Arbitrator Selection and Confidentiality of and in Arbitration Proceedings

Speaker	Dialogue
Nuna Lerner, Moderator, Gornitzky & Co	So, [*noises in background*] Good Afternoon everyone who's just joined, and thank you for joining us. This is the BCLP -- I'm sorry, I'm hearing an echo, am, am I OK panellists? Can someone say that I'm fine? Can you hear me OK?
Gavin Denton, Arbitration Chambers	Yes.
Nuna Lerner	OK good. So, thank you for joining us. This is the BCLP and Gornitzky's third session in this webinar on, seminar on International Arbitration. We have already had two successful sessions before and we have another one in [*inaudible*]. In this seminar we're gonna discuss International Arbitration. We're basically asking the million dollar question, which is: Why arbitration? And we do this by considering and highlighting what we find as the main advantages of arbitration. So, as International Arbitration Lawyers, there are mainly two things that we do for our client. So, first of all, obviously, the, the main thing is that we conduct international arbitration, but we also provide advice on the drafting of dispute resolution mechanism for use in commercial agreements. Now this part of the job usually will happen as we get a phone call in the middle of the night from a corporate lawyer that has been working on this negotiation for the past four months. They're ready to sign, they're signing tomorrow morning, and they just realized that under the, under the header Dispute Resolution they have a big question mark. So they, they wanna, they want their answer, they need it quick, do we go to arbitration or do we go to the court? So obviously the, the answer, the, the, the question is not a simple one and the answer is not a simple one, and there's many other, many other questions that we need to ask in order to, to answer this. But, the main question will be this: Do we go to court or do we go to arbitration? So, what do we do, how do we answer this and how do we do the, usually the time will be stressed and we, we need to provide an answer quickly. Basically, we analyse the agreement, we consider all of the future disputes, the risks, sometimes this is considered 25 years into the future. We try to think of all the different disputes, we try to imagine or consider what our client's position will be and where will their interest lay, and to decide if they will be better off at court or in arbitration. Now, the way that you do that is, we usually ask the corporate lawyers a list of questions and we consider those criteria that we think are important and these are largely based on that list of advantages that we think that arbitration can provide. Now, during this series we're trying to touch and consider the main one, we've already discussed during the first session enforceability and finality of award, and then during the second session we've discussed the flexible nature of arbitration. Now today we're gonna talk about two advantages. The first one, and that would be our first mini-panel, will discuss the choice of arbitrators and the tribunal selection. This is definite-, this is basically where a party is able to decide on the, the, sorry, the tribunal members and their profile. The second half session we'll be discussing the, the, the nature, the, sorry, the confidential nature of arbitration. This is a factor that can never be overlooked and sometimes this can also act as, as a tipping factor that will, that will make our client choose to go to arbitration instead of going to court.

Speaker	Dialogue
	So two very important issues that we're gonna consider. If you'll join us in two weeks' time, our fourth session is gonna consider the potential that arbitration has on reducing both, both the cost and the time of proceedings, so that will be an interesting one, so if you'd join us there. We have with us today a panel of four panellists. We have Claire Morel of BCLP. Claire is a counsel and arbitrator; she has a lot of experience in tech disputes, and she acts as the co-chair of the Silicon Valley Arbitration and Mediation Center's Young Practitioners Group. We have Shai Sharvit of Gornitzky of course. Shai also acts as counsel and arbitrator; he is a founding member of the Tel Aviv Arbitration Day, which we are all looking for, looking forward for; he is a court member of the LCIA, and he is a member of the ICC Commission on Arbitration and Alternative Dispute Resolution. We are also very lucky to have not just one but two arbitrators with us today, and they will share their experience with us. So we have Patricia Shaughnessy; Patricia is a professor at the Stockholm University, and she sat as a Board member at the Stockholm Chambers of Commerce for over 10 years. And we also have with us Gavin Denton; Gavin is the founder and head of Arbitration Chambers; he is a full-time arbitrator with substantial experience in disputes across Euro and the Asia Pacific Region. Sorry, I'm hearing a horrible echo. I'm hoping that you can hear me OK. Yeah? Thank you. OK. So we, as I said, we're gonna have two separate sessions, each of them will be about 20 minutes long. If you have any questions you can see on the right side of the, of your screen the Q&A section. Please pop any question there and we will do our best to answer these during the session and if we can, then our panellists will be happy to answer tho-, those later. So without further ado, let's start with the first session on arbitrator selection and we're gonna start with you, Shai. So you can unmute. Thank you. So Shai, as counsel, what do you find as the main consideration that one needs to consider when nominating an arbitrator?
Shai Sharvit, Gornitzky & Co	So, first of all, thank you, Nuna. And thank you to all our speakers and guests. I guess the first consideration for arbitrators is impartiality and independence, which are the main features for adjudication of any kind, actually. But once you move pass those, you know, initial features, or initial considerations, it becomes more tricky, especially with the variety and endless possibilities out there. I would say the second consideration for, for myself and, and my clients is the professionalism of, of the arbitrator. It's a very complex issue and we'll touch upon it later on in this, in this session. My co-panellist will touch on it, in, in really greater length. The third for me and, and I guess as an Israeli counsel is, is, it kind of looks very natural to consider this as a key element, is the, is the origin of the arbitrator. Not in the sense of where he's coming from geographically, but from what legal tradition and, and jurisprudence he's coming from. Well I, I, I've heard this argument many times before and, and I think that, generally speaking, the international arbitration community is trying to downplay these, these elements. But I, I think that, personally, it's more important than we think, and, and it's not only, you know, wh-, when we are talking about the, the different cultures of, of arbitrators, whether they're coming from civil or common law jurisdictions, which is kind of a main difference but even from different jurisdictions. So y-, you have the, the, the most discussed issues

