



**International Academy for Arbitration Law**

**Laureate of the Academy Prize**

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

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## I. INTRODUCTION

The predominant international practice, as reflected in the most widely used rules of international arbitration, allows for the parties' choice to appoint *ex parte* arbitrators. Some exemplifications are found in UNCITRAL Model Law on Commercial International Arbitration (1985) Article 11(3)(a), ICC Arbitration Rules (2012) Article 12(4), LCIA Arbitration Rules (1998) Article 7(1), and AAA Commercial Arbitration Rules (2010) R-12(b). Certain rules provide for party-appointed arbitrators as *default* mechanism, as in ICSID Convention (1965) Article 37(2)(b) and UNCITRAL Arbitration Rules (2010) Article 9(1). This means that, if three arbitrators are to be appointed, each party generally shall nominate one of the three.

We hold that the parties' right to appoint "their" arbitrator is a basic principle of arbitration and that its wise application is desirable for the sake of the legitimacy of international arbitration as alternative means of dispute resolution. This essay will attempt to describe the functions of party-appointed arbitrators (Section II) and their requirements of impartiality and independence (Section III). It also will describe the role of dissenting opinions issued by party-nominated arbitrators in order to demonstrate that this practice does not diminish their neutrality (Section IV). Then, this article will try to offer a reading of pre-selection interviews of potential party-appointed arbitrators in a way that is consistent with their requirements of impartiality and independence (Section V). Finally, concluding remarks are formulated (Section VI).

## II. THE FUNCTIONS OF PARTY-APPOINTED ARBITRATORS

We identify four *specific* tasks of party-nominated arbitrators. First, the presence of party-appointed arbitrators gives confidence to counsels who appointed them and through counsels to the parties in the dispute. As the nomination of an arbitrator is based on *intuitus personae*, the parties *do* have the right to appoint a person that they perceive would be suitable to handle the adjudication of their case. We would

say that this function relates to the "human" side of confidence, resulting in a sort of sympathetic interaction between the litigant, the counsel and the co-arbitrator.

Second, the role of co-arbitrators is to frame the story of the dispute before the presiding arbitrator. In this regard, party-appointed arbitrators have a fundamental role to ensure to nominating parties that their case is fairly heard and fully discussed and considered. Consequently, the parties will not later complain that their right of defense has been limited, if "their" arbitrator has brought their arguments to the attention and analysis of the Tribunal.

Third, *ex parte* arbitrators are selected in order to convey into the case their expertise and specialized skills. A person with a specific legal competence and consolidated experience on certain industries, subject-matters and disputes is likely to reassure the parties about his or her ability to understand the case and to persuade the whole Tribunal. We would define this function as the "technical" side of confidence, meaning that expertise, rather than human qualities, is at issue in this respect.

Fourth, party-appointed arbitrators serve as "translators" of legal institutions from a domestic system and culture to the arena of international arbitration. Sometimes, it may even be a matter of language, as in the case of *faux amis* words, which are recalled by Professor Lowenfeld. This is a function really peculiar to international arbitration, in contrast to domestic arbitration. Thus, it is fundamental in order that the presiding arbitrator and the other co-arbitrator truly understand a party's perspective.

### III. THE REQUIREMENTS OF PARTY-APPOINTED ARBITRATORS

*Ex multis*, UNCITRAL Model Law Article 12(1), UNCITRAL Rules Articles 11 and 12(1), ICC Rules Article 11(1), and LCIA Rules Article 5(2) provide that *all* arbitrators, including party-appointed arbitrators, must be and remain independent and impartial of the parties involved in the proceeding. ICSID Convention Article 14(1) refers to arbitrators' "high moral character", which conveys a notion of fairness. Impartiality, independence and fairness may be resumed by the notion of neutrality.

The belief that party-nominated arbitrators are non-neutral is not appropriate. The sole fact that a party nominated a co-arbitrator does not determine *per se* that such adjudicator is untrustworthy. We will

demonstrate that co-arbitrators usually do not act as the "advocate" of the appointing party, because such a conduct would not be favorable to that party, nor to co-arbitrators themselves.

First, where party-appointed arbitrators are too eager in defending their nominating party, they inevitably lose credibility in the eyes of the chairman. Instead, the president is likely to rely on the analysis and the advice of the party-appointed arbitrator that tries to sort out the facts and the law in a fair manner. For instance, in extreme cases, when a co-arbitrator communicates with the appointing party in violation of the principle of secrecy of proceedings, then the outcome is likely to be a majority award to the exclusion of the partisan arbitrator, who will be left in minority.

Second, an unfair bias towards a party is not convenient for co-arbitrators, because this would not corroborate the possibility to be later re-appointed. In the business community a shared perception is rising that arbitrators who are unlikely to preserve their intellectual integrity, conscience and legal professionalism will not "help" a party to win the case. Moreover, a notion of intellectual independence would militate against the circumstance that party-appointment dictates the outcome of the proceeding.

We are convinced that *ex parte* appointments in international arbitration proceedings do not and *should not* undermine arbitrators' morality and professionalism. Indeed, we reject the concept that party-appointed arbitrators are not required to be impartial, even though unfortunately the law of some important U.S. states provides for their non-neutrality. On the contrary, we hold that there are not differentiated standards of impartiality between the chairman and the co-arbitrators. In ICSID arbitration, the fact that all members of the Tribunal sign the same oath may confirm our position. As a matter of fact, only when *all* arbitrators consider their role as that of judge and not advocate, they come to function as a unit. In our opinion, a common high standard of adjudicators' impartiality is a pre-condition of the principle of full collegiality in the activity of arbitral panels. It is in *such* respect that the parties would become *mutually* confident (to quote Professor Paulsson) with regard to the Tribunal as a whole.

