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**Ex Parte Interviews of Party-Appointed Arbitrator Candidates:
A Study Based on the Views of Counsel and Arbitrators
in Sweden and the United States**

Depending on how they are used, ex parte interviews can either be a helpful tool when parties want to appoint qualified and suitable arbitrators, or undermine the impartiality and independence of the arbitrators. This study of almost 100 counsel and arbitrators in Sweden and the United States shows a clear support for ex parte interviews as such, but not under all circumstances. The study indicates that the main concern is the lack of international consensus regarding the circumstances under which ex parte interviews are appropriate. For instance, the American respondents were much more reluctant to disclose the existence of ex parte interviews, and found discussions of the parties' positions and facts related to the dispute less problematic than the Swedish respondents. After having reviewed current practice and regulation, this article explores how transparency as well as specific, non-mandatory rules seem to be the two most important and requested solutions to avoid undesirable situations and challenges, and to maintain the confidence in the fairness of international arbitration.

1. INTRODUCTION AND CONFLICTING INTERESTS

The parties' right to appoint their arbitrators is not only one of the main characteristics of arbitration as a method of international dispute resolution, but also an essential factor for the

quality of the process as well as the outcome.¹ In contrast to court litigation, the parties in arbitration proceedings may appoint arbitrators they believe are particularly competent for the dispute at hand, but the very limited possibilities to successfully challenge an award places a premium on the appointment of competent arbitrators.²

Given the importance of arbitrator appointments,³ parties understandably want to base their decisions on comprehensive information about a potential arbitrator's availability, qualification, experience, personal style as an arbitrator, etc. Some information is available through public sources – such as the potential arbitrator's biography, previous publications, arbitration institutions and ranking institutions – and other information is available through references and recommendations from colleagues.⁴ In addition to confirming with the potential arbitrator that he is available and interested in accepting the appointment, and making sure that he does not have any potential conflicts of interest in the particular case, a party might want to supplement its knowledge by asking the potential arbitrator additional questions directly. Such questions might cover everything from further information about the arbitrator's experience to his view on his

¹ A. Redfern and M. Hunter, *Law & Practice of International Commercial Arbitration*, 182 (4th ed., Thomson 2004); G. Born, *International Arbitration: Law and Practice*, 121 (Kluwer Law International 2012). The parties' right to choose the method for appointment of arbitrators is stated in national legislation as well as international conventions, *see e.g.* the Federal Arbitration Act, 9 U.S.C. § 5; Swedish Arbitration Act (1999:116) § 12; the New York Convention Article 5(d).

² Regarding challenge of awards under the Federal Arbitration Act, 9 U.S.C. § 10, *see* K. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61(3) *Disp. Resol. J.* 16 (Nov. 2006/ Jan. 2007); D. Senter & A. Chapin, *Statutory Grounds for Challenging Arbitration Awards*, 19 *Construction Law* 30 (October 1999). Regarding challenge of awards under the Swedish Arbitration Act (1999:116) § 34, *see* N. Elofsson, *Klandrade skiljedomar mellan 1999 och 2009 – särskilt om skiljemäns uppdragsöverskridanden och handläggningsfel*, 2010-11(3) *Juridisk Tidskrift*, 732 (2011).

³ *See also* Redfern and Hunter, *supra* n. 1, stating '[o]nce a decision to refer a dispute to arbitration [has been made, nothing is more important than choosing the right arbitral tribunal. It is a choice which is important not only for the parties to the particular dispute, but also for the reputation and standing of the arbitral process itself.'

⁴ *See e.g.* G. Born, *International Commercial Arbitration* vol. 1, 1391 (3rd ed., Kluwer Law International 2009) regarding efforts to publish systematic collections of international arbitrators, their background and experiences, as well as evaluations by previous parties.

role in appointing chairman of the tribunal, and his views on a particular legal issue previously expressed in a publication.

Ex parte interviews with party-appointed arbitrator candidates can take place in two different situations. The first situation arises when the party interviews one or more candidates for the purpose of making an appointment decision. The second situation occurs after the party has appointed its arbitrator and wants to discuss the appointment of chairman.

When a party initiates *ex parte* communication with an arbitrator candidate beyond ordinary questions related to conflicts of interest, availability, etc., the underlying interest in having sufficient information about arbitrators might conflict with another fundamental principle in international arbitration – impartial and independent arbitrators.⁵ Neither the right of the parties to appoint arbitrators nor the right to impartial and independent arbitrators is controversial or difficult to support. The more challenging issue is to draw the line between appropriate and inappropriate *ex parte* interviews of party-appointed arbitrator candidates.

The issue is particularly important and challenging in international arbitrations where parties, counsel and arbitrators do not stem from the same jurisdiction and therefore differ in their expectations as to the appropriateness of *ex parte* communication and in their views on the role of a party-appointed arbitrator. For instance, historically in the United States, different

⁵ The basic rule that every arbitrator must be and remain impartial and independent of the parties involved in the arbitration is explicitly stated and emphasized in many arbitration statutes, rules and guidelines. *See e.g.* ICC Arbitration Rules (2012), Article 11(1); SCC Arbitration Rules (2010), Article 14(1); AAA International Arbitration Rules (2009), Article 7(1); LCIA Arbitration Rules (1998), Article 5.2. *See also, Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) holding that the governing American standard of arbitrator impartiality is ‘appearance of bias’, and *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters’ Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) stating that an award should be annulled if ‘a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration’.

impartiality standards were applied depending on whether the arbitrator was party-appointed or the chairman, based on the presumption that a party-appointed arbitrator would be a partisan for the appointing party unless the parties specifically had agreed that all arbitrators should be neutral.⁶ Such view is alien to many other jurisdictions – including Sweden and England – where all arbitrators, like a judge, should be strictly impartial and neutral.⁷

Although particularly civil law lawyers might expect party-appointed arbitrators to be impartial and neutral, that does not mean that they would not be interested in appointing an arbitrator who is likely to share their views on the legal issues in the case. Lawyers from both civil and common law jurisdictions tend to strive to appoint an arbitrator who has some legal or cultural predisposition in favor of the client's case, without being completely biased.⁸ However, a party who views the party-appointed arbitrator as the party's advocate on the tribunal is likely to deem extensive *ex parte* communications more appropriate – including questions about the merits of the case and the selection of chairman – than a party who views all arbitrators as strictly neutral.

⁶ D. Bishop and L. Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14(4) *Arb. Int'l*, 402-404 (1998). Cf. ABA Model Rules of Professional Conduct 1.12(d), stating that an arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party. However, AAA's domestic arbitration rules were amended in 2003 and Rule 17(a)(iii) is now a presumption for neutral party-appointed arbitrators. See also ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) Canon IX; B. Sheppard, *A New Era of Arbitrator Ethics for the United States: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*, 21 *Arb. Int'l* 91, 94 n. 11 (2005).

