



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

One of the most common contemporary practices in international arbitration is the constitution of a three-member arbitral tribunal in which the parties select the two co-arbitrators unilaterally and a presiding arbitrator is appointed either by the party-appointed arbitrators or an independent appointing authority.

This practice exemplifies the principle of party autonomy, which is the cornerstone of international arbitration. Its historical origins can be traced back to international conventions and treaties of the 18th and 19th century, which expressly provided for such unilateral appointments by contracting parties.

Recent legal scholarship by two eminent arbitration practitioners – Professors Jan Paulsson and Albert van den Berg – has however sparked a serious debate in the arbitration community as to whether the practice of unilateral party appointments has now outlived its utility.

In essence, the principal criticism meted out to this practice appears to be based on the presumption that party-appointed arbitrators are inherently incapable of being truly independent and impartial in the same way as, for example, the presiding arbitrator, who is not directly appointed by the parties. It has been argued that parties do not in reality make such appointments with the *bona fide* intention of appointing the most-suitably qualified arbitrators but instead anecdotal evidence suggests that their main objective is to

gain a tactical advantage in the arbitration by ensuring that there is at least one arbitrator on the panel who is predisposed towards their case. In order to avoid the purported “*moral hazard*” that co-arbitrators are likely to be vulnerable to by virtue of the fact that they are directly appointed by the parties to the dispute, it is accordingly proposed that all appointments of arbitrators should be made only by a neutral body.

In this essay, I argue that the current practice of unilateral party appointments is not only sound in principle but also essential to ensure that international arbitration continues to flourish in the future. Moreover, the above critique is demonstrably flawed and problematic on several counts, for the reasons I explain further below.

The starting point in any analysis with respect to international arbitration is that it is necessarily premised on the principle of party autonomy. The ability of the parties to be free to agree to, amongst other things, choose the seat of the arbitration, tailor the arbitral procedure and identify the rules of law that will be applicable to a given dispute are some of the key features of international arbitration. It is important to note that the consensual nature of arbitration increases the confidence of the parties in the arbitral process in that the parties actively participate and exert a degree of control over the process. This, in turn, is likely to enhance the perceived legitimacy of the final award that may be rendered by the arbitral tribunal.

It must be specifically borne in mind that the viability of international arbitration to remain as a popular and effective means of resolving disputes in the future largely depends on arbitration users continuing to have confidence in the arbitral process and the perceived legitimacy of the arbitral decision-making process.

In my view, the proposal to eliminate unilateral party appointments, if accepted, will adversely impact party confidence in the arbitral process and consequently the perceived legitimacy of the arbitral decision-making process. This is because the practice of unilateral party appointments plays an important role insofar as it allows the parties to be intimately involved in the constitution of the arbitral tribunal, thereby enabling the parties to have greater faith in the arbitral process.

It is therefore perhaps unsurprising that most arbitration users consider unilateral party appointments to be one of the most important and necessary hallmarks of international arbitration, as is borne out from the results of the recent Queen Mary-White & Case LLP survey that was conducted in 2012. In that survey, an overwhelming 76% of those surveyed preferred to retain the practice of making unilateral party appointments of the two co-arbitrators in a three-member arbitral tribunal.

At the heart of the proposal to eliminate unilateral party appointments, however, is the apprehension that in a bid to gain a tactical advantage in the arbitration, the parties will seek to appoint an “*arbitrator-advocate*” who will not be truly independent and impartial

and may instead indulge in unscrupulous and deviant conduct in order to advance the case of the party who appointed him or her.

At the outset, it ought to be recognised that arbitrators, as for that matter human beings in general, cannot be independent and impartial in absolute terms. This is because they have opinions and biases based on their collective moral, cultural and professional education and experience. A practice that enables both parties to a dispute, which are likely to have different perspectives and backgrounds, to select their own arbitrators strives to neutralise the reality that arbitrators are not absolutely independent and impartial.

In any event, it is wholly unwarranted to draw the inference that *all* party-appointed arbitrators generally lack independence and impartiality from the mere fact that there have been instances in the past where certain party-appointed arbitrators acted in a manner that was incompatible with their duty to remain independent and impartial. In such circumstances, the focus of the arbitration community ought to be in devising a robust system of safeguards and sanctions that thoroughly disincentivizes arbitrators from conducting themselves in such a disreputable manner rather than seeking to eliminate the practice itself, which, as stated, can manifestly enhance party confidence and the perceived legitimacy of the arbitral process.

Moreover, with the benefit of experience, it has become evident to the majority of arbitration users nowadays that the unilateral appointment of an “*arbitrator-advocate*” is not only ordinarily ineffective within the dynamics of the arbitral tribunal but can also be

quite often counterproductive to the cause of the party that made such an appointment. The Queen Mary-White & Case LLP survey conducted in 2010 confirms that the appointment of an “*arbitrator-advocate*” does not find favour amongst arbitration users by virtue of the fact that a majority of 66% of those surveyed considered that the primary considerations for them in selecting a party-appointed arbitrator were “*open-mindedness and fairness*” and not that potential arbitrator’s “*favourable disposition to the issues in dispute*”.

