a prospective arbitrator to act as arbitrator.
4. Although this Note refers to the appointment of arbitrators, it will apply mutatis mutandis to all appointments made by ICC upon the proposal of a Committee or Group, including but not limited to mediators and experts.

## II - Duties of Committees and Groups

### a) *General*

5. Pursuant to the ICC Rules, when the Court is to appoint an arbitrator, Committees and Groups may be requested to assist the Court in selecting the best-suited candidate.
6. The Court will generally make the appointment upon a proposal from one or more Committees or Groups. When the Court selects a particular Committee or Group as appropriate to propose arbitrators, it does so, as a matter of principle, because it considers that it would be appropriate for a national of that Committee’s country or a resident in that Group’s territory to act as arbitrator in the case.
7. The Court may decide to invite several Committees or Groups at the same time to propose prospective arbitrators for a given case, or to invite a Committee or Group to propose several names for the Court’s consideration.

**b) Discretion of the Court to appoint the candidates proposed**

8. Under the ICC Rules, Committees or Groups shall propose the best suited-candidate(s), taking into account the circumstances of the case and bearing in mind that proposals are to be made in the interest of the parties.
9. Committees and Groups enjoy discretion in establishing the process by which they select arbitrators for proposal to the Court, subject to the recommendations made under this Note.
10. The Court enjoys full discretion as to whether or not to appoint any of the candidate(s) proposed.

**c) Nominations Commission and Contact Person**

11. According to the ICC Rules, the Court may, when appointing an arbitrator, seek a proposal from a Committee or Group. Such proposals are non-binding in nature and all appointments are always made exclusively by the Court.
12. In order to ensure the neutrality of the process and avoid any perception of bias, Committees and Groups are strongly encouraged to create a Nominations Commission in charge of proposing arbitrators to the Court. If a National Committee or Group considers it is not appropriate to create or no longer appropriate to maintain a Nominations Commission, it shall promptly inform the Secretary General of the Court.
13. The constitution process and composition of the Nominations Commission are at the discretion of the Committee or Group, in consultation with the Secretariat. The Secretariat shall be informed of any proposed change in the membership of a Nominations Commission. In no circumstance shall the members of a Nominations Commission hold institutional positions in other arbitral institutions, unless the Secretariat agrees to an exception.
14. Consistent with the Court's policy to foster transparency, Committees or Groups:
  - a. Shall make publicly available the composition of their Nominations Commission by
    - (i) posting the information on their website or
    - (ii) sending, with no undue delay, such information to the Secretariat which will post it in a dedicated section of the ICC website

and
  - b. Shall ensure that such information is updated promptly.

Failure to make said information publicly available or to promptly update it will lead to the exclusion of the respective National Committee or Group from being invited to propose arbitrators.
15. Members of a Nominations Commission should be selected in a consultative and transparent manner. Save in exceptional cases discussed with the Secretariat, the term of their office shall not exceed three years. Nominations Commissions should include members who are experienced and well-known arbitration practitioners.

16. A Nominations Commission shall not propose its own members or their relatives for appointment by the Court.
17. Nominations Commission membership should reflect generational and gender diversity, as well as various components of the local arbitration community. Committees and Groups should make best efforts to achieve and maintain gender parity in their Nominations Commissions.
18. Upon consultation with the Secretariat, Committees and Groups shall designate one of their staff members to be responsible for coordinating the Court's request for proposal of an arbitrator ("Contact Person"). The Contact Person serves as the link between the Nominations Commission and the Secretariat.
19. Court members may be members of the Nominations Commission in their respective country or territory. Where Committees or Groups consider designating a Court member as the presiding member of their Nominations Commission, they should first consult the Secretariat.

**d) Confidentiality and Conflicts of Interest**

20. Members of a Nominations Commission and any staff member of a National Committee or Group involved in the selection process in any capacity shall be bound by an obligation of confidentiality concerning all information exchanged.
21. To that effect, they shall sign a Non-Disclosure Agreement (NDA), a copy of which will be communicated to the General Counsel of the Court. A model of such NDA is attached to this Note.
22. Corporate counsel (i.e employees serving in the legal department of a company) who are members of a Nominations Commission or involved in the selection process in any capacity shall also have said NDA signed by a legal representative of their employer.
23. Members of a Nominations Commission shall be wholly excluded from participating in the work of said Commission for cases in which they or their employers may be interested in any capacity.
24. To that effect:
  - a. Corporate counsel who are members of a Nominations Commission shall communicate to the Contact Person a complete list of the entities and individuals in respect of which their employer should be considered as interested. Such entities and individuals include competitors and business partners of their employer, or companies involved in dealings the subject-matter of which should be considered commercially sensitive. Such members will then be excluded from the selection process regarding said entities and individuals;
  - b. Corporate counsel who are members of a Nominations Commission shall sign an affirmation, endorsed by a legal representative of their employer, that they are capable of identifying all entities and individuals for which there may exist legitimate concerns over the transmission of competitively or commercially sensitive, non-public information;