⁷ Born, *International Commercial Arbitration*, *supra* n. 4 at 1499-1501; Bishop and Reed, *supra* n. 1, at 396; C. Lundblad, *Behövs en uppförandekod för skiljemän*, Svensk och internationell skiljedom 1991 – Årsskrift från Stockholms handelskammarens skiljedomsinstitut 44 (Arbitration Institute of the Stockholm Chamber of Commerce 1991). See also S. Lindskog, *Skiljeförfarande – En kommentar* 8 § 4.1.6 (Norstedts Juridik 2012) mentioning that although partial party-appointed arbitrators are unfamiliar from a Swedish perspective, there is probably no ground for disqualification if the parties have agreed to it.

⁸ Bishop and Reed, *supra* n. 6, at 395-396; L. Heuman, *Arbitration Law of Sweden: Practice and Procedure* 214 (Juris Publishing 2003) emphasizing that it is normally in the interest of the party to appoint an arbitrator who is able to convince the chairman of his view, instead of someone who simply is loyal to the appointing party in all circumstances; A. Lowenfeld, *The Party Appointed Arbitrator in International Controversies Some Reflections*, 30 *Texas Int'l L. J.* 59 (1995); M. Hunter, *Ethics of the International Arbitrator* 53 *Arb.* 219, 223 (1987).

Extensive *ex parte* interviews with arbitrator candidates are rooted in domestic American arbitration practice,⁹ but the question is to what extent such *ex parte* communications are appropriate in international arbitration. There is a lot at stake. If a party's *ex parte* communications with the party-appointed arbitrator exceed the appropriate scope, it can be deemed a violation of the impartiality and independence requirement, which ultimately is a ground for challenge of an arbitrator, challenge of an award or denial of enforcement.¹⁰

A clear standard for appointment of party-appointed arbitrators is, however, not only relevant in cases regarding challenge and enforcement, but also for the confidence in international arbitration in general. Regardless of what the standard is, parties have a legitimate right to know what role the party-appointed arbitrators play and what actions that are appropriate in the context of their appointment. Uncertainty as to, or absence of, such a governing standard may undermine the confidence of both the parties and the public in the integrity and due process of international arbitration proceedings.¹¹

⁹ J-F. Poudret and S. Besson, *Comparative Law of International Arbitration* 334 (Sweet & Maxwell 2007) describing that this practice also aims to avoid liability for malpractice.

¹⁰ E. Onyema, *Selection of Arbitrators in International Commercial Arbitration*, 8(2) *International Arbitration Law Review* 45 (2005); Bishop and Reed, *supra* n. 6, at 427-428 (referring to S. Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 *Arb. Int'l* 300, 306 (1988) regarding a study showing that ICC challenges to arbitrators are much more likely to be sustained if objections are made prior to the confirmation).

¹¹ H. Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, 33 *Columbia FDI Perspectives* (Vale Columbia Center on Sustainable International Investment 2010) arguing that party-appointed arbitrators should not be allowed unless their roles are fully disclosed and accepted; Bishop and Reed, *supra* n. 6, at 396-397.

2. STUDY OF THE VIEWS OF COUNSEL AND ARBITRATORS

2.1 *The Purpose of the Study*

Unless the parties have agreed on a sole arbitrator or have assigned the right to appoint all arbitrators on the tribunal to an arbitral institution, one of the first questions the party will encounter at the beginning of the arbitration proceedings is how the parties should appoint their arbitrators.¹² Several rules, cases and commentators have considered the general principles of the impartiality of the arbitrators and the right to appoint an arbitrator, but the specific issue of *ex parte* interviews of party-appointed arbitrator candidates is relatively unregulated, and the case law is very limited.¹³ There have been some discussions among American commentators but almost none by their Swedish counterparts.¹⁴

The purpose of this study is to identify if there is a common practice and perception among counsel and arbitrators regarding *ex parte* interviews of party-appointed arbitrator candidates, in the common law system of the United States and the civil law system of Sweden respectively. The results of the study might be of interest and value a) when interpreting an international standard for appropriate *ex parte* interviews, and b) to create awareness of what differences and similarities counsel and arbitrators can expect when participating in international arbitration proceedings.

¹² Selection of party-appointed arbitrators by each party unilaterally is the preferred method, rather than using arbitral institutions or specific agreement of the parties, according to the vast majority (76%) of the respondents in Queen Mary, University of London, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* 5 (hereinafter ‘Queen Mary Survey’).

¹³ See e.g. Chartered Institute of Arbitrators, *Practice Guideline 16: The Interviewing of Prospective Arbitrators* 2.1 (2011) (hereinafter ‘CI Arb Practice Guidelines’).

¹⁴ See e.g. Linskog, *supra* n. 7, at 13 § 4.1.5.

The countries in this study are chosen because they represent two different legal systems and cultures, while also both having a long tradition of international arbitration.¹⁵

2.2 Research Method and Data Collection

A survey has been conducted to gather data about the perspective of counsel and arbitrators on six issues related to *ex parte* interviews: frequency of interviews, regulations, interview procedure, interview topics, appointment of chairman, and appropriateness. In order to obtain results that represent the arbitration profession in each country as accurately as possible, the following target group was used: Swedish and American lawyers who have served as arbitrators and/or lead counsel in arbitration proceedings.¹⁶

For the purpose of this study, ‘interview’ was defined to respondents as ‘either a regular meeting or a longer video/phone conference, but not short standard questions regarding availability and information for conflict checks etc.’ and an ‘*ex parte* interview’ was defined as an interview without both parties present’. The survey also clarified to respondents that the questions related to a party’s interview with an arbitrator candidate before the appointment of arbitrator.

¹⁵ See e.g. Proposition 1998/99:35 *Ny lag om skiljeförfarande* 32-39 [Swedish government bill]; S. Certilman, *A Brief History of Arbitration in the United States*, 3(1) N.Y. Disp. Resol. Law. 10 (2010).

¹⁶ Associate lawyers assisting arbitrators or counsel were explicitly excluded in order to only obtain data from those who are responsible for decisions in these proceedings.