Speaker	Dialogue
	like contract interpretation, good faith principles, disk document discovery, etc., etc., but there's also different approaches, fundamentally different approaches, to oral testimony, to concurrent application of different legal doctrines, and, and there are more differences, so I, I, I would say that legal tradition of the arbitrators can have a sig-, a significant impact on, on, on the outcome of the arbitration, and this must be a key consideration in selecting arbitrators.
Nuna Lerner	Thank you. So I think, I think we understand better now wh- [*inaudible*] to be, like the important criteria. Do you find that your clients are more attentive to one criteria or another? Is there something that perhaps, or one thing you find that usually tip the scale, one criteria that clients are more upon to consider than others?
Shai Sharvit	So, I, I, I think, and similarly to, to my first answer, the main issue is trust, which again goes back to the, to the independence and the impartiality. But, but, but I think that the trust is not only in the sense that the arbitrator they appointed would be attentive to their argument, but also, that he will be experienced enough. And in that sense clients often opt for former judges as the arbitrator simply by the virtue of having enough experience in adjudication. For me personally, I'm not quite sure this is a flawless approach and, and I think it, it oversimplifies the considerations of what makes a good arbitrators. Because in many cases, parties opt in for arbitration so they can resolve the dispute quickly and, and not resort to lengthy court proceedings. And, and in times -- it's not always the case – but, but sometimes when, when you opt for a former judge as an arbitrator, you do exactly that but in a more expensive environment and, and probably in a better room. But apart from that it's, it's, you know, it's pretty much the same as, as court proceedings. And, and I think that there are a lot of former judges that are excellent arbitrators, and there are many experienced arbitrators who are potentially much better in managing arbitrations than former judges. But, again, if you can appoint a former judge and, and, no, parties always feel comfortable with someone who's a former judge in that sense, make sure that you know he's also a good arbitrator. Because I, I, I'm not sure that, that automatically opting for a former judge is, is a positive thing. And I think it, it oversimplifies the, the, the way people perceive the arbitral process and the roles of the arbitrators in the proceedings. It's a tough management, well [*inaudible*], and, and you need to understand how to manage it and it's a completely different way of management from court proceedings so, so, so I, I, think that, that would be my, my answer.
Nuna Lerner	OK thank you. Gavin [*inaudible*] turn to you. So, you've been appointed as arbitrator more than a few times in your career and you've sat as a sole arbitrator and co-arbitrator, and you've acted as the chair. Do you have any advice for us for counsel, how do we, what should we consider when we appoint, when we appoint someone or when we nominate an arbitrator? And another question is, is this different from what you maybe consider when you need to appoint your chair?
Gavin Denton, Arbitration Chambers	I'm sorry, there's something wrong with the, the, I don't know if other people just had a problem hearing you as well, but you, you froze [*simultaneous speaking*] now I'm fine, yeah, you froze, so but I presume you want me to talk about the different ways you appoint, so whether the difference considerations whether it's a sole arbitrator or a co-arb or potentially a chair and, and there …,

Speaker	Dialogue
Nuna Lerner	I was, yep, go head. I was looking for some advice, yes, please go ahead.
Gavin Denton	Well I think they're fundamentally different, and I think the starting point is, it's the most important decision counsel will ever make, you know, it's imperative that they get this decision right. And it's a really difficult one now, now, nowadays because we have thousands and thousands of arbitrators to choose from, not just full-time international arbitrators but, many counsel or partners of law firms that also sit as arbitrators, so that just increases the pool even more. I think in terms of sole arbitrators, what tends to happen is, that the parties just never want to accept the proposal of the other side, so somebody'll propose somebody and they will just naturally say no because they're suspicious or they think there's some particular reason why they suggested them. And what often happens is they leave it to the tri-, to the institutions to decide for them. I think that's a fundamental mistake, and I know Patricia's gonna talk about the SCC and maybe experiences with other institutions, but I sat in just about all of the major institutions now, and, and sometimes they work beautifully and it, and it's just not a problem. I was chair of ICC Australia and I found the ICC to be very professional. But also I found some of the others to be … al-, almost dangerous. So I wouldn't readily give up that option of having an influence over who the sole arbitrator is. Whether that means finding a mechanism that you can agree with the other side to try and appoint that person, be it a list of arbitrat-, of, of sole arbitrators, a strike-out system, but some way of retaining influence over that process, I think it's important. If, if you can't and it comes down to a choice of the institution, then I think many counsel, in fact almost invariably, fail to take up the opportunity of writing or liaising with the institution and suggesting, at the very least, the skills sets and the qualifications of the arbitrator that should be appointed. That rarely happens and yet it's, that's a mistake. And counsel need to realize that they're entitled to do that, and they should always do it. So that's sole arbitrator. Co-arb's, well most counsel are very experienced at choo-, choosing a co-arb; they will do a lot of due diligence and they will ultimately choose someone that they think is best going to represent or, if not their position just be fair, have integrity, and they have trust in that person to do a decent job. One of things I'd say about choosing a co-arb is the, the natural inclination is to choose somebody world renowned who has been doing it for, for a long period of time and who has the trust of the community. And that's [*laughs*], that's obvious, but you also need to look at some of those people who have 20, 25, 30 arbitrations on-the-go as well, and accept that the realities are that those people simply don't have the same amount of time to dedicate to your arbitration, they're simply too busy. And I found with many of my arbitrations that a less busy arbitrator is prepared to and has the inclination to do a lot of the heavy lifting and do a lot of the work, has more of a say within a tribunal. You know, the others, they're so busy, that they, they really haven't done the work necessary to make the determinations. And so even as a co-arb you can have a tremendous impact on the outcome of an arbitration. So I would definitely look at how busy somebody is.

