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Party Appointment of Arbitrators: A Recipe for Cronyism and Corruption?

By Eoin Moynihan

In this short article, we take a look at the practice of parties appointing their own arbitrators. An increasingly common critique of this practice is that it tends to encourage bias but is this concern well-founded?

The argument for party appointment

The party appointment of arbitrators is a very popular¹ and well-established² feature of arbitration that is vigorously defended by its proponents. They claim that it “*gives a party a sense of control and proximity to the arbitration proceedings that engenders confidence in the process and its outcome.*”³ Some go so far as to claim that the legitimacy of arbitration itself rests on parties’ ability to appoint arbitrators.⁴

The problem with party appointment – baking in the bias

Advocates for party appointment actually suggest that arbitrators appointed by parties are financially incentivized to pay more careful attention to their appointers’ case.⁵ When they do so, what they are really saying is that party appointed arbitrators are financially incentivized to unfairly favor their appointers and that there is actually an unspoken expectation of such favoritism,⁶ in spite of the possible application of various ethical rules⁷ and/or institutional rules that require otherwise. Indeed, there is some statistical evidence to prove that this is what actually happens.⁸

Surely, such a system is inherently biased and lacks moral legitimacy.⁹ This was the critique advanced by the Chief Justice of Singapore, Sundaresh Menon, at a recent keynote address to the annual SIAC Congress attended by this author.¹⁰ It is, in this author’s view, a fair criticism for which there is no convincing rebuttal.

One of the attractions of arbitration, particularly to parties doing business in jurisdictions where the judiciary is thought to be susceptible to bribery or to favoring that jurisdiction's government in litigation against it, is the promise of impartiality. This author suggests that there is considerable irony in the insistence of these parties on a dispute resolution system with bias and conflict of interests baked into it from the outset. Arbitration involving institutional arbitrator appointments would serve the same purpose of circumventing undesirable court systems without replicating the partisanship in adjudication that makes them undesirable in the first place.

The other problem with party appointment – the old boys' club

When institutions appoint arbitrators, they have no interest in the outcome of the dispute. They do have some other interests, such as securing opportunities for the less-experienced arbitrators of the future to hone their craft and ensuring that women have equal opportunities to sit as arbitrators.

Parties do not necessarily share those interests. In appointing arbitrators, parties are motivated primarily by selecting the candidate most likely to rule in their favor, including producing an enforceable award in their favor if they are the claimant.¹¹ In practice, this means prioritizing the most experienced candidates with the best reputations and the longest history of being appointed by that party that they can get away with. This results in the constant re-appointment of the same usual suspects, who tend to be predominantly men.¹²

Parties do not appear to be sufficiently interested in changing this *modus operandi* and are content to leave the business of gender equity largely to the institutions.¹³ Therefore, if we are to make significant progress in advancing gender equity in arbitration, reducing or eliminating party appointments would be one effective way to do that.¹⁴

Conclusion

There is nothing wrong with parties wanting control over the process by which their dispute is to be resolved. However, when they try to exert control over the outcome by tainting the neutrality of the arbiter of fact, they irredeemably corrupt the decision-making process on which the resolution of the dispute rests, thereby undermining the legitimacy of the outcome.

Furthermore, by overwhelmingly placing their thumbs on the scales for men in arbitrator selection, parties hold back advancements in gender equity. Rather than trying to persuade them to be more progressive, we should recognize that there is little incentive for parties to advance this cause and we should advocate for institutional appointment processes instead.

Eoin Moynihan is a New York-based attorney with Global Legal Solutions, where he works on a wide range of contentious commercial matters. He has experience advising and representing clients in international commercial arbitrations across a number of industry sectors, including maritime, energy, construction, trade, and insurance. For a discussion related to this article, he can be contacted via email at eoin@glsl.global.