Invitations to complete the survey were sent out via individual emails to approximately 400 arbitrators and lead counsel in Sweden and the United States in accordance with the defined target group. The selection of recipients was based on a) Chambers and Partners' ranking of individual arbitration practitioners, b) individuals listed as senior arbitration practitioners at law firms on Chambers and Partners' list of firms recognized within the field, and c) individuals listed as senior arbitration practitioners at the largest law firms in each country.¹⁷

The survey was conducted in February and March 2013, and 93 lawyers completed the survey, of which 57 were Swedish lawyers and 36 were American lawyers. Of these 93 lawyers, 18 indicated that they mainly serve as arbitrators, 46 as counsel and 29 as both arbitrators and counsel. In addition to answering specific questions, of which some were multiple-choice and others asked for a narrative answer, each respondent had the opportunity to provide additional comments after the questions to make his or her answers as accurate as possible. The multiple-choice questions that allowed more than one answer are indicated below. All respondents answered all questions. The responses were collected confidentially. The results are presented and discussed under each subsection below.¹⁸

¹⁷ Chambers and Partners, *Europe Guide 2012* and *USA Guide 2012*, <http://www.chambersandpartners.com> (accessed February 9, 2013).

¹⁸ Two common challenges when using surveys in this type of research are the risk that someone else than the intended respondent completes the survey, and that respondents' answers deviate from the entire researched population. The former risk is probably very limited in this study since the survey was only accessible via individual emails to intended respondents and there where no financial compensation for completing the survey. The latter issue is harder to evaluate, but the goal has been to use a number of respondents that is large enough to give a fair indication of the views of the relatively small population of potential respondents in each country, particularly in regard to the Swedish arbitration practice.

3. ANALYSIS OF THE RESULTS AND DISCUSSION

3.1 Frequency

Given that *ex parte* interviews of party-appointed arbitrators have often been described as an American concept, the first question addressed is how often the respondents had experienced such interviews in relation to their total number of cases.

Q1. How often have you experienced <i>ex parte</i> interviews of arbitrator candidates?		
	Swedish lawyers	American lawyers
Never	58%	0%
1-25%	33%	42%
26-50%	9%	19%
51-75%	0%	11%
76-99%	0%	14%
Always	0%	14%

The result clearly confirms that *ex parte* interviews are significantly more common in the United States. The vast majority of the Swedish respondents had rarely or never experienced such interviews and no one had experienced them in more than 50% of their cases. On the contrary, all American respondents had experienced at least one case with *ex parte* interviews. Although all American respondents in the study had some experience of such interviews, the result does not indicate that they are a standard procedure in most proceedings and less than one-third answered that they had experienced them in more than 75% of their cases.

3.2 Rules and Guidelines

Several arbitration rules, national statutes, model rules and guidelines state the general principles regarding the impartiality of the arbitrators, *ex parte* communication and the right to appoint arbitrators. For instance, UNCITRAL Model Law on International Arbitration (2006) Article 24(3) requires that all statements and information to the arbitral tribunal by one party shall be communicated with the other party, and Articles 10-11 enable the parties to determine the number of arbitrators as well as how they should be appointed. As mentioned, similar rules can be found in most institutional rules and national arbitration legislation.¹⁹

Furthermore, IBA has published guidelines on conflicts of interest in order to assist the international arbitration community.²⁰ In addition to general principles, these guidelines also include a list of examples of different situations presenting conflicts of interest requiring disclosure.²¹ The examples in the IBA guidelines primarily focus on the previous and current relationship between the arbitrator and the parties, rather than communication between them in the current arbitration. Part II § 4.5.1, however, addresses the issue of *ex parte* communication at the appointment phase of the proceedings, and will be discussed below.

¹⁹ See n. 1 and 5 *supra*. Several ethical rules for lawyers state a general prohibition of *ex parte* communication between a lawyer and judge during the proceeding. See e.g. ABA Model Rules of Professional Conduct (2012), Rule 3.5(b).

²⁰ IBA Guidelines on Conflicts of Interest in International Arbitration (2004) pp. 3-4.

²¹ IBA Guidelines on Conflicts of Interest in International Arbitration (2004) p. 17. Its examples are divided under four categories: Non-Waivable Red List, Waivable Red List, Orange List and Green List.

Beside the general regulation on the impartiality and appointment of arbitrators, there are a few rules and guidelines that address the specific issue of *ex parte* interviews of party-appointed arbitrator candidates. Some of the more well-known specific rules will be examined in the following. Like many other guidelines and arbitration rules, none of them are binding without an agreement between the parties.

The ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) Canon III(B)(1) states that *ex parte* communication between an arbitrator or an arbitrator candidate and a party is in general prohibited unless the parties agree otherwise. However, the arbitrator candidate may respond to inquiries from a party regarding the suitability and availability of the arbitrator for the appointment, and may in such dialog receive information from a party about the general nature of the dispute as long as the arbitrator does not permit a discussion of the merits of the case.

The AAA International Arbitration Rules Art. 7(2) explicitly prohibits *ex parte* communication relating to the case with any arbitrator or candidate, except general questions to determine the qualifications, availability or independence of a candidate.²²

The most extensive and detailed guidelines are the CIArb Practice Guidelines,²³ which discuss and recommend how to conduct an appropriate *ex parte* interview. In contrast to the abovementioned rules and guidelines, CIArb Practice Guidelines address many procedural aspects of an interview, including the location, notes, reimbursement, etc. It should, however, be noted that these guidelines do not represent an international minimum standard for when

²² The rule provides an exception for discussion of potential chairman, see subsection 3.5 *infra*.

²³ CIArb Practice Guidelines, *supra* n. 13.

challenge is an appropriate remedy upon non-compliance. The aim is rather expressed as a basis for discussion and a framework that arbitrators or parties can refer to.²⁴

Given the limited number of rules and guidelines regarding the scope of *ex parte* interviews, the next question in the survey was therefore which rules and guidelines the respondents had applied or referred to, if any.

Q2. Have you applied or referred to any of these rules/guidelines regarding ex parte interviews?²⁵		
	Swedish lawyers	American lawyers
ABA's Code of Ethics for Arbitrators in Commercial Disputes	7%	58%
AAA's International Arbitration Rules	2%	47%
Chartered Institute of Arbitrators' (CIArb) Practice Guidelines	9%	17%
National law	16%	25%
Other	4%	17%
None	70%	31%

The results show that very few Swedish respondents had referred to any rules or guidelines that specifically regulate *ex parte* interviews. Most Swedish respondents had either never referred to any rules or guidelines on this issue, or just to the general provisions in national legislation.

Considering that *ex parte* interviews are not very common in Sweden and that there are no

²⁴ M. Moses, *The Principles and Practice of International Commercial Arbitration* 135 (2nd ed., 2012); CIArb Practice Guidelines, *supra* n. 13, at 3.1.