Speaker	Dialogue
	Also some of the older arbitrators, I sit with many of them in Asia. And they may have been fantastic five years ago, they may have been fantastic 12 months ago, but you need to, your, your due diligence needs to be current. And, you know, I had examples when I was counsel still where arbitrators have actually passed their prime. And we don't like to talk about it, and it's a difficult conversation but, you're acting on your clients' behalf and they pay a lot of money. It's vital that your due diligence is up to date. In terms of choosing a chair, I often, more often than not, now though sit as a chair, but when I was more often a co-arb, I think the fundamental mistake people make is that the, the co-arbs say, look I always choose the most experienced person and the most relevant person for this particular matter. Well, you know, personally I think that's rubbish. In, in most matters if you know dozens or hundreds of international arbitrators, highly competent lawyers, you're always going to know half a dozen or a dozen people that would be perfectly adequate to be appointed. And so, so then you need to look at other things, you need to look at, the reality is most arbitrators will look at somebody they know, somebody they've worked with, somebody they trust. So, you know, you need to think about that at the point in time when you're appointing a co-arb as well. What influence is this person going to bring to bear, to choose the chair? Because there's no point in spending all that time and money choosing someone as a co-arb if they're not going to have an influence within the tribunal, not only to appoint the chair but to ensure that the party that's appointing you, that their case is adequately understood by the whole tribunal. So, you know, that's, that's the role of the co-arb. Again, I, I think counsel sort of ex-, remove themselves from this process. They should stay intimately involved in the process of choosing these arbitrators for as long as they can. So once you've chosen your co-arb, you know, you can have a conversation with that co-arb about the skillset necessary for the chair. And, you, you may not like to suggest particular names, but it's absolutely appropriate for you to have that conversation and talk about the nature and the skillset of the chair. And again, even if your arbitration clause or, or contract doesn't specify, there's nothing preventing counsel from agreeing with each other that they're going to remain involved in that process to choose the chair, again, either through a list system or some other process. I've had some Korean parties where they will produce a 15-page document as to how they want to remain involved in the process of choosing the chair, very detailed, and yet it says nothing, there's no reference to it at all in their contract. So, I think, that's the most important thing I can say is counsel need to understand what influence they can bring to bear, and for what period of time, and to ensure that they, you know, you know, they continue to have an input for as long as they can.
Nuna Lerner	Thank you. I just wanted to make sure I'm not muted, no. OK. All important points and I think for us, in many, many cases where we have a co-arb that provided that communication with the other party, co-arbitrator, and, when we used a list, for instance, and we stayed involved, usually it took longer, usually the process was longer, but then we actually, I think both parties had the assurance, more security, they felt that the, the, the chair is someone that really fit the, the position. So, that's really, really good. Thank you. I have another question actually ….

Speaker	Dialogue
Gavin Denton	[*simultaneous speaking*] Can I just say, the other thing that I think is really important, and it's impossibly more difficult to tell, particularly if you're appointing somebody that you don't really know, but the co-arb's ability to persuade within that tribunal. I think people would sometimes be very concerned if they understood how many tribunals operate. And it is very useful for counsel, if they ever get the opportunity to sit as an arbitrator, to experience that and then go back, I think it definitely makes for a better counsel, going forward. Because, all sorts of things go on, maybe moreso in the part of the world that I predominately worked in in for the last 20 years, but I suspect everywhere. And, you know, and so yes, the, the ability for the co-arb to persuade, but also, and we haven't really talked about it now, but culture becomes important too. And, I think people having an understanding of the culture of the parties that are participating, my experience being predominately China, but, you know, I, I will sit with retired UK judges and with English QC's and we'll have an issue about fraudulent documents, and they will go, oh, they wouldn't be fraudulent. Whereas, you know, the, the perception of most full-time arbitrators in Asia would be, well we assume they are until proven otherwise. Maybe not always but you, you take my point, which is that we think very differently, depending on where we've spent most of our practicing lives.
Nuna Lerner	OK. I have, I, I, I think we're a bit, running a bit with the time, but still I have one question is: Did you ever get appointed, or sorry, get, goo-, get, got nominated and you kind of look at the case, the files or even before that if you get an email, just kind of like with an overview of the case, and you're thinking, I'm actually not the right fit for this? So (a) if that ever happens, and (b) what do you do? So, what do you do if, if someone wants to nominate you but actually you think you're not, you're not the right … one?
Gavin Denton	Look, sometimes people want to nominate you for lots of reasons, they think that you can help them in the future with their careers, so they nominate you, you know. Look, I, the answer is yes. I worked in a construction group for a number of years in Australia with [*inaudible*] Rosen[SP], but there were people that have done construction disputes day-in, day-out for 40 years, that's all they do, they are absolute specialists in the field. And I've been approached many times about sitting in construction disputes and I just think there are better people to do them and I told them so. Now, that depend, if, if it's a mining dispute or if its predominately a contractual dispute, that's different, but when we come down to the nuts and bolts of a construction dispute, I wouldn't take it, because there are just better people.
Nuna Lerner	OK. Thank you. Claire, I'm wondering, so there's, there's obviously a tension between a sector or industry knowledge and administrative knowledge. It's already been raised already in this conversation. Do you, do you find that one is more important than the other, maybe in specific sector?
Claire Morel de Westgaver BCLP	Yes. Thank you, Nuna. There are, there are certainly areas where it used to be very difficult to find an arbitrator who had both the, the, the experience or the knowledge of a particular sector or even a law or a particular technology, as well as experience in arbitration and ideally experience as arbitrator. This is changing because of, you know, because of the, the success and popularity of arbitration in virtually all sectors. We now have, you know, arbitrators who are familiar with, for example, IP patent disputes;