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¹ In a survey conducted by Berwin Leighton Paisner, 79% of respondents felt that party appointments give a party greater confidence in the arbitration process and 66% considered retention of party appointments to be desirable. Berwin Leighton Paisner, *International Arbitration Survey: Party Appointed Arbitrators* (2017) at 2;

In the most recent edition of the White & Case Queen Mary University of London survey, the ability of parties to select their own arbitrators was identified as the fourth-most valuable characteristic of international arbitration. It was chosen by 39% of respondents; behind only the enforceability of awards, the ability to avoid specific legal systems or national courts, and flexibility: Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* at 7

² “One eminent practitioner has described the practice of unilateral party appointments as the “keystone of international arbitration” ... The right of a party to name an arbitrator has been an integral part of the arbitration process for more years than most people can remember.” Berwin Leighton Paisner, *International Arbitration Survey: Party Appointed Arbitrators* (2017) at p2

³ *Ibid.*

⁴ “Parties will generally have greater faith in the arbitral process if they themselves are the creators of the tribunal that will judge them. There thus seems to be a close nexus between the perceived legitimacy of international arbitration and the parties’ appointment of the arbitrators.” Charles N. Brower and Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 ARB. INT’L. 7, 44 (2013).

⁵ “At least one of the persons who will decide the case will listen carefully – even sympathetically – to the presentation, and if the arbitrator is well chosen, will study the documents with care.” Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 59, 65 (1995).

⁶ “Once selected, an arbitrator’s personal incentive is to secure reemployment by providing his or her party with a favourable outcome. ... the reality is that many, if not most, ... party appointed arbitrators respond to their personal incentives and become to a certain extent party advocates within a system that expects them to behave objectively” Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, 33 COLUM. FDI PERSP. 1 (2010)

⁷ *E.g.* The ICDR Code of Ethics for Arbitrators in Commercial Disputes (2004)

⁸ In more than 95% of cases, dissenting opinions were written by the arbitrator nominated by the losing party. See JAN PAULSSON, *THE IDEA OF ARBITRATION* 163 (Oxford University Press, 2013) citing Alan Redfern, 2003 Freshfields Lecture, *Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly*, 20 ARB. INT. 223 (2004); Eduardo Silva Romero, *Brèves observations sur l’opinion dissidente*, in JOSÉ ROSELL (ED), *LES ARBITRES INTERNATIONAUX* 179 (Société de législation compare, 2005); and Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in MANOUSH H. ARSANJANI, JACOB KATZ COGAN AND ROBERT D. SLOANE (EDS), *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF W. MICHAEL REISMAN* 821 (Martinus Nijhoff, 2011).

In the Berwin Leighton Paisner survey, *supra* n. 2, 55% of respondents who had sat as arbitrators reported having experienced a party-appointed arbitrator trying to favour the appointing party by some means; and 70% of respondents who had acted as counsel recounted situations where they believed a party-appointed arbitrator tried to favour the party who appointed him.

⁹ See Paulsson, *supra*, n. 8, at 156, where he argues that party appointment of arbitrators presents a “moral hazard” and is “fundamentally at odds with the very concept of arbitration”.

¹⁰ Menon CJ, *Arbitration's Blade: International Arbitration and the Rule of Law*, SIAC VIRTUAL CONG. 2020 2 (2020).

¹¹ “*The incentive of the party and its counsel is to appoint an arbitrator who will win the case for them. That incentive will be particularly strong when its case, on the merits, is not particularly strong.*” Smit (n 6)

¹² Statistics compiled by ICCA show that in 2019, women were, on average, over 20% less likely to be appointed as arbitrators by parties than by an institution. Women accounted for a mere 13.9% of party appointments in 2019 compared to 34% of institutional appointments. International Council for Commercial Arbitration, *Report Of The Cross-Institutional Task Force On Gender Diversity In Arbitral Appointments And Proceedings*, 8 ICCA REP. 1, 27 (2020).

¹³ The 2018 Queen Mary University of London Survey noted that a significant majority of respondents considered that arbitral institutions were “*best placed to ensure greater diversity across tribunals.*” Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 2

¹⁴ In the Berwin Leighton Paisner survey, *supra* n. 2, 41% of respondents felt that more institutional appointments would help gender diversity and 45% of respondents believed that it would provide increased opportunities for younger arbitrators.