²⁵ More than one answer was available. Results indicate how many percent of the respondents from each country selected a certain option. This and subsequent questions were answered by all respondents, regardless of how often they have experienced *ex parte* interviews. Results therefore show how frequently these rules and guidelines are used in relation to the target group of the survey, not only among those who often have experienced such interviews.

regulations regarding this specific situation, it is not surprising that most Swedish respondents have not referred to any of the American or British guidelines, but it indicates that these might not necessarily be established internationally.

About half of the American respondents had used ABA's ethical rules and/or AAA's international arbitration rules in this regard, whereas notably fewer had referred to or applied the CIArb Practice Guidelines or national law. One potential explanation of this difference could simply be a difference in the level of awareness. ABA and AAA are large and well-established American organizations, while CIArb is a London-based organization and their guidelines are much newer. However, that few respondents have used or referred to the CIArb Practice Guidelines does not necessarily mean that they would not be aware of them. Another explanation could be that they believe in a different governing standard than the one expressed in the guidelines, something that will be studied and discussed below. Though significantly fewer than their Swedish counterparts, it is furthermore interesting to notice that as many as about one-third of the American respondents answered that they have not referred or applied any rules or guidelines regarding *ex parte* interviews.

Some respondents mentioned that they have used Article 5.1 of IBA Rules of Ethics for International Arbitrators (1987). This rule is similar to the mentioned ABA Code of Ethics for Arbitrators in Commercial Disputes, but IBA's rule also emphasizes that a prospective arbitrator should make sufficient enquiries to inform himself if he is competent, available and impartial for the case. The arbitrator is consequently not just permitted to answer such questions under this provision, but is also required to initiate the contact if necessary.

Q3. What is your view on rules and guidelines regarding <i>ex parte</i> interviews?		
	Swedish lawyers	American lawyers
More regulation is needed	39%	28%
Current regulation is sufficient	37%	53%
There is no need for regulation at all	25%	19%

Considering that very few Swedish but most American respondents answered that they have applied or referred to a specific regulation regarding *ex parte* interviews, it was interesting to see how divided all respondents were when it comes to the question whether more regulation is needed, current regulation is sufficient or there is no need for regulation at all. A clear majority from each country deemed that regulation was needed regarding this issue. Most American respondents considered the current level of regulation to be sufficient, while the Swedish group of respondents were almost equally divided when it comes to keeping the current regulation or introducing more regulation.

Many respondents who wanted to see more rules and guidelines pointed out that specific regulations in this area would be very helpful as a reference even if they would not be binding for the parties unless they explicitly refer to them. Although the arbitrator is best positioned to make the decision whether an *ex parte* communication is appropriate in the particular situation, it is more likely that he makes a good decision if he has some established guidelines to refer to, especially if he encounters a new situation for the first time. Some respondents also emphasize that guidelines would be very helpful for counsel as well.

Most of the respondents who were against regulation of *ex parte* interviews commented that it is hard to find one set of rules that applies in all situations and that the parties should not be bound by rules that are not suitable to their situation. Some respondents also said that arbitration as a method of dispute resolution will be less attractive if it becomes over-regulated.

Although the questionnaire in the study did not distinguish between rules that are binding without parties' consent – such as domestic legislation and the New York Convention – and guidelines that are only binding if the parties so agree, this distinction is of some importance. Based on the comments provided by some of those who answered that no regulation is needed, it is not clear whether they opposed *any* regulation in this area or rather were opposed to *more* rules that are binding without the parties' consent. Party autonomy would hardly be diminished by the existence of international guidelines that are not binding unless the parties so decide. It is likely that some of the respondents were only against more binding rules in international arbitration, and the number of respondents who supported regulation on this area is even higher.

Some conclusions can be drawn from the above. The majority of respondents from both countries think that some regulation or guidelines are important, but not necessarily binding rules. The American respondents use current guidelines to a much greater extent and are also more – but not completely – satisfied with the current level of regulation than the Swedish respondents. The views expressed by the Swedish respondents in this regard indicate a need for international guidelines, especially in international settings where *ex parte* interviews have become more common but parties sometimes have different views on the appropriate standard, which might

differ from the American view. Several American respondents also highlight that the current guidelines and rules are not sufficient for international arbitration proceedings.

There seems to be a clear demand for non-binding international regulation as such, but the current rules and guidelines fall short in primarily two aspects: they are not specific enough on critical issues and some of them are based on domestic views rather than international practice. Most rules are very general, while for instance the CIArb Practice Guidelines are detailed regarding some procedural issues but do not give much guidance on more difficult issues, such as to what extent a party and the arbitrator candidate may discuss potential chairmen. What we need is consequently not more general rules, but specific guidelines that are drafted from an international perspective. Not all parties and arbitrators might choose to apply them, but such international guidelines would still serve as the important reference that respondents have asked for and increase the awareness and transparency regarding differences between parties.²⁶ To be able to draft such guidelines, the next challenge is to try to identify a common standard regarding how the *ex parte* interviews properly should be conducted as well as what topics that properly fall within the scope of the interview.

²⁶ The need for clear international guidelines is not new and has been argued by practitioners from several countries, including the United States and Sweden. *See e.g.* Lundblad, *supra* n. 7, at 48-49; Bishop and Reed, *supra* n. 6, at 397, who also emphasize that it is important that such guidelines should be specific and clear rather than broad and general.

3.3 *The Interview Procedure*

It can be argued that the more extensive an *ex parte* interview or communication has been, the more likely it is that the bounds of propriety have been exceeded. An extreme illustration of this is the case in which the ICC Court refused to confirm a party-appointed arbitrator who spent approximately 50-60 hours with the nominating party reviewing the case before appointment.²⁷

The CI Arb Practice Guidelines were created as an attempt to provide arbitrators and parties from all jurisdictions with practice guidelines on how an appropriate *ex parte* interview can be conducted, with a particular focus on the proceeding and the setting of the interview.²⁸ These guidelines have, however, been criticized for being too prescriptive on practical details and too vague on the more important substance of the interview.²⁹

Although the CI Arb Practice Guidelines probably are the most detailed guidelines on this particular topic, this study indicated a very limited use among the respondents in both countries.³⁰ This does not necessarily mean that there is no interest in or need for guidelines in this area. It could just be the case that potential users are not satisfied with the content of the guidelines, or are unfamiliar with them. The current version of the guidelines was released in

²⁷ D. Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6 ICC Int'l Ct. Arb. Bull. 4, 7-8 (Nov. 1995). Cf. *Employers Ins. of Wausau v. National Union Fire Ins. Co.*, 933 F.2d 1481, 1489 (9th Cir. 1991) where an interview or consultation lasting only a couple of hours was held not to establish partiality.

