

International Arbitration in Practice

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Edited by

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Wolters Kluwer

Published by:

Kluwer Law International B.V.

PO Box 316

2400 AH Alphen aan den Rijn

The Netherlands

E-mail: irs-sales@wolterskluwer.com

Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:

Wolters Kluwer Legal & Regulatory U.S.

920 Links Avenue

Landisville, PA 17538

United States of America

E-mail: customer.service@wolterskluwer.com

ISBN 978-94-035-4387-1

e-Book: ISBN 978-94-035-4397-0

web-PDF: ISBN 978-94-035-4407-6

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Printed in the Netherlands.

We have benefitted from an excellent education in the field of international arbitration both inside and outside of the classroom and hope to impart some of what we have learned here with the help of friends, colleagues, peers, and even those who have taken the role of courtroom adversaries.

For that reason, this book is dedicated to ‘the teachers’.

Editors

Courtney Lotfi Recognized as one of her generation's leaders in international arbitration, Courtney acts as counsel and arbitrator in common and civil law disputes across all sectors with particular emphasis on energy, life sciences, construction and industrial engineering matters. Her corporate work extends to post-M&A, joint venture and shareholder disputes. Courtney's disputes-related experience has reached five continents (so far), including North and South America, Europe, Africa and Asia.

Courtney began her arbitration practice at Freshfields Bruckhaus Deringer, the then-leading international arbitration practice (as ranked by GAR), where she successfully represented a European energy company in a series of market-leading arbitrations, including a first-of-its-kind price review resulting in the tribunal rewriting the purchase price formula under a long-term, large-volume natural gas supply contract to include hub indexation and a contentious take-or-pay arbitration involving EU competition law that was eventually brought before the Austrian Supreme Court.

Her recent counsel work includes representing the contractor in an arbitration related to the construction of an LNG re-gasification plant, the sellers of a coal-fired power plant in a post-M&A arbitration, and a joint venture partner in a dispute regarding company management and accounting. She has also recently advised on disputes related to Russian sanctions and counter-sanctions.

Courtney was a member of the ICC's Task Force on Disability Inclusion, is a member of the VIAC's energy expert focus group, and a co-founder of the Berlin Dispute Resolution Days.

Courtney is an enthusiastic supporter of developing young legal talent and lectures at the International Dispute Resolution Master's program at the Humboldt University of Berlin and at the undergraduate level at the University of Bonn.

Courtney's work has been recognized by Who's Who Legal (Most Highly Regarded, Future Leaders, Germany), the Legal 500 (DACH Powerlist, Rising Star), the Global Arbitration Review, Best Lawyers (Litigation, Mediation and Arbitration), Handelsblatt, and the Virginia Bar Association (Pro Bono Honour Roll). She is licensed to practice in the USA (Virginia) and as a registered foreign lawyer in Germany (Frankfurt).

Alicja Zielińska-Eisen is a highly respected Polish attorney, arbitrator, and educator, recognized as a Thought Leader – Global Elite in the 2025 Lexology Arbitration ranking. She has over a decade of experience representing clients in both court and arbitration proceedings. Having developed her skills first at a Magic Circle firm and now as Counsel at Queritius, Alicja acts as an arbitrator and counsel helping businesses prevent, manage, and resolve disputes at every stage, from contract negotiation and mediation to contentious proceedings and cross-border enforcement.

Alicja's expertise in international arbitration is underpinned by hands-on experience, including investment arbitrations, having successfully represented both foreign investors and the state. In recent years, her practice has expanded to include more commercial disputes, private international law, and ESG issues, with a focus on post-M&A disputes and infrastructure projects, notably in the energy and transportation sectors.

She combines her legal practice with an academic career as a lecturer for the advanced International Dispute Resolution (IDR) LL.M. at Humboldt University of Berlin. Until recently, she also served as the Academic Coordinator for the IDR LL.M.

Alicja is a member of the ICC Poland Arbitration Committee and a former ICC YAAF Representative (2021-2024), responsible for initiatives in Poland, the Czech Republic, Slovakia, and Hungary. She is a passionate supporter of initiatives for students, and young professionals, regularly speaking at seminars and conferences on communication and soft skills, arbitration, and other ADR-related topics. She acts as a mentor in the Mentor-Mentee program run by the global organization Moot Alumni Association (MAA).

