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"The Parties' Right to Appoint 'their' Arbitrator in an International Arbitration Proceeding"

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Introduction

The purpose of the present essay is to analyse whether the parties to an international arbitration proceeding have an essential right to appoint their arbitrators. The issue will be addressed by asking three questions: i) What is the task of the party appointed arbitrator?, ii) Do party appointed arbitrators fulfill their task? and iii) Is there a better method to constitute the arbitral tribunal?

What is the task of the party appointed arbitrator?

Some scholars have debated on whether there exists a right of the parties to appoint an arbitrator or not. Under most arbitration rules, each party actually has the right to appoint an arbitrator and, usually, both co-arbitrators jointly appoint the chairman. However, when the arbitration acts and rules allow the parties to do this, they are protecting the underlying right of the parties to have an impartial tribunal. That is to say, that the party appointment is only a means to have a neutral tribunal. Therefore, the relevant question should –instead- be whether appointing an arbitrator is essential to achieve impartiality.

Granting the parties the opportunity to participate in the formation of the panel legitimates the award and is what makes arbitration a better dispute resolution method than others. By the same token, when one party intends to exercise this right in excess, the challenge is a tool to stop it, because as all rights, it is not absolute and it finds a limit when collides with the other party's right to impartiality.

Generally each party chooses the most suitable arbitrator for the matter, but they might also consider who is more likely to render a favorable award, by taking into

account different things, such as his or her influence. One can expect this to happen and it is almost unavoidable.

Regardless of what the parties expect, the arbitrator's task is to resolve the dispute submitted by the parties, what requires them to be and remain independent and impartial through out the proceeding.

Although the parties may expect the party apointed arbitratos to benefit each of them, this should not happen since the party appointed arbitrators do not work for the appointing party, rather they are members of the panel and all of them must play the same role. Their duty is towards both parties, irrespective of who appointed each of them.

Nonetheless, impartiality is of great concern and there is discussion on whether, in practice, arbitrators comply with this task or not. The main positions can be presented as follows: some consider that an arbitrator can remain independent from the appointing party; whereas others consider that they cannot be absolutely independent because somehow they feel pressure to benefit, or at least help, the appointing party.

It is not reasonable to affirm that arbitrators always feel pressure. They are not going to receive anything for benefiting the appointing party; instead, they can loose their reputation for future cases, having more to win by maintaining the independence. For instance, the arbitrator's chances to be appointed again by the appointing party in case of voting in its favour are the same chances as to be appointed by the other party if demonstrating diligence and impartiality.

Arbitrators are frequently very careful with their attitudes and try to build and conserve their reputation, which takes a lot of time. In this connection, since building a

good reputation is so hard, most arbitrators would most probably not risk to ruin it that easily. For example, they would not dare to submit an autonomy and independence statement when planning to help one of the parties.

Where allowed, dissenting opinions are generally issued by the arbitrator appointed by the loosing party and are deemed to demonstrate the existence of bias. Nonetheless this is not necessarily like that, since even an objective arbitrator may disagree with the majority and it may be preferable to include the dissenting opinion in the award in order to demonstrate that all the arguments were considered. In fact, most state judicial systems allow dissenting opinions by judges and they are not considered as something negative by itself.

Do party appointed arbitrators fulfill their task?

It is naturally difficult to know how arbitrators feel about this matter, because they are not likely to admit whether they are influenced or not. However, some scholars who act as arbitrators have expressed that such influence exists, which reveals that even though it is not a rule, in a few cases, they might be, and therefore the issue needs to be addressed.

Bias depends on many factors, such as whether a particular case represents a relevant part of the arbitrator's cases, income, among other things. It must be noted that bias is not necessarily intentional or conscious and one could be biased even when trying hard not to be. Thus, the most complicated situation is when the pressure makes the arbitrator really believe in the appointing party's case. The fact that some arbitrators also act as counsel makes it complicated, since it is not easy to be a counsel in the morning and an arbitrator in the afternoon.

It is worth highlighting that bias does not only mean voting in favour of the appointing party, rather it can manifest in some other fashion, such as when the arbitrator exchanges communications or meets in private with one party, circumstances which in the whole represent a detriment to the counterparty, who did not have the same opportunities.