²⁸ See subsection 3.2 and n. 23-24 *supra*; H. Dundas, *The Chartered Institute Good Practice Guidelines: Guideline on the Interviewing of Prospective Arbitrators*, 2(2) Disp. Resol. Int'l 276 (September 2008).

²⁹ M. Friedman, *Regulating Judgment: A Comment on the Chartered Institute of Arbitrators Guidelines on the Interviewing of Prospective Arbitrators*, 2(2) Disp. Resol. Int'l 288 (September 2008).

³⁰ See subsection 3.2 *supra*.

2011 and is consequently fairly new. The next question to the respondents was therefore whether they agreed with the different interview requirements discussed in the CI Arb Practice Guidelines.

Q4. Which of the following do you view as a requirement for an <i>ex parte</i> interview?³¹		
	Swedish lawyers	American lawyers
Interview to be held at the arbitrator's office or other 'neutral' location	47%	31%
Tape recorded or detailed notes	28%	0%
Interview should follow certain guidelines or rules, which have been agreed prior to the interview	40%	47%
The arbitrator should not be compensated for his time	56%	69%
The arbitrator should not be compensated for his travel expenses and related costs	28%	33%
There should be no meal or drinks at the interview	25%	17%
An agenda for the interview should be decided prior to the interview	46%	17%
None of the above	23%	22%

The results show that only one requirement – that the arbitrator should not be compensated for his time – is favored by a majority of respondents from both countries, but even that requirement seems to be contested by a relatively large group of respondents. Having a set agenda prior to the interview and taking notes during the interview is important to more Swedish than American respondents, but other than that, the differences between the countries appear to be less significant here than in most other questions in this study.

³¹ More than one answer was available. Results indicate how many percent of the respondents from each country selected a certain option.

Several respondents from both countries expressed that although the setting and procedure are not irrelevant, the substance of the interview is the essence of impartiality and independence judgments. Many respondents said that they avoid most of these procedural questions if the interview is conducted over phone, which rarely incurs costs and normally leads to a shorter and more concise interview. It was also suggested that, unless the parties have agreed otherwise, it is up to the arbitrator candidate to set the conditions and methods for the interview and a party should only engage in *ex parte* interviews under such circumstances that it can accept to disclose to the other party if receiving a question later on.

A closely related question is whether the opposing party is entitled to be informed about the interview and to what extent.

Q5. In your opinion, which of the following should the opposing party have right to receive after an <i>ex parte</i> interview?		
	Swedish lawyers	American lawyers
Detailed notes from the interview	28%	0%
Notification about the existence of the interview	35%	28%
Neither	37%	72%

The American respondents expressed clearly that the opposing party had no general right to be informed after an *ex parte* interview has taken place or receive any details from the interview. Several American respondents further added that disclosure only serves a purpose in those situations where the interview has crossed the line and touched any inappropriate issues, or if the

opposing party asks. The majority of the Swedish respondents stated, however, that the opposing party at least had a right to be notified about the existence of the interview, while almost one-third also thought detailed notes from the interview would be appropriate. Some Swedish respondents also emphasized the importance of transparency in all *ex parte* communication.

These notably different views on disclosure of information are not surprising when considering the different roles party-appointed arbitrators traditionally have played in each country. Where the party-appointed arbitrator historically has served as an advocate on the tribunal for the appointing party, a more extensive and confidential *ex parte* communication can be justified by similar rationales as the communication between a client and an attorney, which normally is protected by confidentiality or privilege. However, where the party-appointed arbitrator is viewed as a neutral judge, it is expected to limit and disclose *ex parte* communication similar to the communication between attorneys and court judges.³²

Another potential reason why American and Swedish respondents show a different disclosure practice may be differences in expectations. As showed above, Swedish respondents expressed that *ex parte* interviews are a rare exception that may motivate a greater need for disclosure than for the American respondents who presume that such interviews routinely take place.

The differences between countries have also been indicated by the Queen Mary Survey, which showed that American lawyers tend to be more reluctant than lawyers from other regions to impose a duty to disclose information about the existence of an *ex parte* interview.³³

³² See section 1 and n. 6-7 *supra*.

³³ Queen Mary Survey, *supra* n. 12, at 8, which showed a clear but not as significant difference as this study.

In summary, the study regarding the interview procedure shows that the differences between the countries are much more evident when it comes to disclosure of the interview to the opposing party than other procedural requirements relating to the interview. Disclosure may be unnecessary if all parties have the same view on *ex parte* interviews and to what extent they exist and are appropriate. However, one thing that the present study shows is that there are significant differences in several aspects regarding how *ex parte* interviews properly should be conducted. Given these differences, disclosure might be even more important than common guidelines or rules. As emphasized above, parties have great latitude to make decisions regarding their procedure and even set aside many rules. But to the extent there are no binding rules or clear international practice regarding a procedural issue, one can hardly conclude that the parties have agreed to such procedure or not objected to it if there are not at least some level of transparency between the parties and the arbitrators. That being said, the more detailed disclosure is not necessarily for the better. Depending on the preferences of the parties and their views on the role of the party-appointed arbitrators, they should have the opportunity to decide what information about the *ex parte* communication to disclose. Finally, the study also shows that it can be questioned if the CIArb Practice Guidelines really represent an international standard and serves their purpose, considering that most respondents did not support most of the procedural requirements set forth in those guidelines.

3.4 Interview Topics

The IBA Guidelines on Conflicts of Interest in International Arbitration include in the ‘Green List’ of situations in which there are no conflicts of interest, the situation when an ‘arbitrator has had an initial contact with the appointing party ... prior to appointment, if this contact is limited to the arbitrator’s availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute’.³⁴ Several other rules, guidelines and statements by commentators use similar language where they state that *ex parte* interviews are appropriate only when there is no discussion of the ‘merits’ or the ‘substance’ of the case.³⁵ Although many arbitrators and counsel probably would agree with this, the question is what the ‘merits’ or the ‘substance’ actually means. Is it everything that is not merely procedural or limited to questions of law? Does it only relate to the parties’ positions and the alleged facts in the case, or are the arbitrator’s previous experiences or expressed views also questions related to the ‘substance’? The next question was therefore designed to identify what respondents found inappropriate at an interview.

³⁴ IBA Guidelines on Conflicts of Interest in International Arbitration (2004), Part II, § 4.5.1; *see* subsection 3.2 and n. 20-21 *supra*.

³⁵ *See e.g.* Born, *International Arbitration: Law and Practice*, *supra* n. 1 at 135 n. 39 with references to institutional rules; Bishop and Reed, *supra* n. 6, at 424-425.