Alicja's experience, along with her thought leadership, make her a respected and insightful voice in the dispute resolution community. For her pro bono work, she received the 1st Honourable Mention in the Female Advocate of the Year in 2023, a nationwide competition held by the Polish Bar Council.

Alicja graduated from the University of Silesia (Poland) and holds an LL.M. from Humboldt University of Berlin, as well as a Postgraduate Diploma in Negotiation, Mediation, and other ADR from the Centre for Dispute and Conflict Resolution at the University of Warsaw.

Verónica Sandler Obregón Among the most well-known and experienced practitioners of international arbitration of her generation in Latin America, Verónica boasts a blend of practical and academic experience in alternative conflict resolution. She has dedicated her career to promoting the growth of international arbitration by combining her passion for teaching and research with many years of arbitration experience, as well as an ample background in the corporate sector as principal and counsel.

Verónica has acted as arbitrator, party counsel, and secretary in domestic and international commercial and investor-state arbitrations under the rules of virtually all the principal arbitration centres of the world.

She is a prolific author, having published on subjects as varied as international arbitration, commercial and corporate law, entertainment law, and international public and private law. She is regularly invited to lecture on arbitration and participates as a

speaker frequently at international events. She teaches arbitration and corporate law at the graduate and postgraduate levels at various Argentine universities.

She is well-known for having organized what has become the world's premier Spanish-speaking commercial arbitration competition held every year throughout Latin America, now in its 17th edition.

Verónica has been a member of the ITA Task Force on Legal Representation of American States in Investment Arbitration and was on the Drafting Committee that prepared the Guide on ICC Disability Inclusion in International Arbitration. She is a co-founder of Women Way in Arbitration (WWA), an NGO which promotes greater participation and visibility of women in international arbitration. She is a Delegate to the ICC Commission on Arbitration and ADR as one of the representatives of Argentina.

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CHAPTER 47

Working with Other Members of the Tribunal

*Julie Spinelli & Michał Kocur**

Most often than not, tribunal deliberations run smoothly and are cordial. This chapter proposes to offer insights and sometimes solutions to overcome four typical challenging situations that arbitrators might encounter during their career, namely: (A) the partisan or biased arbitrator, (B) the disengaged arbitrator, (C) the unevenly distributed competence throughout the arbitrator panel, and (D) the arbitrator behaving inappropriately (overbearing, bossy, antisocial, rude, etc.).

Before getting to the core of the subject, some general observations are necessary to better understand the premises of the arbitrator's duties.

First, it is crucial for arbitrators to be aware of their own duties towards the parties. The arbitrator's main and most significant obligation is to render an award that is enforceable.¹ This obligation encompasses: (1) the duty to resolve the parties' dispute in a binding and definitive manner and in accordance with due process, (2) the duty to conduct the arbitration in accordance with the parties' arbitration agreement, and (3) the duty to remain impartial and independent.

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The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

1. Gary B. Born, *Chapter 13: Rights and Duties of International Arbitrators* (Updated February 2024), in *International Commercial Arbitration* (3rd ed. 2021), §13.04[A][4].

Second, as outlined below, there are different appointment mechanisms (party-appointment, institutional appointment; appointment by the appointing authority) for the arbitral tribunal members, which may impact the dynamics of the tribunal.

Third, an arbitrator being a part of a multi-member tribunal must participate conscientiously in deliberations with the other members. This includes the obligation to make oneself available for deliberations in a timely fashion, not to delay the arbitral process by unduly protracting or obstructing the deliberations, and to participate collegially in the drafting and reviewing of the award.² The arbitral tribunal also has the obligation not to disclose the content of the deliberations.³

A HOW TO WORK WITH A BIASED ARBITRATOR?

A problem in co-operation among the arbitrators arises when at least one of the arbitrators appears biased.⁴ An arbitrator's bias may take many forms. It may transpire during deliberations when the arbitrator unreasonably defends the views and motions of one party. It may also become evident in the course of a hearing or case management conference when the arbitrator's questions or comments make clear that he is not neutral.