Proponents of the proposal to eliminate unilateral party appointments contend that in order to avoid the undesirable appointment of partisan party-appointed arbitrators, it would be more appropriate for arbitral institutions to appoint all of the arbitrators in a three-member arbitral tribunal.

However, the shifting to a mandatory institutional appointments model will raise a host of additional concerns. The general perception amongst arbitration users is that arbitral institutions make appointments from their institutional panels or lists, which ordinarily comprise of a limited pool of high quality and experienced arbitrators. The selection process adopted by the arbitral institutions also tends to be non-transparent and accordingly does not inspire any particular degree of confidence amongst arbitration users.

Furthermore, shifting to such a model will invariably tend to politicise the appointment process. One can immediately conjure the spectre of potential arbitrators perpetually

seeking to curry favour with arbitral institutions in order to be (i) included on the institution's panel or list of arbitrators and (ii) given repeat appointments in the cases referred to such arbitral institutions. As potential arbitrators begin to progressively look less to the parties and more to arbitral institutions for appointments, a significant disconnect is likely to be created between the community of arbitrators and the community of arbitration users. If such a scenario were to materialise, there is a strong likelihood that it will have a deleterious effect on party confidence and the perceived legitimacy of the arbitral process.

It is also noteworthy that the constitution of a three-member arbitral tribunal is particularly common in cases where either the stakes are high or the issues that need to be resolved between sophisticated parties are quite complex. In those circumstances, it is not unreasonable to assume that, in principle, the parties and their counsel will be in a better position than the arbitral institutions to be able to evaluate the knowledge, expertise and cultural awareness that the members of the arbitral tribunal ought to possess in order to appreciate the different aspects of the case and resolve their disputes.

As a corollary, there is a significant risk that arbitral institutions may not, for a variety of reasons, appoint arbitrators who possess the qualities that the parties consider to be necessary and relevant in resolving their disputes. This is again likely to considerably undermine the parties' faith and the perceived legitimacy of the arbitral process.

Another issue that needs to be seriously considered is the difficulty in enforcing the mandatory institutional appointments model. There is currently no supranational authority that has the mandate to regulate on matters concerning international arbitration generally, let alone specifically with respect to the constitution of a three-member arbitral tribunal pursuant to a myriad of institutional arbitration rules apart from *ad hoc* arbitrations.

In reality, there are currently a multitude of arbitral institutions which offer their services in an ever increasingly competitive arbitration market. In order to differentiate themselves in the market, these arbitral institutions have adopted different methods in order to constitute arbitral tribunals pursuant to their respective arbitration rules. Thus, whilst some institutions, such as the ICC, allow parties to unilaterally nominate their own arbitrators subject to the final confirmation by the institution, others, such as the LCIA, provide for a default rule by which all three arbitrators are to be appointed by the institution. Whilst nothing *per se* prevents an arbitral institution, of its own volition, from expressly providing in its arbitration rules that all arbitrator appointments will be made by the institution regardless of an agreement to the contrary by the parties, at present there are no incentives for arbitral institutions worldwide to simultaneously and uniformly promulgate such a rule.

Finally, proponents of the proposal to eliminate unilateral party appointments argue that the participation of party-appointed arbitrators undermines the quality of final awards in that it increases the risk of incoherent awards based on undue compromises. It is not only

extremely difficult to prove this hypothesis empirically but further if one accepts that parties are better placed to select arbitrators who possess the relevant knowledge, expertise and cultural awareness that is needed to resolve their disputes, in principle party-appointed arbitrators ought to enhance the quality of the final award rather than undermine it.

Conclusion

International arbitration is currently at a critical juncture in its evolution and its future is likely to vary considerably depending on the approach ultimately adopted by the arbitration community with respect to the recent proposal to eliminate unilateral party appointments.

If the proposal is rejected, it will unequivocally signal to arbitration users that they are entitled to be comforted by the fact that at least one arbitrator will be willing to hear and review the presentation of their case meticulously, and even sympathetically. This may even induce the other arbitrators to be as equally attentive and in the process assure the parties that they have received a fair and considered hearing. Arbitration users will accordingly perceive international arbitration to be a legitimate and respectable form of dispute resolution mechanism and would be willing to, without hesitation, frequently use it for the resolution of their disputes.

On the other hand, if the proposal is accepted, the legitimacy and effectiveness of international arbitration as a form of dispute resolution mechanism are likely to come into

question amongst arbitration users. They are likely to believe that despite the principle of party autonomy, it is quite possible for them to not obtain a just outcome to their case because the selection of the arbitral tribunal is completely beyond their control.