Q6. In your opinion, which of the following subjects are inappropriate for discussion with an arbitrator candidate at an interview?³⁶		
	Swedish lawyers	American lawyers
The candidate’s position on legal questions relevant to the case	82%	78%
Prior views expressed on a particular legal issue (e.g. as an expert or arbitrator)	56%	36%
Attitude to particular procedure (e.g. evidence by video conference)	33%	31%
Experience and knowledge of a particular legal topic, technical environment or industry	9%	17%
Specific facts or circumstances related to the dispute	91%	67%
The positions or arguments of the parties	86%	69%
None of the above is inappropriate	5%	8%

The results show that a clear majority of respondents from both countries find it appropriate to discuss the arbitrator candidates’ experiences and knowledge of a certain area, but not his position on legal questions relevant to the case. However, while almost all Swedish respondents found it inappropriate to discuss specific facts related to the dispute or to the parties’ positions and arguments, about one-third of the American respondents did not have any problems with such discussions. Respondents seemed to be most uncertain regarding two questions – whether it is appropriate to discuss the arbitrator candidate’s previously expressed views on a particular legal issue and his attitude to particular procedural questions. An interesting observation is that many respondents – similar to commentators and guidelines – commented that the line should be

³⁶ More than one answer was available. Results indicate how many percent of the respondents from each country selected a certain option.

drawn between general questions related to the candidate's qualifications and specific questions related to the merits of the dispute, but they apparently did not agree on exactly what this meant.

The appropriateness of the first four interview topics was also included in the Queen Mary Survey and the results were almost identical.³⁷ This indicates that there is a common acceptance of questions about the candidate's expertise but not his legal position on the case, while there is much more uncertainty regarding the appropriateness of questions about previously expressed views and procedural preferences of the candidates.

Based on existing rules and their view of general practice in international arbitration, Bishop and Reed have tried to outline a more detailed list of topics that are appropriate to discuss during an *ex parte* interview.³⁸ This study and the Queen Mary Survey support most of their listed topics, but three topics are less obvious than the others: published articles, previous positions taken by the arbitrator candidate as an expert, and previous decisions rendered as an arbitrator. None of these are probably controversial for the purpose of determining potential conflicts of interest or the candidate's competence and suitability as an arbitrator in the new arbitration. However, if a party uses previous awards, publications or expert statements to initiate a discussion with the candidate to obtain further information than publically available about the candidate's position on critical legal issues, then we are getting closer to the substance of the case and what most respondents in this and the Queen Mary Survey viewed as inappropriate. This illustrates the gray zone between parties' interest in appointing arbitrators with predispositions in favor of their case

³⁷ Queen Mary Survey, *supra* n. 12, at 7.

³⁸ Bishop and Reed, *supra* n. 6, at 424.

but who at the same time could not be considered biased.³⁹ It also shows that although a list of appropriate and inappropriate topics can be helpful, one cannot always follow such a list strictly, since one also has to consider the underlying purpose of the questions and how they are addressed.

The conclusions that can be drawn from this is that, even though many arbitrators and counsel agree that general questions about the arbitrator candidate's experience and knowledge are appropriate and that specific questions related to the substance of the case are inappropriate, in reality it is not entirely clear how to keep these two concepts apart. This is particularly evident when it comes to discussions regarding the candidate's previously expressed views on legal issues related to the case. If the line for instance should be drawn between publicly and non-publicly expressed views, it would on the one hand reduce the risk that the appointing party got an advantage by knowing more about the arbitrator's legal predisposition than the other party could access through public sources. However, if such division would bar you from asking a candidate about previous arbitral awards or other non-public references, it would on the other hand make it harder to obtain information about a practitioner's suitability for a case than a professor or judge who has his views and expertise published. Finally, the study also indicates that Swedish respondents to a greater extent found it inappropriate to discuss specific facts related to the dispute and to the parties' positions than the American respondents did.

³⁹ See section 1 and n. 8 *supra*.

3.5 Discussion of Appointment of Chairman

It is common in arbitrations that parties appoint one arbitrator each and that the party-appointed arbitrators then appoint a third arbitrator as the chairman of the tribunal. Since it is very unusual that the two party-appointed arbitrators render an award with the chairman dissenting,⁴⁰ the chairman's view will generally be decisive. The appointment of chairman is undoubtedly a key moment in the proceeding and it can be expected that all parties have an interest in the selection of the chairman. Since the arbitration is based on a contractual relationship between the parties,⁴¹ they are free to jointly appoint a chairman of their choice, as long as it is within the basic requirements stated by applicable law and rules.⁴² However, in cases where the chairman is not appointed by an institution, parties have either directly or through applicable rules delegated the appointment of the chairman to the party-appointed arbitrators as mentioned. The question is then if, and to what extent, it is appropriate for parties to discuss the selection of chairman at an *ex parte* interview with a party-appointed arbitrator candidate.

⁴⁰ E. Schčäfer, Herman Verbist and Christophe Imhoos, *ICC Arbitration In Practice*, 120 (Kluwer Law International 2005); Lundblad, *supra* n. 7, at 47.

⁴¹ J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, 77 (Kluwer Law International 2003).

⁴² See e.g. Swedish Arbitration Act (1999:116) § 7, which for instance requires that an arbitrator must be a person who possesses full legal capacity in regard to his actions and his property.

Q7. Do you consider it appropriate to discuss the selection of chair at an interview?		
	Swedish lawyers	American lawyers
Yes, including potential names	33%	50%
Yes, but only a chair's desired qualifications in general	19%	17%
No, but it is appropriate to discuss it after the party's appointment of arbitrator	39%	31%
No, never	9%	3%

The results show that only a few respondents deem it inappropriate to have such discussions at all, but the views diverge on whether it is appropriate to discuss potential names or if it should be limited to the general profile of a chairman during a pre-appointment interview, or if such discussions should not take place prior to the party-appointed arbitrators' appointment. It is consequently not only the content of such discussions that is relevant, but also the timing. The American respondents were slightly more favorable towards discussing names at the pre-appointment interview, but the differences were clearly more significant within each group than between the countries. A similar but not identical question was asked to the respondents of the Queen Mary Survey, and about three-quarters of them believed that a party-appointed arbitrator should be allowed to exchange views with his appointing party regarding the selection of chairman.⁴³

Some Swedish respondents in the study stated that parties should be allowed to express suggestions regarding the potential chairman, but if they decide to do so, the arbitrators should

⁴³ Queen Mary Survey, *supra* n. 12, at 9. It is, however, not clear if those respondents answered the question from a post-appointment perspective, and if their views might be different depending on whether the party-appointed arbitrator has been appointed or not.

