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

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THE PARTIES' RIGHT TO APPOINT 'THEIR' ARBITRATOR IN AN INTERNATIONAL ARBITRATION PROCEEDING

International arbitration, commercial as well as investment-treaty based, is the preferred alternative dispute resolution method in international business community. One of the main reasons for its popularity is definitely the flexibility of the arbitral proceedings, which is based on the principle of party autonomy. The principle of party autonomy is in turn based on the assumption that the parties are knowledgeable and informed, and that they use the principle reasonably and responsibly. This principle allows parties to choose not only the law applicable to their relationship and the disputes arising therefrom, but also the rules governing the arbitral proceedings, as well as to initiate the arbitral proceedings and to conduct them, *inter alia* by appointing the arbitrator(s). The latter constitutes one of the main advantages of the arbitral proceedings. This right is also acknowledged and applied by all international arbitral institutions.

The parties select the arbitrators in their arbitration agreement or by a separate agreement, in which they agree on the number and the appointment procedure. Most commonly the arbitral tribunal in international arbitral proceedings, whether *ad hoc* or institutional, consists of three arbitrators, of which each party appoints one and these arbitrators choose the third one, *i.e.* the chairman of the arbitral tribunal. In the alternative, other methods of appointment of the arbitrators include the appointment of the arbitrators from a list or through a third party or an international institution selected by the parties. In the absence of an agreement between the parties regarding the

appointment of the arbitrators, the arbitral tribunal can be appointed also by the international arbitration institution or by a court as the appointing authority. Despite this option it is highly recommended that the parties and/or the arbitrators appointed by them make every effort to agree on the constitution of the tribunal in order to ensure a good start for the arbitral procedure.

Based on the aforementioned, a crucial question arises, *i.e.* whether the arbitrators appointed by the parties can be considered as 'their' arbitrators. This essay will provide elements of analysis of this issue from the perspective of the parties as well as from the perspective of the arbitrators appointed by the parties.

As the appointment by the parties of an arbitrator of their choice is one of the main advantages of the arbitral proceedings, the parties tend to have greater confidence in an arbitral proceeding in which they are involved not only as disputants but also as the creators of the tribunal called upon to decide on their dispute. It is therefore natural for the parties to want to take part in the formation of the tribunal in order to control its level of competence and experience. This gives the parties a certain level of comfort with regard to the initiated arbitral proceeding and provides the necessary consent, as there is no arbitration without the parties' consent to arbitrate.

It is often emphasized that the arbitration can only be as good as the arbitrators involved. Parties to international arbitration therefore normally exercise thorough due diligence in selecting the arbitrators, which enables them to appoint persons with relevant expertise and experience as well as sympathy for their understanding of the

case at hand. It can accordingly be assumed that the party is going to appoint the arbitrator that is expected to defend its position with regard to the main issues of the particular case. In fact, parties in practice often (at least try to) use the arbitrator as their representative within the tribunal. In this respect it can be said that the parties may consider the arbitrator appointed by them as 'their' arbitrator.

Consequently, there are examples in practice, especially in *ad hoc* arbitrations, that the party-appointed arbitrators (attempt to) act as the 'advocates' and represent the interest of the parties who have appointed them. But while the responsibilities of the arbitrator appointed by the party may legitimately be considered to include ensuring that the party's written and oral submissions are taken into account in the tribunal's deliberations, experience shows that, a party-appointed arbitrator's acting as the advocate of the party within the tribunal is self-defeating and mostly results in decrease of such arbitrator's influence on the deliberation and decision process of the tribunal. Therefore, even from the party's standpoint it is not in its interest to select and pressure an arbitrator into such actions. Even more so if the party-appointed arbitrator were to breach his obligation of confidentiality. Moreover, the rules of most international arbitral institutions explicitly require independence and impartiality of their arbitrators and sanction any breaches thereof, as explained in detail below.

The appointment of arbitrators by the parties can therefore be seen as a kind of 'moral hazard', to use Jan Paulsson's terms, especially for the party-appointed arbitrators. This is why the arbitrators in the international arbitration are subject to stringent requirements of independence and impartiality, which have a substantial roles in the

process of selection and any subsequent challenges of arbitrators as well as ultimately in the process of annulment or enforcement of the arbitral award.