#### IV. DISSENTING OPINIONS BY (PARTY-APPOINTED) ARBITRATORS

The fact that dissenting opinions often come from arbitrators appointed by the party who entirely or partially lost the case (as underlined by Professor van den Berg) does not represent a clue of their non-

neutrality. In international arbitration, the possibility to issue a dissenting opinion is not co-essential to the role of party-nominated arbitrators. Indeed, each member of the panel may avail himself or herself of this faculty. In ICSID arbitration, an important example is the famous dissent by Professor Weil, the president of the Tribunal in *Tokios Tokelès v Ukraine*, which confirms that the justification for dissenting opinions is not the adjudicators' interested bias towards one party. Otherwise, why international courts or common law courts would allow for such a practice? Indeed, in our opinion, to maintain that dissenting opinions are the consequence of non-neutrality of the arbitrators who issued them (for instance in ICSID proceedings) is tantamount to affirm that judges sitting in the International Court of Justice or in the European Court of Human Rights are not impartial, as well.

Bearing in mind our analysis of the requirements of party-appointed arbitrators (cf. Section III of this essay), it is evident that when they render a divergent opinion from the majority of the panel, their purpose is and *should be* to show their *intellectual* dissent on a legal issue, not to favor or praise the party that nominated them. To this extent, dissenting opinions serve the mission to contribute to the development of the law, notably in the field of investment arbitration. Jurists in common law jurisdictions use to say that "dissenting opinions may one day become majority ones". Where the law on a particular issue is not settled or there are conflicting views and exigencies in the legal community that may result in a change in the predominant approach, dissenting opinions represent the most suitable tool to enhance a process of updating transition (I refer again to the ICSID case law on the jurisdictional issue of corporate nationality, where we assisted to "split" decisions: apart from *Tokios*, cf. *Agua del Tunari, S.A. v Republic of Bolivia*; *TSA Spectrum de Argentina S.A. v Argentine Republic*). Last, the presence of a dissenting opinion - whether or not being likely to undermine the legitimacy of the majority award, which however depends on its intellectual credibility, *not* on its degree of support to the losing party - is going to foster a mechanism of "fair competition" within the divided Tribunal that will benefit the quality of the majority decision or award. Indeed, the majority arbitrators will be led to phrase in a more careful and reasonable manner the most critical aspects of their reasoning, because they are aware that their decision

is going to be challenged by a concomitant dissent that they may read in draft (which in the case of ICSID arbitration might provide the basis for a subsequent annulment proceeding).

## V. PRE-SELECTION INTERVIEWS OF PARTY-NOMINATED ARBITRATORS

Counsels' practice to interview potential party-appointed arbitrators must be carefully performed. On one side, interviews ought to serve the purpose to personally know the arbitrator, which is sometimes required by clients. This is the right moment for a counsel to get acquainted with the potential co-arbitrator, with regard to both sides of "human" and "technical" confidence.

On the other side, interviews should not be the occasion to "test" a prospective arbitrator, to address questions related to the case, or to ask for predictions on the outcome of the merit of the dispute. Since arbitrators should not seem to be applying for a job and to "sell" themselves, they should not act in order that the disputant party relies on their partisanship in the process. Again, this is clearly a matter of impartiality and independence.

In our opinion, pre-selection interviews should be allowed and are even desirable, but they should not tend to obtain the active support by a potential party-nominated arbitrator. Accordingly, the prospective co-arbitrator should not be expected to specifically reply to detailed questions related to the case, give advice to the party or its counsel, and should not be asked to do so. On the contrary, issues related to the review of arbitrators' previous awards (and separate opinions), professional and scholarly articles and lectures, and participation in law associations are not really going to affect their requirement of impartiality.

## VI. CONCLUDING REMARKS

In this essay, we have tried to defend the parties' right to appoint "their" arbitrator as a basic principle of arbitration law. We underlined their specific functions (see Section II), notably their task to guarantee to the appointing parties a fair hearing and full discussion of their case. To this extent, *ex parte* arbitrators appear as the symbol of due process of law and of the right to be heard in international arbitration. Indeed, they warrant that the arbitration proceedings fully consist with the adversarial

principle ("a process *of* the parties *for* the parties"). Moreover, party-nominated arbitrators offer substantial benefits to transnational or cross-cultural arbitration, where their function is to "translate" to the benefit of the other members of the Tribunal institutions of national legal systems that otherwise would remain as not correctly understood.

However, the "right" to nominate co-arbitrators does not create an obligation of the latter to "fight" for the appointing side. We share the view that *all* arbitrators must comply with a high standard of impartiality. Therefore, the "proximity" of *ex parte* arbitrators to the appointing party (which, as above explained, is directly functional to that party's right to be heard) should not result in "moral hazard". This is a fundamental requirement, which would strengthen the legitimacy and acceptance of arbitral awards, in an era of international arbitration when *legalization* and *institutionalization*, rather than compromises or parties' opportunistic calculations, seem to be required.