invite the other party to do the same.⁴⁴ Other Swedish respondents argued that the parties should either be allowed to discuss names and qualifications, or that they should not be allowed to discuss this at all, since generalized discussions are either not useful or are merely discussions of specific chairmen disguised in general terms. Some American respondents held the view that discussions about potential chairmen are appropriate as long as the discussion is about the chairman candidate's ability to function as a chairman rather than his predisposition on the merits.⁴⁵

The views expressed by the respondents regarding the selection of chairman are in line with several established rules and guidelines to the extent that at least some communication between the party and the party-appointed arbitrator is allowed, but the question is to what extent and when. IBA's guidelines list discussions about 'names of possible candidates for a chairperson' to be an example of appropriate discussions, also prior to the appointment.⁴⁶ ABA's ethical rules state 'consult[ation] with the party who appointed the arbitrator concerning the choice of the third arbitrator' as one exception where *ex parte* interviews are appropriate,⁴⁷ but the language of the rule appears to only address discussions after the appointment. AAA's international rules excepts 'discuss[ion] [of] the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection' from the general prohibition of *ex parte* interviews.⁴⁸ IBA's ethical rules use a slightly different language by declaring that 'it is acceptable for [the party-nominated arbitrator] ... to obtain the views of the

⁴⁴ This procedure is also suggested by Heuman, *supra* n. 8, at 216.

⁴⁵ *Cf.* Lowenfeld, *supra* n. 8, at 64, who also emphasize the importance of such communication does not continue after the tribunal is fully formed.

⁴⁶ IBA Guidelines on Conflicts of Interest in International Arbitration (2004), Part II, § 4.5.1; *see* subsection 3.2 and n. 20-21 *supra*.

⁴⁷ ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) Canon III(B)(2).

⁴⁸ AAA International Arbitration Rules (2009) Art. 7(2).

party who nominated him as to the acceptability of candidates considered'.⁴⁹ While most rules allow 'discussions', the latter indicates rather that the party might object to suggestions that it does not deem acceptable, than actually propose the names that the party-appointed arbitrators should consider. It is, however, not clear whether this rule permits such discussion both prior to and after the appointment.

Since it ultimately is up to the parties and not the party-appointed arbitrators to agree on the applicable rules and procedure of the selection of arbitrators, it can be argued that there is no reason to limit the role of the parties in this process to passively wait until the party-appointed arbitrator asks for objections on a proposed candidate.⁵⁰ On the other hand, however, it has been claimed that it would affect the arbitrator's impartiality and independence negatively if the parties not only review the party-appointed arbitrator's candidates, but also present their own suggestions.⁵¹

Both these viewpoints hold merits and illustrate again the underlying conflicts of interest between the parties' right to appoint arbitrators and the importance of impartial and independent arbitrators.⁵² To uphold both these interests, transparency and respect for the parties' agreements seem to be essential, especially in international proceedings where there is a lack of established standards to fall back on.⁵³ The core of the problem is probably not that a party participates in the process of finding a qualified chairman, but if the selection process is unequal. An example is if

⁴⁹ IBA Rules of Ethics for International Arbitrators (1987) Article 5.2.

⁵⁰ Cf. T. Webster, *Party Control in International Arbitration*, 19 Arb. Int'l 119, 132 (2003); Cf. also n. 41 *supra*.

⁵¹ Lundblad, *supra* n. 7, at 48-49.

⁵² Cf. section 1 at n. 5 *supra*.

⁵³ Cf. P. Thomas, *Ex Parte Communications with ICC (And Other International) Arbitrators: Drawing Ethical Lines*, ICC Charlottesville Conference, 5 (June 2005), suggesting *Miranda* caution 'anything you say can and will be used against you'.

one party-appointed arbitrator – without the other party’s and arbitrator’s knowledge – allows ‘his party’ to freely select chairman candidates with a predisposition for his case, while the other party-appointed arbitrator solely suggests chairman candidates which he believes to be neutral and the party who nominated him had none or very limited opportunities to object.⁵⁴ Such a situation is not desirable and it can be questioned if it meets the basic arbitration principle of due process. It can furthermore be discussed whether the selection in such a case would be in accordance with the parties’ agreement if they had agreed on letting the party-appointed arbitrators appoint the chairman, but one of the parties got the opportunity to propose candidates without the other party’s knowledge or equal right to participate in the procedure.

Given the parties’ ultimate right to appoint arbitrators and the abovementioned considerable support for at least some discussion of the chairman selection between the party and the party-appointed arbitrator, it is hard to see why such involvement should be prohibited in general. However, the importance of due process and the uncertainty among the respondents as to when and how involvement is appropriate calls for transparency. The party-appointed arbitrator might for instance want to disclose to the other arbitrator and party that a particular proposal for chairman is made by the party, so that the other party and party-appointed arbitrator have sufficient information when making their decision, and are given the opportunity to present their own proposals.⁵⁵

The conclusions regarding *ex parte* communication about a potential chairman are that, while several rules allow such communication and a clear majority of the respondents in the study

⁵⁴ Cf. Heuman, *supra* n. 8, at 217.

⁵⁵ Lindskog, *supra* n. 7, at 13 § 5.1.3.

consider it appropriate in general, the views are divided regarding what can be discussed during the pre-appointment interview and whether such discussions should wait until after the appointment of the party-appointed arbitrator. An argument for not making a distinction between pre- and post-appointment discussions is that the selection of chairman is a critical decision for both the proceeding and the outcome of the arbitration, and the party has an interest in making sure that the arbitrator it appoints has a reasonable view on who might be suitable to chair the proceeding. A counter-argument is that the parties have agreed to delegate the selection of chairman to the party-appointed arbitrators, and it would undermine the party-appointed arbitrator's impartiality if the candidate, in order to be appointed, has to more or less commit to advocate for a certain chairman candidate that the party believes to be the most predisposed to its case. Given the divided views among respondents from both countries and the lack of clear rules or guidelines, there are reasons for the parties and party-appointed arbitrators to disclose the parties' involvement in the selection to the opposing party to ensure the integrity of the process.

3.6 Appropriateness

The final question of the study summarized several of the issues discussed by asking the respondents whether they consider *ex parte* interviews with arbitrator candidates appropriate.