Speaker	Dialogue
	vice versa, we have, you know, excellent IP lawyers who have experience of arbitration and, and as, as arbitrator. Maybe a few more examples of, of those particular issue-, you know, disputes where it used to be tricky, it can continue to be difficult so financial disputes, telecommunications, data, privacy-related disputes. So, those are just examples but as I said, it's, it's changing, so it's quite encouraging. If, if, if one is, is in a situation where effectively it's not possible to find that person that has both the knowledge of, of the, you know, of circumstance effectively or a particular sector and, and, and sufficient experience as arbitrator, my j-, you know, whether one would be more important than the other I think depends on, on each case, of course, and the com-, complexity of the issue and, you know, what's at stake, how the, how the, the, the arbitration is, is, is likely to, to be conducted in terms of, you know, aggressivity, you know, procedural issues, etc. But my advice would be generally to go, if you can't have both, to, to go for somebody with an arbitration background, but, but, but that person would have to be, in my view, somebody with a track record or at least a reputation that they will be willing to engage with, with issues with a sector that they're not necessarily familiar with. And I think that's important for technology in disputes in particular where it's very difficult to find an arbitrator with knowledge of, of the particular technology. But, you know, what's even more important than knowledge of the technology is actually willingness to engage. And, and, and so, so that, that will be my, my advice in relation to this. Maybe one, one more thing is, is, is the dynamics within an arbitral tribunal. Something, something to watch, I think, is, is, is situations where there's potentially a lack of balance in relation to, for example, knowledge of a sector or a technology or even an applicable law between the arbitrators too. As arbitrator and also as counsel actually, I've experienced those situations myself, and I think they can be dangerous, particularly with highly technical disputes. Because why, because effectively, you know, as you know, it's, it's completely, it's a human natural reaction when somebody doesn't know something is to defer to the person who knows best, right? And so then you …
Nuna Lerner	Mm-hmm.
Claire Morel de Westgaver	… you, you wouldn't want your, all your co-arb, for example, to be a situation where that person does not know, does not really understand the technicality of the case and maybe the chairs understand them either and only, only the other co-arb of the other sides understands those issues. So, effectively, you have an imbalance. That can, that can be, that can be important for language sometimes as well, and also the applicable law. So I just wanted to [*inaudible*] I think because it's important.
Nuna Lerner	So I have one question. So, let's take a very technical issue. If you have something that, a case with a very technical issue, and you can't find the arbitrator that has this background. Would you consider taking counsel that never sat as an arbitrator and ask them to act as an arbitrator in a case? Or would that be just too frightening really?
Claire Morel de Westgaver	[*inaudible*] it is a good solution, but if, if the person has knowledge of the arbitrary procedure and International Arbitration generally, but has never sat as an arbitrator but, but potentially it's, it's a, it's [*inaudible*] fit. You know, as co-arbitrator, definitely; as chair of sole, maybe not. But, I mean, we all have, we all had our first initial appointment, right? So, …

Speaker	Dialogue
Nuna Lerner	Yeah.
Claire Morel de Westgaver	… you know, that's a good solution.
Nuna Lerner	OK. And, and we've seen within the last six [*inaudible*] Covid has, has made a shift on this balance, because now we're doing so, so many more virtual hearings, it has become the norm. Does this in some way change the advice that you give your clients. Do you, do you find that today they need to consider better the, you know, the technical nature of the arbitrators, you need someone that will be more comfortable with technology? I think the general question is, is yes it's important but the question is, does this really change the way that you, that your decision-making?
Claire Morel de Westgaver	It's a good question. I don't, I don't think it, it changes things dramatically. I mean all those issues, virtual hearings, cyber security, they were, they were already existing before the pandemic. I think what the pandemic did was to make those issues more prominent, and they're now at the top of people's minds. I would definitely, you know [*laughs*], consider a potential candidate's ability to conduct virtual hearings and, and be aware of cyber security and these are protection issues. No, I don't think it's a just exchange. There are, there are potential other issues, I mean, due process, I think due process is, is, is, continues to be important and less of, less of cases now require really, you know, in-depth knowledge of those issues to be able to manage a case where one of the parties is, is effectively, you know, tak- a, taking advantage of that paranoia.
Nuna Lerner	Yeah.
Claire Morel de Westgaver	So I think in my experience the pandemic and the current environment has potentially accelerated that trend, so, you know, that's something to, to watch. And maybe lastly, dynamics again. I wonder if, as we move to this new phase where there's going to be more and more hybrid hearings, where potentially people located in the same city will be taking part in hearings from the same room with people located in other cities loca-, you know, taking part remotely. I wonder if par-, parties will start thinking about the location of arbitrators again, to try to avoid a situation where your, your, your party-nominated arbitrator is, is, is isolated from the other two for the hearing. Just a thought, I mean, I, I haven't, I haven't, I haven't come across that situation yet.
Nuna Lerner	That's actually a very good point. Yeah, I, I admit I've, I've been [*inaudible*] as well but yeah, it makes a whole lot of sense. I think we, we start seeing cases where we are disadvantaged in that we are, that some of our witnesses are located elsewhere, while most of the other party's witnesses and expert will be in the same room as the arbitrator. You know, that's a, that's a really, really good point. Thank you. Patricia, you've been awfully quiet [*laughs*], sorry. So Patricia, it would be great if you can provide us the institutional point of view. And I don't know if you would agree that some institutions are maybe less concerned about that sector knowledge, they want to make sure that they have someone in play that will be very strong on the technical side. They already know all the rules, they've done this a million times before, and I think in a way if you consider the, the clients of the institutions which are clients as counsel as well. They, they come to these institutions looking for a service and paying good, good money for that service. So are some institutions more,