- c. The Contact Person shall exclude said corporate counsel from participating in the work of the Nominations Commission for appointments involving in any manner the identified entities and individuals;
- d. In addition to the foregoing, all members of a Nominations Commission shall confirm within one business day after receipt of information regarding an arbitration the absence of any links or concerns over competitively or commercially sensitive non-public information with any of the parties. Failure to provide such confirmation shall cause them to be excluded from the work of the Nominations Commission with respect to that case.

#### **e) Prohibitions**

- 25. Committees and Groups shall not require that a prospective arbitrator be a member of the Committee or Group as a condition for being proposed as an arbitrator (ICC Global Partnership Agreement between the ICC World Council and National Committees and Groups, article 2).
- 26. Committees and Groups shall not require that a prospective arbitrator be a member of any other institution, or require that the prospective arbitrator has already acted as arbitrator or otherwise for a local dispute resolution provider.
- 27. Committees and Groups are not allowed to accept or require any form of benefit, payment or compensation for their proposals and/or for including prospective arbitrators on any list of arbitrators they might have.
- 28. Committees and Groups must not make the proposal of an arbitrator conditional upon any training or accreditation scheme from which they may derive financial or other benefit.
- 29. ICC does not have a roster of arbitrators. Committees and Groups may keep unofficial lists of arbitrators for their own internal work. In such case, Committees and Groups shall not limit their proposals to said lists. Any such list and its updates should be communicated at least once a year to the Secretariat for information.

### **III - Recommendations for making proposals**

#### **a) Procedure**

- 30. Time is of the essence of any appointment process. A Committee or Group shall therefore make its proposal within the strict time limit specified in the Secretariat's letter requesting the proposal of an arbitrator (usually 7 days, or 4 days in Expedited Rules cases). In exceptional circumstances, a Committee or Group may request from the Secretariat a limited extension of time limit to make its proposal.
- 31. If the Court does not accept the proposal made, or if the Committee or Group fails to make the proposal requested within the prescribed time limit, the Court may in its discretion repeat its request, request a proposal from another Committee or Group that it considers to be appropriate, or appoint directly any prospective arbitrator whom it regards as suitable.

32. Cooperation between the Committees and Groups and the Secretariat is key in ensuring the quality of proposals. The Secretariat teams in charge of ICC arbitration cases will provide Committees and Groups with relevant information needed in selecting the best suited arbitrator for each case.
33. Committees and Groups are encouraged to consult with the Secretariat prior to submitting their proposal. Once the Committee or Group has identified one or more prospective arbitrators, the Contact Person is strongly encouraged to contact the Counsel in charge of the case at the Secretariat to discuss the potential proposal before contacting the prospective arbitrator(s).
34. Any discussion between the Committee or Group and the Secretariat concerning prospective arbitrators is confidential and its contents must not be disclosed to the prospective arbitrator(s). The Committee or Group should inform the prospective arbitrator that any appointment is to be made by the Court alone, and that the fact of contacting them will not necessarily result in an appointment.
35. Unless otherwise indicated by the Secretariat, communications with the prospective arbitrator(s) during the nomination process should be made through the Committee or Group. In this respect, it is for the Committee or Group to ensure that the prospective arbitrators have completed the forms properly. It is also for the Committee or the Group to inform the prospective arbitrators if the Court has ultimately decided not to appoint them.

#### ***b) Profile of Prospective Arbitrators***

36. Subject to the restrictions set out in paragraphs 20 to 29 above, Committees and Groups are encouraged to read carefully the Secretariat's letter requesting the proposal of an arbitrator and the case information, which set out detailed information concerning the case and specific requests regarding the profile of prospective arbitrators. This includes mainly the names of the parties and other relevant entities, their counsel (if any), and any arbitrators already proposed, confirmed or appointed in the case, the place of arbitration, the language (or potential language(s)) of the arbitration, the law applicable to the merits of the dispute (if known), a brief description of the nature, facts and circumstances of the case and the current amount in dispute (if known).
37. The information provided to the Committee or Group is intended to help it to propose one or more prospective arbitrators suitable for the case in question. Suitability includes not only consideration of the above-listed factors, but also the level of experience needed for the case and other criteria the Committee or Group or the Secretariat consider relevant.
38. Committees and Groups are encouraged to propose prospective arbitrators having sufficient experience as arbitrators, preferably in ICC cases, when the case is complex or the amount in dispute is high, and prospective arbitrators with experience in arbitration, but not necessarily as arbitrators (such as experience as counsel or as administrative secretary), for less complex cases or cases involving relatively low amounts in dispute. In the latter category of cases, Committees and Groups are particularly encouraged to propose new and/or young arbitrators, as this may help the pool of potential arbitrators in that community to grow.
39. Committees and Groups are encouraged to favour gender diversity in their proposals.

