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ARTICLE 12—REPRESENTATION

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ARTICLE 12

Any party may be represented in the arbitration. The names, addresses, and telephone numbers of representatives shall be communicated in writing to the other parties and to the administrator. Once the tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal.

I. Introduction

Although some jurisdictions have traditionally placed restrictions on who can appear on behalf of the parties in an arbitration proceeding conducted on its territory,¹ there is a clear trend in international arbitration towards allowing the parties freely to choose a representative as they deem appropriate, whether that be a local lawyer or foreign counsel, or someone not qualified as a lawyer at all.² As with most institutional arbitration rules, Article 12 thus provides that ‘a party may be represented in the arbitration’.

12.01

¹ GB Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International, The Hague, 2001) 514.

² M Polkinghorne, ‘More Changes in Singapore: Appearance Rights of Foreign Counsel’, 22(1) *J Intl Arb* 75 (2005); M Polkinghorne and D Fitzgerald, ‘Arbitration in Southeast Asia: Hong Kong, Singapore and Thailand Compared’, 18(1) *J Intl Arb* 101 (2001).

II. Textual commentary

12.02 Article 12 does not provide express guidance as to who may or may not represent a party in arbitration. It does provide, however, that each party has the right to representation and, given the liberal approach underlying modern doctrine and the ICDR Rules, this provision should be interpreted to provide each party with the freedom to select a representative of its choosing, whether that is a lawyer or a non-lawyer. This would be in line with the rules of all major arbitration institutions, which uniformly allow lawyers and non-lawyers alike to represent parties in an arbitration, irrespective of their nationality or connection to a local bar.³

12.03 There is, however, the question of what, exactly, constitutes a ‘representative’. Some international arbitration rules distinguish between party representatives, on the one hand, and legal advisers, who assist the party or its representatives, on the other; other rules appear to conflate the two. For example, Article 21(4) of the ICC Rules specifically distinguishes ‘authorized representatives’ from ‘advisers’, specifying that parties may ‘appear ... through duly authorized representatives’, and ‘may be assisted by advisers’.⁴ The 2010 UNCITRAL Rules incorporate this distinction (as did the previous version) and provide a procedure for what is required to prove that a representative is duly authorized to represent a party, which did not exist in the previous version of the rule. Specifically, Article 5 of the 2010 UNCITRAL Rules provides:

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

12.04 The LCIA Rules take a different approach, muddying any supposed distinction between party representatives and legal advisers: ‘Any party may be represented by legal practitioners or any other representative.’⁵ Such conflation may be a result of the drafters finding that this is an instance of a ‘distinction without a difference’

³ J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) para 21-73, citing, in France, see Cour de Cassation, 1re Ch Civ, 19 June 1979, *SARL Primor v Société d'Exploitation Industrielle de Bétaigne* [1979] Rev Arb 487; see also DW Rivkin, ‘Restriction on Foreign Counsel in International Arbitrations’, XVI Ybk Comm Arb 402 (1991). The survey identified, in the early 1990s, Singapore, Turkey, Japan, Portugal, and Yugoslavia as arbitration venues that do not allow for foreign legal counsels. In almost all of these countries, the practice or law has changed.

⁴ ICC Rules, Art 21(4) (emphasis added).

⁵ LCIA Rules, Art 18.1.

between party representatives and legal advisers for the purpose of the rule. For example, under each of the rule formulations discussed here, both party representatives and legal advisers have authority to act on the party's behalf vis-à-vis the tribunal and the opposing party or parties. Both Article 18 of the LCIA Rules discussed above and Article 12 of the ICDR Rules, more than any of the others discussed above, seem to incorporate this practical view. Indeed, although Article 12 is silent on the matter, there is nothing in the ICDR Rules precluding a party having both.

If a party chooses to be represented in the arbitration, it is as a matter of course required to notify the other parties and the administrator, and to communicate the contact details of its representative. Once those details are communicated, service on the address of the representative is valid service on the party.⁶ Article 12 also clarifies that, once the tribunal is duly constituted, the parties' representatives can communicate directly with the tribunal, rather than route communication through the administrator. In practice, parties will copy the administrator in all correspondence.

12.05

⁶ See ICDR Rules, Art 18.

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