Q8. Do you consider <i>ex parte</i> interviews with arbitrator candidates appropriate?		
	Swedish lawyers	American lawyers
Always	4%	36%
Sometimes	39%	58%
Rarely	42%	6%
Never	16%	0%

While few Swedish and no American respondents considered *ex parte* interviews to be inappropriate as such, there is a clear difference between the countries when it comes to the question whether such interviews are always, sometimes or rarely appropriate. Most Swedish respondents deemed them to be sometimes or only rarely appropriate, whereas almost all American respondents answered always or sometimes. These results are in line with the Queen Mary Survey, which also indicates that most lawyers considered that *ex parte* interviews could be appropriate, but not always.⁵⁶

Several Swedish respondents expressed that it is not that *ex parte* interviews are *per se* appropriate or inappropriate – it rather depends on how the interviews are conducted and what the discussions are about. Many Swedish respondents stressed that interviews definitely can be appropriate, but the involved parties must be very careful not to discuss the merits or the facts of the case. Some respondents said that pre-appointment interviews are more important when you consider appointing an arbitrator that you have been recommended but who is not as well-known

⁵⁶ Queen Mary Survey, *supra* n. 12, at 6, whose respondents were from all over the world and 46% answered yes, 40% sometimes, 12% no and 2% unsure. Respondents could not choose the option ‘rarely’.

or with whom you do not have any personal experience.⁵⁷ Interviews may consequently facilitate for a younger arbitrator to get in to the market.

Some American respondents believed that concerns related to *ex parte* interviews are inflated, because even if party-appointed arbitrators sometimes have a predisposition for one party, they are incentivized to do a good job to get future appointments and therefore will not let ‘their’ party improperly affect the judgment. Other respondents disagreed and shared their experiences that interviews often go beyond appropriate topics, and *ex parte* interviews should therefore be limited to three questions: potential conflicts, availability and the relationships to the parties. According to the respondents, the last question might include a very brief description of the case, but not a discussion of different views. Another American respondent had a very similar view but added as a fourth question the expertise and general experience of the candidate. In line with what has previously been discussed, some American respondents also expressed the view that the question should not be whether interviews are appropriate as such, but rather what the appropriate scope of the interviews is and that it would be useful if more arbitrators referred to guidelines and rules on this issue.

Given that most Swedish respondents never or rarely have experienced *ex parte* interviews, it is not unexpected that they have a more conservative view on the appropriateness than the American respondents, who have all experienced *ex parte* interviews.⁵⁸ If you have never experienced a certain practice, you will probably answer the question of appropriateness based on your presumption of how it is put into practice, which might differ from those who actually

⁵⁷ See also Lowenfeld, *supra* n. 8, at 62.

⁵⁸ See subsection 3.1 *supra*.

have experienced it. A partial explanation of the differences could therefore be that Swedish and American respondents answered the appropriateness question based on different views on how *ex parte* interviews are conducted and what topics that are discussed. Although the limited experiences of *ex parte* interviews among the Swedish respondents, the results from this question show that the vast majority is not opposed to such interviews, but neither do they believe them always to be appropriate.

The final part of this study provides convincing support for *ex parte* interviews as such, but not under all circumstances, which is in line with the view of the majority on previous questions in the study. Given that many American respondents and almost all Swedish respondents did not consider *ex parte* interviews always to be appropriate, there are reasons for parties and arbitrators to be aware of this and take measures – for instance by referring to guidelines, or the arbitrator clarifying the conditions for the interview – to avoid exceeding the line of appropriateness.

4. CONCLUSIONS

Ex parte interviews of party-appointed arbitrator candidates balance between two fundamental interests in international arbitration – the parties’ right to select arbitrators and the importance of impartial and independent arbitrators. By examining the views of counsel and arbitrators from Sweden and the United States as examples of two different legal systems and traditions, this study has concluded that there appears to be a lack of international consensus regarding the circumstances under which *ex parte* interviews are appropriate. Some of the more significant

differences were that the Americans were much more reluctant to disclose the existence of *ex parte* interviews and found discussions of the parties' positions and facts related to the dispute less problematic.

The study indicates that these differences can probably at least be partially explained by different practices and views on the role of the party-appointed arbitrator. Although the traditional American view of the party-appointed arbitrator as the party's advocate on the tribunal is no longer a presumption in domestic American arbitration, more American counsel and arbitrators than their Swedish counterparts still seem to accept more extensive *ex parte* communication between the party and the party-appointed arbitrator.

The problem is, however, not the *ex parte* interview as such. Some questions related to the arbitrator's availability and impartiality need to be asked on the pre-appointment stage in all arbitrations, and asking such general questions in a structured way will hardly undermine the underlying interest of impartiality and independence. Instead, a problem arises if one party goes beyond those general questions by getting involved in detailed discussions about the merits of the case and decides what chairman proposals its party-appointed arbitrator should present, while the other party believes that it is only appropriate to ask formal questions and not engage in discussions about the choice of chairman unless the arbitrators raise the question.

The parties have great latitude to agree on what the appropriate standard for *ex parte* communication should be. However, since parties and arbitrators in international arbitrations come from different legal systems and cultures, much of the problem appears to originate in

differing expectations on the appropriate standard. The study explores two elements to avoid such undesired situations – transparency and non-mandatory rules.

Many potential problems can be solved if the parties and arbitrators do not assume that everyone has the same view on *ex parte* interviews and arbitrator appointment, but instead discuss or at least disclose to the others what role it believes that the party-appointed arbitrator should have, and what kinds of communication that are appropriate. If all parties involved act transparently and agree on more extensive *ex parte* communications, there is no reason why they should be bound by very restrictive rules as long as they comply with basic requirements, such as due process.

Transparency is indeed desirable, but regulations play an important role in situations where parties cannot, or have not, addressed or disclosed the issue. A claimant might for instance not want to disclose that it has contacted an arbitrator candidate if the claimant intends to seek interim measures and believes that the defendant would obstruct such measures upon gaining knowledge of an upcoming arbitration. Detailed legislation or other mandatory rules would, however, only serve the interests of clarification and predictability at the cost of some of the distinct characteristics of international commercial arbitration, such as procedural flexibility and the parties' right to decide over the proceeding. The study instead shows that non-mandatory rules and guidelines can have a very central function as references of proper conduct, especially in the international context where the parties might otherwise rely on diverse domestic standards. Current regulation gives guidance on some issues, but what the counsel and arbitrators in this

study would like to see is more specific guidelines that outline examples of both content and form of appropriate *ex parte* interviews from an international perspective.

Appointment of arbitrators is one of the first steps in every arbitration proceeding and *ex parte* interviews of party-appointed arbitrator candidates regularly take place in international arbitration as a part of this. It appears to be clear that such communication can be appropriate, but not under all circumstances. A clear standard is not only relevant for the parties in order to avoid challenges, but also for the confidence in the fairness and due process of international arbitration in general. Until such a standard has been identified and established, counsel and arbitrators would be wise not to engage in *ex parte* interviews in a way that they are not comfortable with disclosing to the opposing party afterwards.