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"The parties' right to appoint 'their' arbitrator in an international arbitration proceeding"

1997 words

Essay for the 2013 Laureate of the Academy Prize

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International Arbitration finds both its legal foundation and its philosophical justification in the exercise of party autonomy. As a general principle, such autonomy can only be limited by the application of *jus cogens*. Thus, unless one finds justification within the realm of transnational public policy to restrict the parties' decision-making power over the arbitral process, one cannot successfully argue against the existence of an actual right to make use of the system of party-appointments. For clarity, the classic system where each party appoints an arbitrator, and either both arbitrators jointly or an independent third-party appoint the chair will herein be referred to simply as the "party-appointed system" or "party-appointment".

The issue becomes rather one-dimensional when viewed from the perspective of a mutually consensual agreement between two parties. As with many other aspects of the arbitral process, parties are free to agree upon the mode of the Tribunal's constitution. One would be hard-pressed to find any justification in the *jus cogens* to limit such a right in the context of party-appointment. Therefore, we can easily identify a bilateral right, arising directly from party autonomy, to make use of such a system.

Where the issue becomes interesting, however, is in both in (i) understanding if there exists a unilateral right to party-appointed arbitrators when one of the parties is opposed to such a practice and, if so, defining what the nature of such a right is, and (ii) understanding the convenience of choosing this mode of tribunal constitution.

In order to address the first of the aforementioned inquiries, we must differentiate the cases in which the parties have at their disposal an arbitrator selection framework from those fringe situations in which they don't.

Where one is made available, the mode of the Tribunal's constitution is reliant on the framework within which the parties are arbitrating. Depending on the case, the applicable treaty, the *lex arbitri*, the selected institutional rules or the arbitration agreement itself should establish the default method of arbitrator nomination. If the appropriate framework directs parties to a valid but differing mode of arbitrator selection – such as would happen by adopting ICDR rules – then, of course, one could not claim any rights to the party-appointment system. We can, therefore, conclude that if a right to party-appointment exists, it most certainly is not so fundamental as to be unwaivable, and thus, is controlled by the exercise of party autonomy.

If, conversely, the applicable framework directs parties to the classic party-appointment approach, we are brought to our first important question: Is the right to unilaterally appoint arbitrators a right exercisable individually and independently by each party or must it be jointly exercised by all litigants at the moment of the Tribunal's constitution? Translating the question into a practical problem, what should happen if one of the parties simply refuses to participate in the nomination process? Would this mean that an "uneven" tribunal would be constituted, with one party appointing "their" arbitrator while the nominating authority appoints both the chair and an arbitrator on the recalcitrant party's behalf?

I would posit that this situation merits closer consideration. Albeit for completely distinct reasons, in the famous Dutco case (*B.M.K.I et Siemens v. Dutco)* the French Cour de cassation set aside an arbitral award which arose from a similarly unevenly constituted tribunal. The Dutco award came out of a multiparty arbitration where the claimant nominated an arbitrator

and the multiple respondents, with differing interests, could not agree upon whom to nominate, and only jointly appointed an arbitrator under protest when ordered to do so by the ICC.

The main reasoning behind Dutco was that the principle of equality in designation of arbitrators is an expression of public policy and, as such, unwaivable prior to the dispute. As such, the court's holding, however controversial among scholars, is not directly relevant to our question. Nonetheless, it strikes me as noteworthy that the Tribunal constituted under Dutco was as essentially unequally constituted as would be a hypothetical tribunal constituted under a party-appointment framework in which one of the parties refrains from making a nomination. However different the reasons in each case, objectively speaking, both Tribunals suffer from the same anomaly: only one of the parties actually nominated an arbitrator. While the underlying causes for this inequality can be very easily differentiated, the inequality itself cannot.

Understanding the outcome of our hypothetical is essential to understand if there exists a unilateral right to use the party-appointment within the proper framework. If our hypothetical "uneven" Tribunal follows the fate of Dutco, we must understand that requirement of equality in Tribunal composition mandates that party-appointment framework be confirmed at the moment of the Tribunal's constitution, and as a consequence, we must infer that there is only a right when it is bilateral. If, however, our "uneven" hypothetical is a validly constituted tribunal, we are free to conclude that, when exercised within a proper framework, party-appointment is a unilaterally exercisable right.

The latter case proves true. While there are good arguments to both sides of the issue – which, sadly, the constraints of this work do not allow us to address in depth – the better view

is certainly that, even though the structural imbalance of our hypothetical is on par with the Dutco Tribunal, the differing causes of that imbalance lead to different outcomes.

There are many arguments to support this view: under Dutco, the respondent did not, in any way, contribute to the inequality of the Tribunal; recognizing our hypothetical Tribunal's invalidity would contravene the principle of *venire contra factum proprium* as it would allow one party to, unilaterally, interfere with the other party's nomination rights; equal treatment of the parties was not violated, as both had the same opportunity to participate in the constitution of the Tribunal; the opposing theory would undermine *pacta sunt servanda*, as the agreed framework of appointment would not bind a recalcitrant party who refuses to nominate; and Dutco cannot be invoked as it very clearly applies to a different set of facts and, even so, establishes that the of the principle of equality in the appointment process is only unwaivable prior to the dispute.

