INCREASED EFFICIENCY AND LOWER COST IN ARBITRATION: SOLE MEMBER TRIBUNALS

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Abstract

In international arbitration, many parties prefer to select the arbitrators who will decide their disputes. This is usually done either by each party selecting their own arbitrator in a three-member tribunal or attempting to agree with the counterparty on a sole-member tribunal. Many parties believe that they will have more control over the process by participating in this selection. However, this article will outline that in many arbitrations, the degree of influence a party-appointed arbitrator has or is able to exhort is negligible. This article will advocate that arbitral tribunals should comprise a sole-member, appointed by an arbitration institution. It is more efficient and cost effective to have an institution appoint an arbitrator rather than the parties. In arriving at this conclusion, various issues such as challenges made to the appointments of arbitrators, time constraints in arbitration as well as institutional versus party appointments will be examined.

1. Introduction

One reason why parties may agree to arbitration instead of resolving their disputes in a national court is that they have the ability to select who decides a potential dispute. Frequently, parties draft an arbitration clause wherein each party becomes entitled to appoint a co-arbitrator in a tribunal composed of three arbitrators. However, there has been academic debate on whether party-appointed arbitrators are best suited to resolve disputes. This debate has traditionally focused on an alleged bias of arbitrators that are unilaterally appointed by each party. A popular argument for why some parties are drawn to international arbitration is the hope that the arbitrator they choose will act as their advocate in some indirect way, and in turn, influence the co-arbitrators.[1] However, it does not appear to be the case, except in some circumstances, and even if a party-appointed arbitrator acts as an advocate for the appointing party, it will likely go over poorly with the co-arbitrators.

This article will start from the premise that arbitrators, like judges, are not biased. Like judges, arbitrators' professional careers are dependent on their impartiality. Arbitrators are selected for their reputation and integrity rather than a bias towards the party appointing them.[2] Following this, an arbitrator who has been unilaterally appointed is unlikely to be more biased than the one who is appointed by an institution, and as such it is not advantageous to a party to make a unilateral appointment (the author recognizes that a perceived bias may not be the only advantage a party considers in the selection of a particular arbitrator). If this premise can be accepted, then there are a number of areas where parties can save costs relating to the appointment of an arbitrator. There are a number of factors that need to be considered regarding the selection of an arbitrator. The starting point is considering how many arbitrators should decide a dispute. This article will then move to the issue of the selection of arbitrator(s) by an institution or the parties, and will outline various aspects relating to each. Lastly, this article will discuss considerations involving the time spent when a tribunal is composed. In looking at the issue of arbitrator selection, this article will take the approach that a sole arbitrator appointed by an arbitral institution is the preferred method for composition of a tribunal for reasons of cost saving and efficiency.

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[1] Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration, in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 381 (Stefan Michael Kröll et al. eds., 2011) [hereinafter *Mourre*].

[2] *Id.* at 384.

2. Number of Arbitrators

The most obvious method of reducing the cost relating to the composition of an arbitral tribunal is having a sole-member rather than a three-member tribunal. The author believes that tribunals comprised of three members are popular for two main reasons. The first is that each party is able to select its own arbitrator and as a result feels that it has some influence over the process. The second is that when the dispute is complex, parties feel that having more arbitrators will ensure that all issues are analysed and addressed in greater depth.

As for fees, arbitrator fees of a three-member tribunal are considerably more than that for a sole-member tribunal. In addition to arbitrator fees, travel expenses and per diems of each arbitrator must be taken into account. As a result, having three arbitrators in comparison to one can be considerably costly, especially where the amount involved in the dispute is low. If a sole arbitrator is selected, this selection can be done by the agreement of the parties, or in a more efficient manner- by an arbitration institution or other appointing authority. By deferring to an institution to make an appointment, parties can save time and cost as they would not have to research potential arbitrators and attempt to agree on the arbitrator. For instance, in 21% of ICC arbitrations with a sole-member in 2013, the appointment of the tribunal was based on the nomination of the parties.[3]

3. Cost Analysis

One aspect that must be kept in mind is whether the arbitrators' fees will be based on an ad valorem or hourly rate. To demonstrate the cost savings of a sole-member tribunal over a three-member tribunal, two hypothetical amounts in dispute under the ICC Rules (ad valorem) will be considered by the author: 50 million USD and five million USD.[4]

For a hypothetical dispute of 50 million USD, under the ICC Rules, the average total arbitrator fees for a sole-member tribunal are 172,484 and for a three-member tribunal are 517,452 (three times the price). For a dispute valued at five million USD, the average total arbitrator fees for a sole-member tribunal are 87,334 USD and for a three-member tribunal are 262,002 USD.

In addition to arbitrator fees, travel and per diem fees must be paid for each arbitrator. The per diem fees under the ICC rules are 1,200 USD per day when arbitrators require a hotel to stay in and 400 USD per day when no hotel is required, which covers, transportation, meals, etc. during a hearing.[5] For example, if a four-day (short) hearing is held, these per diem rates in addition to the return business class flights from where the arbitrator resides to the place of hearing can add up quickly for a there-member tribunal in a small dispute.

