Why Party-Appointed Arbitrators: A reflection

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1. Introduction

Arbitration has been a prevalent method of dispute settlement, in various countries of the world of today and yesterday. Arbitration is defined in the Black's Law Dictionary as "a method of dispute resolution involving one or more neutral third party who is usually agreed to by the disputing parties and whose decision is binding."[2]

Today, with what seems to be the increasing complexity of international arbitration proceedings, and concomitant concern on the part of users as to the efficiency of arbitration as a means of dispute resolution, it may be appropriate for questions to be raised as to the role of party-appointed arbitrators in the efficient operation of arbitral tribunals[3].

In the common international arbitration scenario of a tripartite panel, with each party appointing one arbitrator and the party-appointed arbitrators then selecting the presiding arbitrator, each side's selection of his arbitrator is perhaps the single most determinative step in the arbitration. The ability to appoint one of the decision makers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party.

2. Why Party-Appointed Arbitrators

Choice of persons who compose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only as good as the arbitrators.[4]

If there is a model of an international arbitration tribunal, it is a three-member panel, made up of leading international lawyers from different countries, selected through a process in which each party appoints an arbitrator and these party-appointed arbitrators – or a designated appointing

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[2] Brayan A. Garner, Black's Law Dictionary, (3rd ed., 1981) ,p.1807

[3] Lawrence W. Newman and David Zaslowsky**,** The Party-Appointed Arbitrator Dialectic, New York Law Journal, Vol. 242, No.20, (2009), P.1

[4]Peter Morton, Selection and Appointment of Party-Nominated Arbitrators, K&LNG INTERNATIONAL ARBITRATION SYMPOSIUM at Claridges Hotel, London, 23 March 2006.

authority – choose the presiding arbitrator.[5] In three-arbitrator model is especially common in matters involving sophisticated commercial or state parties where the stakes are high or the issues are complex and parties are eager to appoint their own arbitrators.

A. Party autonomy

One is party autonomy, among many rationales that can be forwarded for the reason why party - appointed arbitrator tribunal has been attracted in international commercial arbitration. The principle of party autonomy is at the heart of international commercial arbitration. An arbitral tribunal exists because the parties have consented to arbitrate certain disputes, rather than litigate disputes in a court as they otherwise have the right to do, and in principle parties are free to agree how they want to appoint a tribunal.[6] Parties to arbitration can also assume his appointed arbitrator- as an especial role of party-appointed arbitrators, as a 'translator'-the most traditional and conventional view is that they can ensure that the case presented by the party who appointed them is properly understood by all the members of the arbitral tribunal something which cannot be taken for granted when there are cultural differences among arbitrators or parties[7] (e.g. some coming from Common Law jurisdictions, while others having a background in Civil or Islamic Law).

An arbitrator nominated by a party will be able to make sure that his appointer's case is properly understood by the arbitral tribunal; in particular, such an arbitrator should be able to ensure that any misunderstanding which may arise during the deliberations of the arbitral tribunal (for instance, because of difficulties of legal practice or language) are resolved before they lead to injustice.

One of the key reasons behind party-appointed arbitrator system, therefore, is the comfort and confidence parties gain by having a person of their own choice hearing and contributing to determination of their case.

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[5]Steven Finizio and Claudio Salas, Whether Party-Appointed Arbitrators Can Be Justified – Do They Undermine The Fairness of Proceedings, or Give Parties Ultimate Confidence In The Three-Member Panel Model? , https://www.cdr-news.com/firms/wilmerhale/steven-finizio.>Accessed on November 11, 2017

[6]Ibid

[7] Ibid

B. Subdivision of Responsibility

Arbitrators are supposed to work by themselves, without relying on subordinate fact-finders or scriveners.[8] There is, therefore, a need for three-person arbitral panels to organize themselves efficiently in obtaining a full and clear understanding of the facts of the case without relying on subordinate fact-finders or scriveners. It is the responsibility of every arbitrator to take the time to inform herself/himself thoroughly as to the procedural and substantive issues of any arbitration in which s/he is sitting.

Party-appointed arbitrator system permits, by its very nature, a subdivision of responsibility among members of the arbitral tribunal that not only lends itself to a thorough examination and analysis of the factual and legal issues, but also promotes efficiencies in doing so[9]. Thus, division of responsibility among the arbitrators makes logical sense.

However, with respect to the process by which the arbitration is conducted, it should be regarded as the responsibility of all arbitrators, particularly the chairman, to make sure that the record is clear and that there are no issues dealt with by the tribunal as to which the parties have not been afforded a full opportunity to set forth their positions and challenge the other side's evidence and arguments.