Speaker	Dialogue
	considering more the, that ability of tribunal members to kind of meet clients' expectation in that sense, and provide them that assurance that, you know, the process is efficient. I, I would love to hear your thought.
Dr Patricia Shaughnessy Arbitrator, Law Professor and Co-leader of SVAMC task force on tech & International Arbitration	Well, first of all, let me say that there are probably about 200 active arbitration institutes in the world, and there are thousands of registered arbitration institutes in countries that allow for registration without much regulation. So I certainly can't speak to all those institutes in the world, but if one looks at the major institutes, the ones who are doing most of the administration of cases, I think that all of those institutes take the role of appointing arbitrators very seriously and certainly they are all trying to meet their users' expectations and needs because they are providing a service. And most of the elite in arbitration institutes and, indeed I think it's, it's, it's best practices, whether you look at CEA guidelines or whatever, that an arbitration institute is best if it is a non-profit organization who's seeking to provide services to the business and investment community. And that is it's guiding light is providing services to that community, rather than trying to be a for-profit organization. So, to your question, do some institutes think that meeting client expectations is more focused on providing arbitrators who are technically? I, I can't imagine that unless it happens to be WIFO[SP] or some very specific institute that's, you know, like a CAfA[SP] doing commodities or something. But, if you're looking at, at, at a general arbitration institute, that technical aspect is just one of many factors, so they're looking for arbitrators that meet the clients' needs and expectations, that are gonna be reliable and can be trusted and will be able to manage to bring a arbitration efficiently and effectively and fairly and within what is required under the lex arbitri[SP] to, to end up with an enforceable award. So, but I think that going to, to, the Gavin's point, one hears sometimes complaints about arbitral institutes' appointments. The concern about that ought to be at the time when parties agree on what arbitral institute that they will have administer their case. And so, if one chooses one of the [*inaudible*] arbitration institutes to take their role seriously, then they're gonna have a robust discussion on dili-, due diligence on who to appoint. It will differ whether they're appointing an arbitrator for a nonresponding respondent, someone who is not participating, then they may try to put, appoint an arbitrator that they think would be likely to meet the expectations of that party. If it's a multiparty situation and the tribunal has to appoint the entire tribunal, it's going to be different, and certainly the appointment of a chair has different needs for being managerial and procedural, they adapt and know how to take on this role that may be different than a party-appointed arbitrator. And sole arbitrators are also different. So I think that once you consider the, the reputation of the institute at the time and look into ideally they should not have a closed list, it might have a pool of arbitrators, but party autonomy should be foremost there still. Even though it may seem antiquated, a number of institutes still have a closed list and that should be a concern. And, [*inaudible*] a look at who makes this appointment. So in the better institutes, the SCC has been this way for more than 15 years, but there's an international Board. So you have really good input and robust discussions by people from different backgrounds, and a lot of experience in international arbitration, who are involved in

Speaker	Dialogue
	making the decision. The same with the ICC, you have of course robust appointment, LCIA, CF, other institutes, so one should look into what kind of [*inaudible*] appointments do they often make. So I would, I'm like Gavin, I think that particularly for if parties who are not as experienced, who may have counsel who are not as experienced, it may, they may not have any idea who to appoint for an arbitrator for an arbitration seated in Lisbon or seated in Israel or sitted, seated in Singapore, and so it gives them a certain comfort to know that they can rely upon an institute to do that.
Nuna Lerner	Yeah, yeah, but yeah, but [*inaudible*] what do you get when you go to a good institution, for sure. Can we maybe talk about diversity a little bit? We see …
Dr Patricia Shaughnessy	Sure.
Nuna Lerner	… a lot of the ...
Dr Patricia Shaughnessy	Before …
Nuna Lerner	… the, the institution … yep, please go ahead [*simultaneous speaking*].
Dr Patricia Shaughnessy	[*simultaneous speaking*] Yeah I will, but before I do that I'm just going to address a question in the Q&A about appointing non-lawyers. I think that many institutes are, are concerned about appointing non-arbitrators, particularly as a sole arbitrator or a chair. Because today there are so many procedural aspects and so many legal aspects and the concerns about ensuring that when it arrives at the enforceable award, and, and there can be certain trip lines and mines that one has to manoeuvre in that situation. Having said that, as we all know the Chartered Institute of Arbitrators began as an engineering association. I know some excellent arbitrators who are actually engineers or perhaps have other, come from other backgrounds, and they bring that in and they have a lot of experience as arbitrators, maybe accountants might be appropriate in some cases. But one needs to be concerned there's, there remains some national arbitration laws that restrict arbitrators to being lawyers, there are some institutes that are concerned about having non-lawyers. If the part-, if there's party autonomy, which is usually the case and parties may appoint them and they may say this is the perfect person for this case, we want an engineer, we want a computer specialist in this case. But if, if, the little warning for sole arbitrator and a chair, be sure that they have a robust and detailed arbitrator experience. So to diversity, now we talked about diversity of background [*laughs*].
Nuna Lerner	Yes.
Dr Patricia Shaughnessy	Yes, as we all know the Pledge has done a lot of good in …
Nuna Lerner	Yeah.
Dr Patricia Shaughnessy	… improving gender diversity in its institutes that have been the lead in that, and so now we see all institutes who are serious about diversity on topic over 20% of the 30 and even more…
Nuna Lerner	Yeah.
Dr Patricia Shaughnessy	… in their appointments of women, and it's certainly not sacrificing quality. There are …
Nuna Lerner	Mm-hmm.
Dr Patricia Shaughnessy	… certainly plenty of experienced, competent skilled female arbitrators that