The independence of the arbitrator means that there are no unacceptable external relationships or connections between the arbitrator and a party or its counsel, such as financial, professional, employment or personal relations, etc. Impartiality means that an arbitrator is subjectively unbiased and not predisposed towards one of the parties of the dispute (absence of any favoritism). As it is sometimes said that impartiality is needed to ensure that justice is done, the independence is needed to ensure that justice is seen to be done. The main purpose of the impartiality requirement is to ensure that the arbitration is unbiased and the main purpose of the independence requirement is to ensure that there are no connections, relations or dealings between an arbitrator and the parties that would compromise the arbitrator's objectiveness, requiring the absence of any factual connections or relations which are likely to result in subjective bias. It is thus evident that both requirements in fact address different aspects of the same inquiry and are to be considered together. As for instance in the UNCITRAL Model Law, which uses both terms, but applies the same result even if only one of these requirements is not fulfilled.

Arbitrators are subject to a number of mechanisms aimed at verifying any potential for bias, including the duty to disclose any relevant information that might cast doubt on their ability to render an impartial and independent decision, the ability to challenge an arbitrator and, with regard to investment disputes also the fact that most awards become

public. These mechanisms can be considered as guarantees of party autonomy by ensuring that the arbitrators act independently and impartially.

Under most national and institutional rules one party's choice of an arbitrator can be rejected or subsequently challenged in either national courts or by way of an institutional challenge because of the lack of the requisite independence or impartiality. Equally, an arbitrator's lack of independence or impartiality can constitute grounds for annulment or denial of recognition of an award under the New York Convention (and other international arbitration conventions) and national law. These results apply notwithstanding the general deference to party autonomy in the selection of the arbitral tribunal.

The reason for overriding the parties' freedom to select 'their' arbitrators in this manner is to ensure the integrity of the arbitral process, as international arbitration is an adjudicatory process, in which arbitrators render a binding decision governing the parties' legal rights, subject to minimal appellate review. Given this, it is essential that the arbitrators be independent and impartial and that the parties' selections of arbitrators who fail to satisfy this basic standard be capable of being overridden.

It is thus clear that in accordance with the consensual nature of international arbitration the parties should be free to agree how their disputes are resolved and subject only to such safeguards as are necessary in the public interest. The parties' involvement in the appointment of arbitrators ensures that the decision-making process is not perceived as something wholly external to the parties.

Participation in the appointment of the arbitrator may play a specific role in international investment arbitration with regard to the appointment of the arbitrators by the States involved in the disputes. A State's right to appoint an arbitrator and to have a voice in the selection of the tribunal's leader is particularly meaningful given the State's limited influence on the institution of arbitral proceedings by investors following the entry into force of the investment protection treaty within the framework of which the State generally gives its advance consent to such "arbitration without privity." In this respect the possible politicization of the appointment process could result in the distancing of the community of arbitrators from the community of users, adversely affecting the perceived legitimacy of the arbitral proceedings.

Finally, it should be emphasized anew that the principle of party autonomy including the parties' right to appoint 'their' arbitrator in international arbitration is based on the assumption of a responsible use thereof. Even if a party were to pressure the appointed arbitrator into acting as 'its' arbitrator in the sense of its representative within the tribunal, such actions are in most cases self-defeating and result in the decrease of such arbitrator's influence on the deliberation and decision-making process of the tribunal.

However, it is also essential for the arbitrators to be independent and impartial regardless of their appointment by the parties or any other appointing authority, given their fundamental duty to arrive at a reasoned decision after giving the parties an equal and full opportunity to present their case. The requirement of impartiality and independence is also widely emphasized and included in the rules and codes of most of

the international arbitral institutions including UNCITRAL, ICC, ICSID, LCIA and many others.

The duties of independence and impartiality are mandatory for arbitrators and failure to honor them can result in the annulment of the arbitral award before the national court or in case of the international investment arbitration before the ICSID by its Committee. Accordingly it should also be noted that arbitrator's lack of independence and impartiality constitutes grounds for denial of recognition of foreign arbitral award and thus disables enforcement of the award in foreign country.

Although there have been some suggestions in the past to abandon the practice of unilateral appointments by the parties with recommendations that arbitrators should be appointed jointly by the parties or selected by a neutral body or simply just from a pre-existing list of qualified arbitrators, I cannot agree with such an interference in the party autonomy and the parties' right to appoint the arbitrator. Especially, as the appointment of an arbitrator of their choice is one of the main advantages of the arbitral proceedings and the parties tend to have greater confidence in an arbitral proceeding in which they are involved not only as disputants but also as the creators of the tribunal called upon to decide on their dispute.