C. Lack of Trust in Arbitral Institutions

The fact that the grounds of appeal or challenge to an arbitral award are limited, generally with no possibility of a review on the merits, makes the selection all the more important. Parties to arbitration may lack of trust in arbitral institutions, in which institutional appointments are mostly applicable from the pre-existing list or in any mechanism such institutions prefer, so long as they can name one of the arbitrators they feel that they will reduce the risk of a runaway tribunal doing something crazy- but non-appealable[10].

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[8] Supra note at 3, P.2

[9] Ibid

[10] Jan Paulsson, "Shall We Have an Adult Conversation About Legitimacy?", 2 March, (2017), keynote address at the Biltmore Hotel, Coral Gables, available on CPR's Face book page. An arbitral award made pursuant to proper arbitration agreement is final and binding as between the parties, unless there is ground for invalidity. No appeal from an arbitral awards, on the merits to ordinary courts, is admitted under the laws of many countries with all kinds of socio-economic system.

D. Illusion Control

Gómez Acebo[11] describes as "mental gambling" one of the reasons which may explain the special interest of parties and their counsel in appointing "their" own arbitrator. Most parties and counsel in international arbitration devote some time to speculating as to what candidate to be unilaterally nominated will be better (closer or less hostile) to the appointing party's position in the dispute. This mental gambling causes no harm to the arbitral proceeding if it is just that. Perhaps some arbitration end-users are attached to the practice of unilateral appointments. Because they see in that mental gambling a tool to increase their chances of winning the case, as though their choice could influence the outcome of the arbitration more than that of the other party[12].

This "mental gambling" does not seem particularly rational, as both parties will have the same opportunity to appoint "their" arbitrator and, consequently, their apparent advantages will cancel out.

In my view, there is a good chance that this psychological attachment of parties to making their own choices, even if not fully rational, is really at play in arbitration, as it would be just an illustration of the phenomenon described by psychologists as "the illusion of control[13]".

However, in some countries, as an exception, there is of course an appeal from an arbitral award on the question of law only. For instance, in England, the 1979, Act, section 1(2) provides a limited right of appeal to the high court on any question of law arising out of an award, and section 2(1) provides that the high court shall have a limited jurisdiction to determine any question of law arising in the course of the arbitral proceedings. The parties may provide in the arbitration agreement for an appeal to a second arbitral instance. And they must determine in their agreement, the conditions, time limits and procedures for such an appeal. The appeal to a second arbitral instance is exceptional. The German law, for instance, does not provide for an appeal from the arbitral award to court. The parties may, however, provide for a second arbitral instance appeal which is common practice in trade associations. The UNCITRAL Model Law on International Commercial Arbitration on the other hand provides that the award shall be final and binding on the parties.

[11] Alfonso Gómez Acebo is a partner in the International Arbitration Group focusing on both commercial and investor-state disputes. He has acted as a counsel in over fifty international arbitrations and has particular experience in disputes related to cross-border acquisitions, financial service, construction, energy, telecommunications and insurance. He also serves as arbitrator.

[12] Alfonso Gómez Acebo, "Party-Appointed Arbitrators in International Commercial Arbitration", Wolters Kluwer (ed.), (2016), P.78

[13] The illusion of control is the tendency for people to overestimate their ability to control events; for example, it occurs when someone feels a sense of control over outcomes that they demonstrably don't influence. The effect was

3. Party-Appointed Arbitrators and Its criticisms

However, party-appointed arbitrators may cause problems that some leading arbitrators have questioned the appropriateness of this practice, arguing that parties make such appointments hoping to gain advantage which at least tacitly endorses unscrupulous behavior, and that ongoing acceptance of this practice undermines the reliability and standing of international arbitration.[14]

There is a problem created by this situation in terms of the proper response of the other party-appointed arbitrator and the Chairman. They will certainly during the course of the proceedings have become aware of the approach being adopted by the partial arbitrator. Parties to International Arbitrations typically find themselves facing a tribunal and an opposing party each likely to be rooted in traditions different from their own. No wonder, then, that they should place great value on the ability to select an arbitrator from, or at least sympathetic to, their own traditions and approach.

Notwithstanding enhanced perceived legitimacy, commentators have criticized party appointments in commercial international arbitration. First, party-appointed arbitrators will not be neutral, impartial and independent decision-makers, but rather will be biased in favor of the party who appointed them. The fact that users identify "fairness" and "quality" as particular concerns in choosing arbitrators does not mean that the motivation behind the preference for party-appointed arbitrators is entirely pure. In his 2010 speech, "Moral Hazard in International Dispute Resolution", Jan Paulsson[15] argues that the motivation in appointing one's own arbitrator necessarily involves the overriding interest in winning the case and permitting such appointments corrupts the institution of international arbitration.