Despite all of the preceding reasons, it is my understanding that, at least for non-ICSID arbitration, the most powerful argument in support of the hypothetical Tribunal's validity lies within the New York Convention. If, because of the recalcitrant party's refusal to nominate an arbitrator, another mode of Tribunal constitution is adopted (even if aiming at the well intentioned goal of protecting party equality within the confines of the panel), any award would arguably be rendered unenforceable under V (1) of the Convention. The inverse would not be true, as the "uneven" Tribunal, under the facts of the hypothesis, would not be in violation of any express provision of the treaty.

Therefore, as previously stated, if we find validity in the "uneven" hypothetical, we must conclude that, within the appropriate frameworks, unless complicated by the occurrence of multiparty arbitration within certain jurisdictions, there actually exists a unilateral right to party-appointment.

The next matter to consider is whether this party-appointment right is a fundamental one. In order to do so, I propose that we investigate if parties may evoke a right to the party-appointment system if no framework is available to them. Consider, if you will, the case of a poorly drafted international commercial agreement, with an *ad-hoc* arbitration clause submitting disputes to a three-person Tribunal, indicating a nominating authority, but saying nothing about tribunal constitution or applicable rules, and stating that "the seat shall be a neutral third country". To be sure, this is a fringe scenario, but one which should help us grasp the true nature of party-appointment.

As prevalent and widespread as is the party-appointed system nowadays, even if parties do not insert themselves within a proper framework (as would happen in our example), it can fairly be argued in most cases that keeping with the tradition of unilateral appointments of arbitrators by each of the parties is within the reasonable expectations they had upon agreeing to arbitrate. In other words, the party-appointment system is so embedded within modern arbitral culture and practice that it would not be improper to find, given the proper circumstances, that parties expected to be able to nominate 'their' arbitrators.

That being said, by subtracting an express agreement as to the mode of constitution, this scenario removes the hurdle imposed by the New York Convention in our previous discussion. As a consequence, it would be much harder to justify an unequal constitution of the Tribunal if one party objected to participating in the nomination process. Barring a clear showing of parties' expectations (which would mean that party-appointment was an implicit term within the agreement and, thus, would place the discussion within a Tribunal constitution framework, discussed above), it would be very hard to argue that, in this scenario, the "uneven" Tribunal is compatible with the transnational public policy of equal treatment of the parties. Most courts would probably find nothing wrong with the party's refusal to unilaterally nominate an arbitrator when that party did not agree to any party-

appointment framework. Certainly many more national courts would refuse enforcement under this scenario than under the previous hypothetical.

Therefore, we may conclude that there exists no fundamental right to party-appointment outside of a pre-existing framework which leads to that system.

Having established the existence and scope to party-appointment, our second inquiry is whether parties should, in fact, exercise that right. After all, the mere existence of a right does not mean that one should necessarily pursue it. For instance, parties could fashion a system of multitier private arbitral appeal, but doing so is almost never wise.

The debate within the arbitral world is well known, with two camps fiercely debating the moral validity of the party-appointment system.

Not to split the baby, but neither side is completely wrong in their assessment.

It is a legitimate goal for a party to pursue victory in arbitration. Arbitrator selection is a unilateral act available to the party. Therefore, it is logical for any rational party to exercise this unilateral act in furtherance of their legitimate goal of winning.

Even if we ignore the outliers who engage in truly spurious behavior, we cannot ignore the direct consequences of the rational behavior of gaming the system. If one party is better at it than the other, she will gain tactical advantage within the proceedings. If both parties are equally efficacious, they will pay for three arbitrators but have only one true decision-maker.

There are other virtues to the proposal of not using party-appointments. For one, if a trusted third party appointed all arbitrators, the Tribunal could be precisely tailored into a heterogeneous composition which collectivity is better suited to understand the dispute.

Nonetheless, if other systems are better, and parties are certainly free to choose how to constitute Tribunals, why has is there such an overwhelming preference for party-appointment within the arbitral community?

This could be a function of inertia bias. It could be due to the parties being stuck in a mutually uncooperative mode of the Prisoners' Dilemma. Or it could be due to the fact that, as sophisticated and rational players in the market, parties seek their best interests, which are well served by the current model.

The fact is that the arbitration market, where sufficiently developed, is self-regulating. Incompetent and unethical arbitrators eventually do not get repeat appointments. Clearly biased arbitrators lose credibility in the Tribunal. Inefficient modes of Tribunal constitution will eventually be substituted by better ones.

Therefore, it is logical to assume that if party-appointment was prejudicial, parties would have exercised their choice to elect other systems.

Party-appointment, while relevant, is not a fundamental element of international arbitration. Party autonomy, on the other hand, is the foundation upon which arbitration stands. Therefore, it is perhaps better left to the parties, through exercise of that autonomy, to decide for themselves which mode of tribunal constitution better serves their interests as rational players of the arbitration market.