1 Spotting the Red Flags: Examples

Bias may be uneasy to ascertain, especially if it is expressed in a subtle way. In fact, in most cases it will be impossible to say with certainty that an arbitrator is biased. There is almost always an alternative explanation: the arbitrator expresses erroneous opinions in good faith and only accidentally they are favourable to one party. If arbitrators come from different jurisdictions, and notably if some of them come from common law jurisdictions and others from civil law jurisdictions, the difficulty in ascertaining bias is compounded by different assumptions as to how to interpret the law and contract. Cultural differences may lead to divergence in opinions relating also to the interpretation of the facts of the matter. The views on what is reasonable and what reasoning is correct may vary widely. This does not mean that the arbitrator should abstain from analysing the arguments and behaviour of his or her co-arbitrators or that he or she should turn a blind eye to their partisanship. It means, however, that in ascertaining the bias of the co-arbitrators the arbitrator must use common sense and must tread with a great deal of caution.

The party-appointed co-arbitrators must ensure that their appointing party is granted a procedurally equal right to be heard and a fair hearing, and shall do their best to make sure that both parties' arguments are fully and seriously considered during the

2. *Ibid.*

3. Jérôme Ortscheidt & Christophe Seraglini, *Droit de l'Arbitrage Interne et International* 420 (2019), para. 435.

4. For comprehensive analysis of bias, see William W. Park, *Arbitrator Bias*, 12 *Transnational Dispute Management Journal*, pp. 1-83 (2015).

award-making phase. When performing these duties, party-appointed arbitrators must nonetheless remain independent and impartial at all times.

Most often, the problem of a partisan arbitrator regards one or two party-appointed arbitrators who want to make sure that the party that appointed them prevails. Sometimes, the presiding arbitrator may be a partisan arbitrator. This may happen in particular when there is an undisclosed relation between the presiding arbitrator and a party or its counsel that unduly influences the arbitrator's thinking and actions.

2 Solutions for One Partisan Co-arbitrator

Starting with one partisan co-arbitrator, the task of handling such an arbitrator falls mainly on the presiding arbitrator. Generally, the best course of action for the president of the tribunal is to try to engage in discussion with the arbitrator suspected of bias and to try to get to the bottom of his or her arguments. At the same time, the president should engage with the other co-arbitrator, so that everyone has an equal opportunity to have a say in the discussion. This should be done with the view to avoid personal confrontation and requires certain diplomatic skills from the president.

At least two arguments favour this approach. First, this may help to establish whether the arbitrator is in fact biased or whether his or her reasoning is sound and only accidentally favours one party. Second, a rigorous exchange of arguments is the only way to dissuade the arbitrator from taking unreasonable stances. Admittedly, it will not dissuade all biased arbitrators and maybe not even a majority of them. However, an intelligent arbitrator will realize that by pushing unreasonable arguments he or she risks alienating the other members of the tribunal, and consequently he or she may have a diminished influence on the outcome of the deliberations. Once the arbitrator is considered by the other arbitrators as quasi-advocate of the party, his or her credibility is shattered.

This strategy usually does not work with arbitrators who do not realize that they have not analysed the case in sufficient depth. Also, it is not effective if the arbitrator thinks that he or she can bully the other arbitrators into submission or at least into a compromise. This can happen in particular if the biased arbitrator assumes that the president will be inclined to look for a middle ground among the arbitrators' views or will try to avoid discord and a dissenting opinion at all costs. Finally, it does not work with the arbitrator who does not care about appearing as reasonable and who is not as interested in influencing the decision-making process of his/her colleagues as he/she is interested in proving to the party who appointed him that he/she defended its position. This is typically an arbitrator who – as soon as he or she realizes he or she is in minority – starts outlining his/her dissenting opinion.

Another strategy for dealing with a biased arbitrator was put forward by Marc J. Goldstein. He proposed that the presiding arbitrator – acting on his/her own initiative or upon request of a co-arbitrator – report to the arbitral institution serious doubts

about the arbitrator's impartiality. The institution may then conduct its enquiry, and if it agrees with the president's report, it may revoke the biased arbitrator.⁵

The author's main concern is the secrecy of deliberations, which may be breached by the president's reporting suspicion of bias. However, Marc J. Goldstein concludes that the right to have a case decided by impartial arbitrators trumps secrecy concerns:

The general principle of the secrecy of deliberations exists to protect the arbitrators from undue pressures from the parties and the public, and surely not to facilitate the concealment from the parties of an arbitrator's partisanship.⁶