40. When the amount in dispute is relatively low, and unless the prospective arbitrator agrees to bear his or her travel expenses, the Committee or Group should seek to propose a prospective arbitrator residing at or near the place of arbitration in order to help keep the costs of the arbitration as low as possible.
41. Court members cannot be proposed as prospective arbitrators (Article 2(2) of Appendix II to the ICC Rules).

### **c) Nationality of arbitrators**

42. When proposing a co-arbitrator, sole arbitrator or president, a Committee shall propose a prospective arbitrator having the nationality of the Committee's country. In exceptional circumstances, and only after consultation with the Secretariat, a Committee may propose a prospective arbitrator not having the nationality of the Committee's country, provided that he or she is domiciled or resident in that same country.
43. Prospective sole arbitrators or presidents generally must not have the nationality of any of the parties, unless so requested by the Secretariat. In light of this, Committees or Groups should check if the prospective arbitrators they might wish to propose as sole arbitrator or president have more than one nationality and, if so, verify that none of those nationalities coincide with those of any of the parties.
44. Groups must propose prospective arbitrators domiciled or resident in the Group's territory.

### **d) Availability, Impartiality and Independence of Arbitrators**

45. Committees and Groups shall communicate the case information to the prospective arbitrator they wish to propose and ask them to complete the forms transmitted to them by the Secretariat (the *curriculum vitae* and the Statement of Acceptance, Availability, Impartiality and Independence ("Statement")). Prospective arbitrators should also be required to read carefully the "*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*".
46. Every prospective arbitrator must disclose any facts or circumstances that might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, or that could give rise to reasonable doubts as to the arbitrator's impartiality. When a prospective arbitrator makes disclosures as to his or her independence and/or impartiality, he or she is said to have filed a 'qualified' Statement, and when no disclosures are made, the Statement is 'unqualified'. If a National Committee or Group intends to propose an arbitrator having filed a qualified Statement, the National Committee or Group shall confer with the Secretariat to discuss whether the proposal is appropriate in the circumstances.
47. Should the Secretariat consider, because of a disclosure or otherwise, that a proposal is not appropriate in the circumstances, it may request the Court in its discretion to (i) invite the Committee or Group to make another proposal, (ii) seek another proposal from another Committee or Group it considers appropriate, or (iii) appoint directly any prospective arbitrator whom it regards as suitable.
48. Committees and Groups should particularly draw the prospective arbitrator's attention to the availability section of the Statement in which a prospective arbitrator should provide thorough information about (i) the number of pending cases in which he or she is involved, and (ii) their existing commitments, the nature and details of which need not be disclosed.

## CHECKLIST ON PROPOSAL OF ARBITRATORS FOR NATIONAL COMMITTEES AND GROUPS OF THE ICC

### PRIOR CONSULTATION WITH THE SECRETARIAT

Once the Committee or Group has identified one or more arbitrators, the Contact Person should call the Counsel in charge of the case to discuss the potential proposal.

### CONTACT PROSPECTIVE ARBITRATORS

After having discussed such proposal, the Committee or Group should contact the prospective arbitrators. Any discussion between the Committee or Group and the Secretariat concerning prospective arbitrators is confidential and its contents should not be disclosed to the prospective arbitrators.

### PROFILE OF PROSPECTIVE ARBITRATORS

Committees and Groups are encouraged to consider among others the following criteria:

- facts and circumstances of a particular case
- level of experience required
- place of arbitration
- applicable law
- amount in dispute
- language
- availability

### NATIONALITY OF PROSPECTIVE ARBITRATORS

The prospective arbitrator should generally have the nationality of the National Committee making the proposal or, in exceptional circumstances, reside or have his or her professional address in such country (to be discussed with the Secretariat).

### IMPARTIALITY AND INDEPENDENCE OF PROSPECTIVE ARBITRATORS

The prospective arbitrator has filed a qualified Statement (to be discussed with the Secretariat).

### AVAILABILITY OF PROSPECTIVE ARBITRATORS

The availability section must be completed thoroughly and provide (i) the number of pending cases in which the prospective arbitrator is involved, and (ii) the dates on which he or she has commitments already.

### TIMING

Committees and Groups should propose a prospective arbitrator within the time limit set forth in the Secretariat's letter requesting the proposal of an arbitrator (usually 7 days).