Arbitrators may sometimes consider they have to represent the interest of the appointing party and make sure that its submissions are taken into account during the deliberations. When an arbitrator tries to be more diligent with the appointing party, he might perfectly study its arguments, check twice all the relevant evidence and therefore have a deeper approach to the case. Nevertheless, the outcome of the case could result even against the appointing party because if the other members of the panel realise this, they might not take his or her opinion seriously and his influence in the decision-making process will decrease considerably.

Some claim that party appointed arbitrators may have a positive impact for the proceedings, because if both do the same the opposite positions will show clearer, making it easier to compare. However, bias is definitely never a good thing, and even if it that was the case, that is certainly not the way arbitration should work. Arbitrators, who have been entrusted to resolve a dispute for both parties, should always study the case in detail with the highest diligence standards.

Is there a better method to constitute the arbitral tribunal?

Regardless of whether a biased arbitrator benefits the appointing party or not, what is clear, is that it does not benefit the institution of arbitration since it deviates the normal course of the proceedings. This does not mean that the institution is at stake,

rather that it faces problems just as any other dispute resolution method. Perfection does not exist and even with a good method there can always be exceptions, but what makes this issue complicated is that bias is subjective, very difficult to discover, measure and control. Therefore, in the end, it depends more on the person than on the process.

Nevertheless, one should not be simplistic and the arbitration community has to keep on working on new ways to enhance this method. In this vein, many authors propose different ways for adjusting this; however, none of them seems appropriate.

As it is common practice to interview the arbitrators before appointing them, both parties could take advantage and attend to all the interviews avoiding any special relationship or treatment between an arbitrator and the appointing party. However, this opportunity is not usually used.

Some scholars suggest that the arbitral institution should appoint the arbitrators or offer the parties a close list of arbitrators. This would represent a substantive and negative change in the essence of arbitration, which would take the constitution of the panel away from the parties' will. Some centres have an intermediate system, in which they play an active role by confirming the appointed arbitrator.

To some extent this would be not that different from state justice, where the judges are appointed by the state and they are supposed to be neutral. Why would the parties trust the centre? It may also have its interests, such as promoting new arbitrators and arbitrators may pressure to be appointed, and such interests can change from time to time. All these circumstances cannot warranty that the parties will have a neutral panel. Choosing who will hear the case legitimates the award, whereas the less the parties

participate in the constitution of the panel, the more the room for complaints. Besides, having the institution involved in the conflict would make it more complex altogether.

Nobody could reasonably contest that jointly selection of the panel would be a perfect solution, though an impossible one, since they are not likely to reach an agreement when they already have a dispute. I propose the following idea, not as a perfect solution, but only as a starting point to hopefully develop new tools.

Firstly, the claimant should, instead of selecting one arbitrator, propose three arbitrators (A1, A2 and A3). In turn, the respondent should also propose 3 arbitrators (A4, A5 and A6). Secondly, the claimant should appoint an arbitrator from the ones proposed by respondent (A4, A5 or A6) and respondent one from the ones proposed by claimant (A1, A2 and A3). Lastly both arbitrators should, as usual, appoint the chairman of the tribunal.

Assuming that A2 and A5 are finally appointed, which one is the arbitrator of the claimant and which is the one of the respondent? Arbitrator 2 has been proposed by claimant and later appointed by respondent, whereas A5 has been proposed by respondent and later appointed by the claimant.

Following this path, the rights of each party are preserved since propose their best options in the first step. In the same vein, both co-arbitrators are appointed by both parties and in the event that they are likely to feel influenced, they would have a very difficult time determining which of the parties was more relevant for the appointment, and might feel committed with both parties. At the same time, the parties would have more confidence in the tribunal as a whole. This process might take a little more time but not necessarily as much as challenges do.

Conclusion

In conclusion, the parties have an essential right to have their case heard by an impartial arbitral tribunal and party appointing arbitrators are, so far, the best option towards such right.

Although the parties can be expected to look for an arbitrator that, to some extent, will benefit them, arbitrators should not feel pressured, since their task is to act equally with both parties. However, in a few cases it might happen that they cannot manage the situation and feel pressured or unconsciously end up benefiting the appointing party. This does not mean that the parties should not appoint the arbitrators anymore, since the same or even more risks can be found following other methods.

The arbitration community should keep on working and trying to develop new tools to enhance this method and allow the parties to rely and trust the whole arbitral tribunal and not only one or two members, eliminating the idea that the party appointed arbitrator is the arbitrator "of" the appointing party, which will not be an easy task, but certainly a really interesting one.