While we agree with that argument, we are not convinced by the overall conclusion that the presiding arbitrator should report the doubts of partiality to the arbitral institution. Ascertaining the existence of bias often requires detailed knowledge of the case, both facts and law, as well as experience and good judgment. It is not obvious that the presiding arbitrator always understands the case better than the arbitrator he suspects of bias. Institutions are generally even less equipped to pass such judgment.⁷ Also, the presiding arbitrator's good faith in reporting the suspicions to the institution may not be taken for granted. He or she may have ulterior motives in trying to get rid of an arbitrator who does not agree with his/her arguments in the hope that the new arbitrator will be more amenable to such arguments. Therefore, reporting the suspicion of bias to have the arbitrator investigated and ultimately revoked is unwarranted.

3 Solutions for Two Partisan Co-arbitrators

The president can be faced with not just one but two partisan arbitrators. This creates different dynamics within the tribunal.

The two arbitrators' positions will usually cancel each other out. Thus, generally, there is no risk that the co-arbitrators will outvote the president. On the one hand, this gives him the power to cast decisive votes. On the other hand, it puts him in a difficult position as he will be 'lonely' on the tribunal: he will not be able to count on the earnest exchange of arguments with the co-arbitrators whose views are preordained. The presiding arbitrator will therefore need to figure out the answers to difficult questions by oneself. In such a situation, the position of the presiding arbitrator can be compared to a sole arbitrator who has to do all the analysis by oneself but unlike a sole arbitrator the presiding arbitrator has to deal with uncooperative arbitrators who may be more of a burden than help.

5. Marc J. Goldstein, *Living (or Not) with the Partisan Arbitrator: Are There Limits to Deliberation Secrecy?*, 32 *Arbitration International*, pp. 599-600 (2016) <https://doi.org/10.1093/arbint/aaw013>.

6. *Ibid.*, p. 600.

7. Institutions generally reject claims that the arbitrators' behaviour during arbitration is evidence of bias. See Gary B. Born, *Chapter 12: Selection, Challenge and Replacement of Arbitrators in International* (Updated February 2024), in *International Commercial Arbitration* (3rd ed. 2021), §12.05[K].

B HOW TO DEAL WITH AN INACTIVE, NON-RESPONSIVE OR ABSENT ARBITRATOR?

There is a wide variety of reasons why an arbitrator may fail to participate in the arbitral proceedings. These include circumstances or events independent of the arbitrator's will, such as illness, de jure or de facto impossibility to perform his or her function. Other reasons may include intentional failure, mere negligence, or complete disregard of the parties' interest.⁸ This may concern indistinctly the presiding or a party-appointed arbitrator.

When an arbitrator is silent and fails to act or does not participate in the procedure, there are two principal ways to deal with it when a discussion with the arbitrator concerned has not led anywhere:

- First, the arbitrator may be removed and replaced by another arbitrator.
- Second, the two remaining arbitrators may continue with the proceedings and issue an award acting as a so-called truncated tribunal.⁹

1 Removal of an Arbitrator

Many institutional arbitration rules provide for the removal of an arbitrator who fails to perform its duties and for the appointment of a substitute.¹⁰ This is usually done after soliciting the views of the parties, the arbitrator concerned, and the other members of the arbitral tribunal. Under certain arbitration laws, such as French law, an arbitrator may only be removed with the unanimous consent of the parties.¹¹ Where there is no unanimous consent, the issue will be resolved by the institution itself or by the judge acting in support of the arbitration (*juge d'appui*) in ad hoc proceedings.¹² Replacement may rest on subjective grounds (the arbitrator's clear intention to impede the procedure) or objective ones (i.e., the arbitrator's non-responsiveness), but in any event, the consequences of such a replacement are severe as under certain rules, the tribunal might be required to repeat all the evidentiary phases of the arbitration.¹³

8. Howard M. Holtzmann et al., *Working Group I: Preventing Delay and Disruption of Arbitration – III Conduct by a Party- Appointed Arbitrator During the Arbitral Proceedings: Topic 7 – Failure by a Party- Appointed Arbitrator to Participate in the Arbitral Proceedings*, in ICCA Congress Series No. 5 (Stockholm 1990): *Preventing Delay and Disruption of Arbitration/Effective Proceedings in Construction Cases*, ICCA Congress Series 254-255 (Albert Jan van den Berg ed., Volume 5, 1991).