Speaker	Dialogue
	can be appointed, are, are fit for the particular case so, what we're, we still need to do a lot of work on that. The party-appointed appointments of female arbitrators is way below. The, the, the statistics of co-arbitrators appointing a female chair runs at about 5% in most places. It's abominable. That's a big area of improvement and it's up to the clients to demand the counsel and for the counsel to do so is to always include female nominees in their list and to encourage that. And we need to go beyond that and we need to look at age dis-, age diversity. We're seeing a big movement there. At the latest ICC statistics, I think, indicated a strong showing of appointing arbitrators under 50. And of course, regional, geographic, religious, the race, we need, we need the world of arbitration to, the appointments to reflect the users. And when the appointed arbitrators of an institute or of our community are not reflecting the users of arbitration, the International [*inaudible*] Arbitration, we have a problem. And it's a problem we all need to solve in order to ensure that we have the most competent people in the pool and that we have legitimacy and that we're contributing to a sustainable area of law. You got me on my cell phone [*laughs*].
Nuna Lerner	[*simultaneous speaking*] [*inaudible*] [l*aughs*] Thank you for that, and I think it's a good, so if we have anyone listening that hasn't [*inaudible*] go sign the Pledge. If we have any counsel listening to us, I think that's excellent advice. Just make sure that when you talk to your clients and that you provide a list of five names, make sure that, I would say, two or three of them …
Dr Patricia Shaughnessy	No, three or four! We need to catch up [*simultaneous speaking*] [*laughs*].
Nuna Lerner	[*laughs*] … three or four [*laughs*] who would risk it, I should have never, yeah, never should noted a number [*laughs*]. Thank you for that. No, this is a very important issue, of course. So we, we will wrap up the discussion on tribunal selection here. It was very interesting. We are, we need to be reminded of time, which we haven't so far. We're gonna do better in this second, I can't say second half because, you know, it's gonna be the second section. So we're gonna [*laughs*] we're gonna discuss the confidently of and in arbitration. And Shai, again, we're gonna start the discussion with you. So you should unmute yourself and it will be great if can give us a general intro into the, into the issue.
Shai Sharvit	OK. Thank you, Nuna. Well, I, I think that when discussing confidentiality, you first need to understand that, for a very long time, confidentiality of the arbitrator process has been considered as a key feature for arbitration. And even in 2018, in the White & Case and Queen Mary Survey, 36% of the participants described confidentiality as one the most valued characteristics of international arbitration. But I think that what we can see in recent years is, is kind of a change in that perception and change in, in the, the concept of confidentiality. I think first of all, because parties realize that when they initiate enforcement proceedings, then confidentiality goes out the window. Because now you're in court and nothing is confidential. Second, because we're seeing more proceedings involving public law aspects and public policy matters, especially in investor-state disputes and, and the parties realise that [*inaudible*] these high profile proceedings is, is inevitable. I guess the, the, the, this approach of, of no public policy concerns and, and, and public fear,

Speaker	Dialogue
	although it started from the investor-state arbitration, is it's slowly appeareated[SP] to commercial arbitration as well. And the [*inaudible*] are, are now, I wouldn't say demanding, but they are expecting to see more transparency. I think that because of that, the, the institutions themself have started taking notice of that and, and, for example, the ICIA has started publishing its decision on [*inaudible*] challenges and the ICC of course as of January first of this year. Parties need to opt out from having their award published with names and, and, and everything, which is a great shift in confidentiality. So I, I, I would say that, you know, it's still significantly different and, and in that sense better than court proceedings which are all public, but I would say that parties cannot and should not expect full confidentiality anymore in, in arbitral proceedings, at least not in the sense that they used to be. Though, that's my take on, on confidentiality in general.
Nuna Lerner	And, then for the members of this tribunal and then the listeners who are not Israeli counsel and don't have the background, I think it will be good if you'll just say a few words on, on confidentiality and arbitration in Israel.
Shai Sharvit	Yeah, so, so I, I think that [*simultaneous speaking*] …
Nuna Lerner	[*simultaneous speaking*][*inaudible*]
Shai Sharvit	… that, the, the situation in Is-, in Israel is kind of funny because it's, it's completely the opposite of the international movement, and I think that in Israel it's not only that Israeli arbitration law does not support, per say, publishing awards or, or, or, you know, removing the confidentiality, but the supreme court has ruled, and it's not that long ago, it's seven years ago, that arbitration documents are not only confidential, they are also privileged. So in, in that sense, for example, if I'm a third party and I have some interest in, in the proceedings, it's not only that I'm not privy to the documents themselves, even if I get them, according to the supreme law participant court case law, I'm not, I'm unable to use that. So I guess, you know, it, it's, in, in some sense it goes exactly the opposite from, from the international trend, but looking at it from a Israel perceptive, not from an Israeli client perceptive, it actually gives them, gives Israel an edge as a seat for arbitration because as, as the [*inaudible*] victory, you can actually enjoy privilege of the, the arbitration documents granted to you by law, so if for example, you're arbitrating in London or in Paris, you might find yourself subject to disclosure, for example. In Israel, that would probably not be the case. So, it's, it's a different atmosphere in a, in a different, you know, way and different approach the courts are taking towards confidentiality in arbitration.
Nuna Lerner	Yeah. Thank you, and I think it's, sorry, there's an echo here with me, sorry [*laughs*] It was a, you know, sound in my head. So, actually I think that this is really important and I think it's important for us as counsel many times to Israeli clients to kind of make sure that they understand that, because I think you're, they're used to something, and I'm not sure that when they all of a sudden go and arbitrate in a different seat than Israel, they realise that things are, are really different then what they're used to. So that's really important to know. So Claire, so you work on many tech-related dispute. Do you find, yes, please unmute yourself, thank you. So do you find that, that plays a larger role in, in, in those than in commercial disputes or other commercial disputes?
Claire Morel de Westgaver	I mean confidentiality, secrecy, privity are themes that are recurrent in technology [*inaudible*] disputes. But of course, they are not unique to