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named by psychologist Ellen Langer and has been replicated in many different contexts. It is thought to influence to gambling behavior and beliefs in the paranormal.

[14] Supra note at 9

[15] Jan Paulsson received his A.B from Harvard University in 1971, his J.D from Yale Law School in 1975 where he was an editor of the Yale Law Journal. He was co-head of international arbitration and public international law groups of Freshfields Bruckhaus Deringer LLP, and helped found Three Crowns LLP, a boutique international arbitration firm. Since 2011, he has been a judge of the International Monetary Fund's Administrative Tribunal.

Second, institutional arbitration rules and/ or other arbitration documents do not clearly define the standards for the selection of party-appointed arbitrators.[16] The absence of clear standards for selection of party-appointed arbitrators may undermine confidence in the international arbitral process and hence limit the growth of arbitration as a means of resolving international commercial disputes.

Arbitrators have proposed some solutions to avert problems raised followed party-appointed arbitrators. As an alternative to party appointments, Professor Jan Paulsson suggested that "any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body."[17] He further recommended an "institutional requirement that appointments be made from a pre-existing list of qualified arbitrators," similar to that used for court of arbitration for Sport.[18] These remedies can't escape from criticism. "In my view, however," said Charles N. Brower[19] "these alternatives are not viable."[20] The pre-existing list approach is undesirable because it unavoidably infuses politics into the system and creates an artificial barrier to entry. Potential arbitrators must have close connections with the States involved or with the appointing institution to be included on the institution's list of potential arbitrators.

Otherwise wannabe arbitrators will wage an extensive lobbying campaign of the former or to the latter. A pre-existing list also provides only a limited choice, whereas the pool of arbitrators is greatly expanded through the input of parties. This militates against the appointment of uniformly high-quality professional arbitrators. The current system of party appointments, by contrast, is the highest form of a merit system; appointments are depoliticized as potential arbitrators effectively "stand for election" by parties every time a new case is brought.

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[16]A. Redfern and M. Hunter, The Reputation and Acceptability of the Arbitral Process Depends on the Quality of the Arbitrators, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (2nd ed., 1991), P.198

[17]Jan Paulsson, Moral Hazard in International Dispute Resolution, 25(2) ICSID REV. 339, 352 (FALL 2010)

[18] Charles N. Brower, The (Abbreviated) Case for Party Appointments in International Arbitration, American Bar Association, Section of International Law, International Arbitration Committee, Vol.1, Issue 1, (2013), p.12

[19] Charles N. Brower has been a judge of the Iran-United Sates Claims Tribunal since 1983. From 1961-1968 Brower was a Lawyer with the law firm of white & case LLP. From 1969-1973 he was Acting Legal Advisor to the United States Department of State. He then returned to the white & case and co-founded its Washington DC office. Brower has been a visiting fellow at Jesus College, Cambridge and a distinguished visiting Professor at the University of Virginia Law School. He graduated from Harvard Law School in 1961.

[20]Supra note at 19.

Institutional appointments are likewise undesirable. It is highly to be doubted that any institution could ever achieve a level of user confidence that even approaches that of selections made by sophisticated parties and counsel. No institution could have the full knowledge of potential arbitrators that clients and their counsel possess. Institutions therefore could never properly evaluate how much trust a party would have in the arbitrators it would appoint, which might negatively affect the perceived legitimacy of the arbitration proceedings.

Neither the pre-existing list approach nor an institutional appointment is an adequate alternative to party appointments. The right of the parties to choose the arbitrators should therefore be preserved, as eliminating it would negatively affect the perceived legitimacy of the proceedings and clearly impede the further development of the field.

4. Conclusion

Given the importance of arbitrator selection in an international arbitration, it is not surprising that there have been some attempts to categorize arbitrator selection criteria relating to impartiality and independence. None has attempted, however, to create a thorough framework of practical guidelines for determining whether a party appointee is disqualified. Although some cases will present special circumstances that require a different analysis from the general norm, there is a clear need for practical guidelines for use by practitioners and arbitrators. Setting forth standards for evaluating the impartiality of party-appointed arbitrators may have great importance.

Otherwise, as far as the writer's view concerns, under ideal circumstances, both party appointed and institutional appointed arbitrators may work effectively; and, in the real world, either one may also show occasional shortcomings, even if the arbitration literature has focused exclusively on the risk of partisanship of party-appointed arbitrators. It is true, though, that, even if there is no clear-cut case for doing away with party-appointed arbitrators, there are potential measures which could improve party-appointed tribunals and minimize their potential shortcomings.