9. *Ibid.*

10. See, for instance, Art. 15 ICC Rules.

11. Article 1458 French Code of Civil Procedure (FCPC).

12. Article 1456(3) FCPC.

13. Howard M. Holtzmann et al., *Working Group I: Preventing Delay and Disruption of Arbitration – III Conduct by a Party- Appointed Arbitrator During the Arbitral Proceedings: Topic 7 – Failure by a Party- Appointed Arbitrator to Participate in the Arbitral Proceedings*, in ICCA Congress Series No. 5 (Stockholm 1990): *Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases* 255 (Albert Jan van den Berg ed., ICCA Congress Series, Volume 5 1991).

2 Proceeding as a Truncated Tribunal

In certain circumstances, the arbitration may be allowed to continue with a truncated tribunal, if the institution or the appointing authority so decides.¹⁴ When assessing whether to proceed with a truncated arbitral tribunal, the common factors that should be considered are: (1) the stage of the arbitration, (2) the explanation given by the failing arbitrator, (3) the possible effect on the recognition and enforcement of the award to be rendered by the remaining arbitrators, and (4) such other matters considered appropriate in the circumstances of the case (such as the time and costs already incurred by the parties).¹⁵ For example:

- Under the Rules of Arbitration of the International Chamber of Commerce 2021 (ICC Rules), a truncated tribunal may be allowed to proceed after the closing of the proceedings and taking into account the views of the remaining arbitrators and of the parties and such other matters that the ICC Court may consider appropriate in the circumstances.¹⁶ The main factor to be taken into account with an award to be rendered by a truncated tribunal is whether it would be enforceable. While such an award would be valid under French law,¹⁷ it would, for instance, be subject to annulment and unenforceable in Switzerland for violation of due process or lack of compliance with the parties' agreement.¹⁸ Even if the choice to pursue the arbitration proceedings with a truncated tribunal could be perceived as 'controversial' under the law of the seat, it is still perceived as one of the most efficient ways to combat the empty-chair strategy as it would allow the remaining arbitrators to comply with their duty to conduct the arbitration efficiently and in a timely manner.
- Under the United Nations Commission on International Trade Law (UNCITRAL) Model Law 1985 with amendments as adopted in 2006 (Model Law), if an arbitrator fails to act or is de jure or de facto unable to perform his or her function, he or she may be challenged.¹⁹ When the arbitrator is replaced, the proceedings resume where the arbitrator who was replaced ceases to perform his or her functions, unless the arbitral tribunal decides otherwise.²⁰

14. *Ibid.*, p. 258.

15. Rozanna Sternad Fackel, *The Truncated Tribunal Doctrine, What Authority do Truncated Tribunals Have to Proceed and Can They Render a Valid and Enforceable Award?* 28-29 (UMEA University 2019).

16. Article 15(5) ICC Rules.

17. According to the FCPC, an award may be rendered and the requirement for deliberation is satisfied as long as each of the arbitrators was given the opportunity to participate in the deliberations. In addition, if a minority of the arbitrators refuses to sign the award, the award will mention it, but it will still have the same effect as if it had been signed by all arbitrators (*see*, for instance, Art. 1480 FCPC).

18. Rozanna Sternad Fackel, *The Truncated Tribunal Doctrine, What Authority do Truncated Tribunals Have to Proceed and Can They Render a Valid and Enforceable Award?* 46-47 (UMEA University 2019). *See Swiss Supreme Court, Ivan Milutinovic PIM v. Deutsche Babcock AG*, Urteil der I. Zivilabteilung vom 30. April 1991 i.S. Gesellschaft X. c. Y. AG, BGE 117 Ia 166.