Speaker	Dialogue
	technology disputes and, and as Shai said, and as reflected in the Queen Mary Survey, Surveys I should say, it's, confidentiality, you know, remains, you know, one of main reasons why parties actually opt for arbitration as appose to court litigation. And so far we've been speaking mainly about confidentiality of the proceedings vis-à-vis the rest of the world. One of the things that I, is also quite common to see in technology disputes, but again not unique to technology disputes, is that its concerns in relation to confidentiality even within the arbitral process. So what we took in here, is, is, is the protection of sensitive information trade secrets between the parties and this is often a concern where the parties are players in the same markets, are competitors. And so the, the arbitral process provides ways to protect sensitive information trade secret within the arbitral process which, you know, could be seen and is sometimes seen as a reason also to, to opt for arbitration. I don't want to, I'm not going to go into the details, but just wanted to mention a few tools that are available generally in arbitration to, to protect those informa-, this information. One way to do that is to seek a protective order by a tribunal, that's possible under most rules and, and, and Article 22(3)[SP] of the ICC is an example of that existing rule of the new rules. Two, two, two typical orders, one "attorney eyes only" rules where the, the, the, only the, the, the external counsel of the requesting party will be able to see the, the, the sensitive documents or confidentiality clause[SP] where the order of the tribunal will set out the individuals within the requesting party who will be, who will have access to the, the, the information, the sensitive information. So that's one. Another possibility is to appoint a confidentiality advisor, so it's while the tribunal does not want, even want to see the document to, to make a ruling on relevance of sen-, on sensitivity and appoint a third-party advisor to do that, that's possible under Article 54 of the WIPO Rules and also Article 3.8 of the IBA Rules. And, does it, in addition, there's also ways to build in the disclosure process requirements by which requesting party will only have access to sensitive or trade secrets information upon establishing a prima facie case of breach or IP infringement. And that's quite important because that's not in rules but it's a trend that I'm, I'm seeing arbitrators starting to do this to when, when, when they understand the sensitivities at stake.
Nuna Lerner	Thank you. So, yeah, let's take that point of protection of sensitive information that Claire touched on. And, and Patricia, what do you think that institutions do or should do to assure that, that sensitive information that the parties are sharing throughout the, the proceedings is handled properly by the tribunal members, but also by the administrative staff, as we said, that, that our clients go sometimes to these institutions because they provide a service and it is very effective but it also means that there's more eyes [*inaudible*] than if you would just go ad hoc on to, to an arbitrator and that's it and it's you, the other party, and that arbitrator in the room and these are the only people that are being, that are on your case and that see your insensitive information.
Dr Patricia Shaughnessy	Well, first of all again, choose your institutions with due diligence. There's a lot of competition and services they can provide. There's a variance as to the confidentiality that may be part of the set of rules. So you'll find some

Speaker	Dialogue
	institutes like the Milan Chamber and others that have very extensive and will extend confidentiality to the parties, witnesses, experts, etc. But then there, probably the more common is the approach where only the institute, including the administra-, case administrators of course, and the arbitrators, are under an obligation of confidentiality. And of course the parties can expand that, they can contractually agree to have greater confidentiality and of course the problem with confidentiality and regulating it in a rule is the one-size-fits-all. Because there's gonna always have to be some tailored exceptions for particular compliance with other legal obligations, etc. And the ideas about when does it start, when does it end, who is supervising, how is it sanctioned, so that's a number of issues. I can say as a little aside in a expert opinion that I was working on and just submitted a few days ago. In a case involving arbitrator liability, I became very deeply acquainted with when you might have the type of misconduct which might trigger potential liability, and the breach of confidentiality could be one of those that could be a potential sanction and of course, but for arbitrators and arbitral institute, you're only as good as your reputation, you're only as good as the trust that Gavin mentioned that you and [*inaudible*] engender. And I think that most take it very, very seriously and it also extends of course to the secretary to the tribunal. So that's important. I can also mention this aside that Claire was talking about privilege experts. I've had the, most people wouldn't say the pleasure, but I actually enjoy it [*laughs*], being appointed in exit[SP] cases as a tribunal expert to go through the extensive documents which are under contention as to privilege and so that there would be some guidance from the tribunal on procedural orders. Then there may be, especially in multi-jurisdictional cases where you have a real matrix of different types of documents and privileges and you might have a stern schedule with hyperlinks and so I do the tedious work of going through that and making recent decisions to the tribunal. And that's one way of dealing, as, as Claire said, to keep the tribunal from seeing something which they can't un-see. So, you'll see that sometimes being done. So I think that you'd find, I think the first time I did was a privilege expert, I'm so old, when I was a young loaner[SP], and I was appointed by the court to be the privilege expert in a financial litigation. I won't tell you how many years ago that was [*laughs*].
Nuna Lerner	[*laughs*]
Dr Patricia Shaughnessy	So if courts can do it, but my impression is that tribunals are a little bit more flexible and adept and that the system, I, I think it works pretty well, so I think arbitration can serve the needs, and as Claire pointed out in these tech disputes, also in corporate governance disputes. Often times that's another area, so let's see, oh the financial disputes and such, knowing that that can be a no-earn out disputes and, and other things that, that can be pretty important information to keep, to keep confidential.
Nuna Lerner	Thank you.
Dr Patricia Shaughnessy	So, with that I guess I'll let you go to Gavin.
Nuna Lerner	Gavin, do you think that counsel usually are doing enough to protect their clients' sensitive information?
Gavin Denton	[*inaudible*] I, I think the, the whole process is governed by counsel and by the parties, by their agreement and whether they adhere to it or not, you

