ABA Section of International Law
Your Gateway to International Practice

The Debate: Unilateral Party Appointment of Arbitrators

Message from the Editor, Edna Sussman

This special publication of the Arbitration Committee of the American Bar Association's Section of International Law is dedicated to the subject of the appointment of arbitrators. A heated debate as to the desirability of the established system of unilateral party appointed arbitrators was launched by Jan Paulsson in his speech in Miami in 2010.[1] It was followed by an analysis by Albert Jan van den Berg which indicated that while there was a growing body of dissents in the context of investor state arbitration awards, virtually no party appointee in investment arbitrations had ever dissented against the interests of the party that appointed him or her.[2] Both accordingly argued that the system of party appointed arbitrators was flawed and that it created, in the words of Jan Paulsson, a "moral hazard."

An equally vigorous response defending the use of the unilateral party appointed arbitrator system was mounted soon after led by Charles Brower, who referred to it as one of the "most attractive aspects of arbitration as an alternative to domestic litigation."[3] The debate continues. In a speech delivered in April of 2013, Johnny Veeder expressed the view that while he had originally been persuaded by the Paulsson/van den Berg argument, on reflection he had concluded that the unilateral party appointed arbitrator system was the "keystone" of international arbitration and that "we should be wary of abandoning a well - established tradition without good cause."[4]

The *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* conducted by Queen Mary University of London and White & Case is instructive. It explored the question of user preferences on arbitrator appointment with the question "By what method do you favour selection of the two co-arbitrators in a three-member arbitral tribunal?" Interestingly, while a majority of 76% of all those surveyed preferred a unilateral appointment of the two co-arbitrators by the parties, there was a notable difference in the percentage of those favoring such a selection process in each user group: unilateral appointment was favored by 83% of private practitioners, 71% of in-house counsel and 66% by arbitrators. One can speculate as to the reason for these preferences and for the spread in the responses.

Why is it that only 66% of the arbitrators preferred this method, a percentage lower than the other groups? Do arbitrators feel constrained in some way when they serve in that position? Do some go beyond feeling that they should ensure that the position of the party that appointed them is understood but also feel they should ask questions that favor the position of the party that appointed them, or refrain from asking questions that might be

[1] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, ICSID Review, Volume 25 Issue 2 Fall 2010.

[2] Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Arsanjani et al. *(eds.),* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (2011).

[3] 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*, Arbitration International, Vol. 29 (2013).

[4] Sebastian Perry, *Party Appointments are the Keystone of Arbitrations says Veeder*, Global Arbitration Review, April 17, 2013.

damaging to that position? Conversely, do some party appointed arbitrators feel inhibited from asking questions that would favor the position of the party that appointed them in their desire to appear impartial to all of the parties?

While dissents are in fact rare outside the investor state context, do some party appointed arbitrators feel they should write a dissent or talk about doing so to drive a more favorable result for their appointing party? In the context of investor state disputes where dissents are more common and the issues that arise from treaty interpretation repeat themselves, there has been considerable criticism of having ad hoc private arbitrators decide matters of public concern. It has been suggested that many stakeholders doubt the impartiality and independence of the arbitrators, many of whom also serve as counsel in such cases and are thus motivated to make decisions helpful to them in their counsel practice (the "double hat" debate) or are driven to reach results that will lead to future appointments. [5]

So should we consider whether there are differences in the approach to the role taken by different party appointed arbitrators that create an inequity in the process? Are influences on the conduct of the arbitrator aspects of the issue to which further research should be devoted and consideration given? Are there countervailing benefits that should be considered such as ensuring that all sides of the issues are considered until the final decision point or fostering more active engagement in the issues by the co-arbitrators?

Why is it that 83% of the private practitioners preferred unilateral appointments by the parties, a percentage higher than the other groups? Is it to ensure knowledge of specific industries? Is it to ensure an understanding of the culture and manner of presentation to be expected from them and their party? Is it to select an individual known to them and likely to share their view of the merits and to be a strong voice on the tribunal in setting forth their position? Is it largely a distrust of the ability of the arbitral institution to appoint good arbitrators? Or a combination of all of these factors? Are there other ways to satisfy these objectives?

Jan Paulsson attributes much of the reluctance to move away from the unilateral party appointed system to a lack of trust in arbitral institutions to appoint good arbitrators. There are many ways to address this and other concerns. Jan Paulsson points out in his original article the use by some institutions of "blind appointments" so that nominees do not know who appointed them or the use of a list procedure which permits the user to select from an initial identification of the candidates by the institution. Both methods ensure that all three arbitrator act in a wholly impartial manner without constraints. In his article in this publication, Jan Paulsson offers a few more options: jointly appointing the presiding arbitrator and letting him or her choose the co-arbitrators or negotiating the right to veto the other party's unilateral appointment once or twice.

Many other possibilities can be explored that may satisfy all interests and concerns. Refinements of the method for preparing the identification of the candidates by the institution to enhance party influence on those selected for consideration and for informing the parties further about the choices presented can be developed. For example, jointly conducted interviews of prospective arbitrators identified by the institution from their list after consultation with the parties as to preferences and needs; unilateral identification by counsel to the institution of

[5] UNCTAD IIA, Issues Note 2, May 2013.

potential arbitrators for consideration for inclusion in the list offered to the parties thus providing the opportunity to move beyond the institution's established list, coupled with a blind appointment process; providing a list to the institution of 5 potential arbitrators developed unilaterally by the parties and letting the other party choose its arbitrator from the opposing party's list. The possibilities abound and our learned arbitrator community is well able to develop creative and effective alternatives for exploration. Piloting alternative modalities for arbitrator selection by the institutions when agreed by the parties may be useful to determine if a move away from the traditional party appointed system is practical and desirable. Such alternative procedures may also allay some of the concerns about the arbitrators in the investor state context where the creation of a standing international investment court has been suggested to completely replace the current system. [6]

A further question to consider is whether there might be ancillary benefits to a system in which all parties feel that all of the arbitrators have equal loyalty to all of the parties. One can consider whether the unilateral party appointed system breeds suspicion of the other party's appointment and has in recent years, with the increase in the amounts at stake in arbitration, led to the very significant rise in challenges to arbitrators that are now plaguing the system. Would a system that provides deeper assurance of impartiality by all arbitrators lead to a welcome reduction in arbitrator challenges?

Old habits die hard. The ultimate question that must be answered is: Is the party appointed method just a habit long imbued in the system or is a unilateral arbitrator selection process necessary for parties to trust in the process, respect the award and continue to use arbitration for their disputes? As the debate continues on this issue we offer articles by Jan Paulsson and Charles Brower, setting forth their respective positions. In order to elucidate the appointment process utilized by many of the leading arbitral institutions we offer articles describing the arbitrator appointment process at the ICC, ICDR, LCIA, ICSID, SIAC, HKIAC, SCC and VIAC. We also offer an article summarizing some of the perspectives that have been published on the related subject of arbitrator interviews.

We trust you will enjoy this issue and welcome your comments and reactions which can be sent to me at ESussman@SussmanADR.com. We can collect your comments and distribute them as a group on the Arbitration Committee listserv.

Edna Sussman, esussman@sussmanadr.com, an independent arbitrator and mediator and the Distinguished ADR Practitioner in Residence at Fordham University School of Law in New York City, is the Immediate Past Chair of the Arbitration Committee of the American Bar Association's Section of international Law. She serves as a board member and member of the executive committee of the AAA/ICDR and the College of Commercial Arbitrators.

[6] Id.