19. Articles 12-13 Model Law.

20. Article 15 Model Law.

3 Other Considerations

In addition to or as an alternative to the two ways described above, the arbitrator who fails to perform his or her duties satisfactorily may lose his or her right to remuneration.²¹

One of the arbitrator's basic contractual rights is the entitlement to a fee for his or her services in resolving the parties' dispute. Under many legal systems and arbitral institution rules, an arbitrator who fails to perform his or her duties would be liable to forfeit or reimburse the arbitrator's fees.²²

C DIFFERENCES IN COMPETENCE/EXPERTISE OF ARBITRATORS

Not all arbitrators are equally competent to decide the cases. Some may have more experience in handling arbitral proceedings than others. Some may have technical or scientific expertise which their colleagues may lack. In international cases, some arbitrators may be qualified in jurisdictions, the laws of which govern the merits of the dispute, while others may be unfamiliar with the governing law. These differences may have no consequences in terms of how arbitrators work with each other, but they may also play out in various ways.

First, if one arbitrator is more 'competent', the other two may defer to him or her. Such arbitrator might become an unofficial internal 'expert' within the tribunal, telling his/her colleagues whether the positions expressed by the parties or their experts within the area of his/her expertise are right or wrong. To achieve such position, the arbitrator in question must not only have superior knowledge or experience but also must use it wisely and always be frank and open with his/her colleagues. If they suspect that he/she is biased or has misled them, his/her authority will wane or disappear completely, and his/her colleagues instead of asking for an opinion will try to form their opinions on their own.

Second, two arbitrators may have similar competence that is superior to the competence of their third colleagues. If they agree, they will obviously decide the outcome irrespective of the third arbitrator's opinion. If they do not, their colleague who is the least competent of the three arbitrators will call the shots. The best they can do is to try to convince him who is right. In such case, the outcome of the deliberations might depend more on the charm of individual arbitrators and their ability to sway the opinion of other people than the logic or content of their arguments.

D HOW TO DEAL WITH A BOSSY ARBITRATOR OR OTHER INAPPROPRIATE BEHAVIOUR?

During the course of the arbitration, co-arbitrators are inevitably required to interact with one another. To facilitate productive discussions, it is advisable for arbitrators to

21. Gary B. Born, *Chapter 13: Rights and Duties of International Arbitrators* (Updated February 2024), in *International Commercial Arbitration* (3rd ed. 2021), §13.05[B].

22. *Ibid.*

meet in person as early as possible and establish a positive rapport among themselves. The responsibility of initiating such meetings primarily falls on the presiding arbitrator, who should create a comfortable atmosphere conducive to fostering personal relationships among the tribunal members before embarking on any challenging discussions related to the case's merits.²³ Prioritizing the development of a respectful connection among those involved, while keeping the focus on the issues to be resolved, is essential throughout the arbitration process. The tribunal members should seize every opportunity to promote a sense of unity at all stages of the proceedings. The more familiar the arbitrators become with one another, the smoother their deliberations will proceed, reducing the likelihood of miscommunication or conflicts among tribunal members.²⁴

However, how should one respond to inappropriate behaviour? While it may be instinctive, the co-arbitrator from the opposing side should remain impartial and refrain from mimicking such misconduct. As reported by Siegfried H. Elsing & Alexander Shchhavelev, one prominent arbitrator suggests that party-appointed arbitrators should aim to cultivate goodwill with the presiding arbitrator.²⁵ In most cases, a discreet word to the chairperson is an appropriate step that generally suffices to protect the integrity of the proceedings. Therefore, the primary focus should be on maintaining proper decorum and tact in all interactions with the misbehaved arbitrator, and the rest of the tribunal should ensure the efficient progress of arbitration proceedings.

In any event, if confronted with an overbearing presiding arbitrator or a dominant party-appointed arbitrator, it is improper for the arbitrator to unilaterally communicate their concerns to the appointing party.²⁶ Disclosing internal information to the appointing party poses a significant risk to the integrity of the arbitration process²⁷ and should never occur.

23. Hans M. Savola, *Chapter 3: How Do Tribunals Deliberate? A Guide to Effective Arbitral Decision-Making in International Arbitration*, in *Stockholm Arbitration Yearbook 2021, Stockholm Arbitration Yearbook Series* (Axel Calissendorff & Patrik Schöldström eds, Volume 3, 2021), §3.03[A].

24. *Ibid.*

25. Siegfried H. Elsing & Alexander Shchhavelev, *Chapter 8: The Role of Party-Appointed Arbitrators*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Patricia L. Shaughnessy & Sherlin Tung eds, 2017), §8.04 [D].

26. *Ibid.*

27. *Ibid.*