Speaker	Dialogue
	know. I've seen recently in, in [*inaudible*] articles where myself and fellow tribunal members are mentioned, that they detail everything about the case, the amount in dispute, I mean, it's just horrific to read when there's this assumption when these proceedings are governed by confidentiality. But, look, it, it happens occasionally but the bigger issue really for sitting arbitrators I think is, what Claire said, which is really looking at documents and whether they attach legal professional privilege or commercial-in-confidence. And you would assume that those arguments would be made in relation to documents in every single arbitration. Surprisingly, that's not my experience. It is rare for counsel, maybe it's again the nature of the, the jurisdiction that I've sat in most of my career, and I think it depends on, you know, you'll find counsel in different jurisdictions, so I think the whole issue of confidentiality is imperative as you were saying that, and Shai was saying, that you understand the nature of confidentiality in that particular jurisdiction. Certainly in China, it's anathema to most counsel to believe that you should produce documents that could potentially damage your own case, they think that is utterly absurd, and, and they won't do it [*laughs*]. So the issue doesn't ri-, rise as often because there are far fewer documents. I think we have to accept too that culturally, you know, people don't wanna waste [i*naudible*] minutes, they don't take file notes, they don't take, you know, so when counsel are saying to myself and other arbitrators sitting in Asia, these documents don't exist, there's every, every chance that what they're telling you is the truth. But when we come back to, you know, documents that attach LLP[SP] or commercial-in-confidence, as Claire said, you know, there are ways of dealing with that, you can order their production, once they've been redacted. You don't see it very often but certainly in one of my cases, we, we outsourced the review of legal professional privilege to a separate arbitrator. Now you probably don't see it very often because it's not requested, because it costs more money, but I think that's a very effective tool. Because, unlike many arbitrators, particularly in Asia where they think you could see something and then forget about it or unsee it, I'm not convinced that that's the case. I think once it's in the little grey [*inaudible*], it, it's a very diffi-, a difficult thing to ignore. And, so, must I agree that it is probably one of the main reasons parties choose arbitration and it's, you know, an importantly, a very significant consideration. From an arbitrator perspective, it's not that often that it arises and where it does in relation to documents I think it's relatively easily dealt with.
Nuna Lerner	OK. Thank you. Alright. So, I think our last question for today could be a question to everyone on the panel. So, I'll ask the question if you wanna raise your hand [*laughs*] or just start, OK. Sorry [*laughs*], so where we discussed the rise of video conferencing because of Covid, and this has, has promoted cyber consent and discussion about, about cyber consent, and we've seen some institutions that have started adopting standards, for instance, cyber protocol. So my question is: Do you think this is something that the institutions should put in place, or is this something that needs to be left for the discussion of the tribunal or the parties? [*pause*] No one.
Claire Morel de Westgaver	I, I can tell you that we, as a firm, we did a survey last year on cyber security in international arbitration, and this was one of the questions we asked the respondents. Another question we asked the respondents was whether they had already been involved in a case that, where there was a

Speaker	Dialogue
	data breach; 10, 11% of the respondents said that they did, so this is a real issue. And in terms of who should take the lead, it was very interesting that it was actually a almost perfect split, where 30%, 30%, and 20% for the institution, the arbitrators, and the parties, so there's, there's, there's no consensus, cons-, consensus yet on that. And of course some arbitral institutions are taking the lead on this like the SCC, which, which has its own platform, some other institutions are, you know, taking more of a, you know, more of passive role, let's say.
Dr Patricia Shaughnessy	May I jump in with a follow-up comment to what Claire said, which was quite cogent?
Nuna Lerner	Please. Please.
Dr Patricia Shaughnessy	Yeah. I would say that one of the key issues is whether or not the market wants to have a one-size-fits-all solution. Because if the institutes are going to be the providers of the ensuring this cyber security and, and that, then it's gonna be a one-size-fit-all. I know there's at least a couple institutions that thought about maybe offering a standard service and then for an increased price you could get the gold standard. It's difficult to start offering different administrative services of that nature on, on different price levels, and so for many clients, they themselves, or their large law firms will have much greater resources to provide the type of security that the client and the firm wants to have. And the, and one of the issues for non-profit arbitration institutes is budgetary, particularly if they're connected with [*inaudible*] Chamber or something. Then, when they're providing, as, as Claire pointed out, the SCC has launched a platform, it's Know Your [*inaudible*], which is a secure communications platform. But it's a service that's pretty basic, that many law firms are using, it's very user friendly and it has good security, but the, the problem with bespoke-tailored systems, is that you're going to have to have a very high cost to have it tailored to that particular system, and a very high maintenance cost. Because, when you're using like the platform we're using now for this webinar, or some other, you get automatic updates all the time, they're concerned about keeping it updated. If you purchase a bespoke system you better hope the supplier keeps on staff, an engineer that's constantly upgrading and maintaining your service. That's probably more expensive than most arbitration institutes can afford and probably clients would feel like they would get more for their money by using their own, or their lawyers. So I think institutes need to provide a basic secure system, but if you want a lot of bells and whistles, you probably better go to the client or to the large firm that has good IT services.
Nuna Lerner	OK. Anyone else?
Gavin Denton	[*inaudible*] I'd say is that, you know, relying on the arbitrators in this particular field would be a massive mistake [*laughs*].
Nuna Lerner	[*laughs*]
Gavin Denton	I, I, I think, you know, there, there's a limit to everybody's skillset and skills, and, and what arbitrators need to do is ensure that this is a discussion that's had at the beginning of an, of an arbitration, and really take the view, but my preference would be that the parties would be informing us as to what they think is most appropriate for the size and nature of the particular dispute. They also have IT specialists and a lot more experience, and I agree with Patricia, I think it's probably a little unreasonable. Institutes do not make a lot of money and they're always struggling financially so maybe a combination of all three but I think for arbitrators it's just about ensuring that the whole issue is raised and dealt with appropriately.

Speaker	Dialogue
Nuna Lerner	OK … Get …
Dr Patricia Shaughnessy	Did you, did you use the word ensure to also mean they should have insurance?
Gavin Denton	[*laughs*] Well, I make sure that all the arbitrators in my chambers have insurance [*laughs*].
Nuna Lerner	Thank you, Devin. Patricia, thank you so much for joining us today. This has been extremely interesting. For everyone who's gonna join us, as I mentioned, in two weeks' time at the same time of day, we're gonna discuss the potential of reducing cost and time by using arbitration. And thank you for everyone who's joined. Hopefully we'll have a taping of this session in, in a few days. And thank you and have a good day.
Gavin Denton	Thank you, bye-bye.
Nuna Lerner	Thank you.
Dr Patricia Shaughnessy	Thank you very much, bye.