In respect of the costs incurred in the process of the appointment of arbitrators, when parties select the arbitrator(s) as opposed to an institution, each law firm will spend time on researching potential arbitrators for a dispute, which in turn results in a higher legal fee that parties must pay. The extent of research on potential arbitrators that a firm engages in can vary significantly. With this in mind, parties should ideally consider fees related to 'arbitrator research' as a factor with at least some weight as early as drafting the arbitration agreement. Similar to unnecessary legal fees incurred for 'arbitrator research' are fees associated with challenges to the appointment of an

[3] *2013 Statistical Report*, 25-1 ICC INT'L CT. ARB. BULL. (2014) [hereinafter *2013 Statistical Report*].
[4] ICC COST CALCULATOR, http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/.
[5] John Beechey, *Revised Note on Personal and Arbitral Tribunal Expenses, Tribunal Expenses,* ICC INT'L CT. ARB., (Sep. 4, 2013).

arbitrator, which incur considerable time spent on drafting pleadings for both sides (with significant legal fees), as well as delays in the proceedings.

4. The Appointment of Arbitrators

In a majority of arbitrations, arbitrators are appointed by the parties. However it will be argued below that an institution or other appointing authority is best suited to make appointments.

(A) Party Appointments

It has been argued that a system of only institutional party appointments would rob international arbitration of one its foremost advantages and attributes.[6] Proponents of unilateral appointments argue that each side appointing an arbitrator ensures that both "stories" are played for discussion throughout the proceedings. Many believe that the role of the party-appointed arbitrator is to make sure the position asserted by his or her appointing party is understood[7] and that all evidence and arguments are adequately considered. In response to this argument, a chairman of a tribunal is not interested in hearing co-arbitrators re-argue a dispute after it is completed. In this respect, if counsel has not succeeded in persuading the chairman, a party appointed arbitrator is unlikely to do so.[8] Along similar lines of the influence that a co-arbitrator yields, the argument that appointing an arbitrator is advantageous because the party-appointed arbitrator will be able to influence the chairperson is a poor one. This is based on the premise that each co-arbitrator advocate will cancel the other out,[9] although Mourre highlights that having an arbitrator who ensures that the arguments of the party who nominated him or her are considered is not necessarily a bad thing.[10] If each party-appointed arbitrator engages in this, then all arguments will be thoroughly considered by the tribunal. If this is the case, it may then be an advantage to appoint a very well-known arbitrator, who will be less perceived as an advocate for the party that appointed him. In this regard, it could be the case that because the arbitrator is held in high regard by other tribunal members, combined with the impression of neutrality, fellow arbitrators may without reluctance give more weight to that arbitrator's positions. This is based on co-arbitrators being reluctant to agree to a clearly biased arbitrator advocate's position and the notoriety of a well-known arbitrator who may be somewhat persuasive to co-arbitrators.

A similar criticism is that the unilateral appointment of arbitrators leads to a bargaining between the party-appointed arbitrators to determine the outcome rather than arriving at an actual decision made on the merits.[11] However, this relies on the core factor in decision making not being the actual merits of a dispute, which seems very implausible. To what extent this bargaining actually takes place is not clear. There are, additionally, a number of theories and approaches to what extent and how exactly a co-arbitrator could influence a chairman.

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[6] Jorge A. Huerta-Goldman, Antoine Romanetti & Franz X. Stirnimann, *Cross-cutting Observations on Composition of Tribunals*, *in* 43 WTO LITIGATION, INVESTMENT ARBITRATION, AND COMMERCIAL ARBITRATION 129, 131 (Jorge A. Huerta-Goldman, Antoine Romanetti & Franz X. Stirnimann eds., 2013).

[7] Jennifer Kirby, *With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated*, 26.3 INT'L ARB. J. 337, 344 (2009) *citing* LAWRENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 191, 196 (2000) [hereinafter *Kirby*]; Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L J. 395 (1998).

[8] *Kirby, supra* note 7, at 350.

[9] *Id.* at 348.

[10] *See Mourre*, *supra* note 1, at 384.

[11] Ana Carolina Weber et al., *Challenging the "Splitting the Baby" Myth in International Arbitration,* 31-6 ARB. INT'L J. 719, 723 (2014).

A prominent argument in favour of the unilateral appointments of arbitrators is that unilateral appointments permit parties to choose arbitrators with certain qualities and backgrounds; for example, an arbitrator may have expressed a certain opinion in various publications which a party may perceive to be compassionate to its position. In this respect, clearly a party is looking for some type of biased characteristics of the arbitrator. Other times, parties may seek an arbitrator with very niche experiences so that they are well suited to deal with the dispute, for example, experience with palm oil milling in Borneo. Along similar lines, before an arbitrator is appointed by an institution, the institution will also attempt to find an arbitrator whose expertise and experiences are well suited for each dispute. From the author's experience in administering arbitrations, the secretariat in an arbitration institution will search for an arbitrator who is a good fit to each dispute, in particular when there is some novel element involved in such dispute. For example, sufficient expertise to handle a niche dispute, or other factors such as the selection of an arbitrator who is located within a close geography to the parties to cut unnecessary costs, will be factors that are considered.

Another argument frequently made in favour of unilateral appointments is that unilateral appointments allow parties to appoint an arbitrator who is from the same cultural background or country as them; which allows the parties to select an arbitrator who better understands their business practices and position in the dispute. Paulsson indicates that parties should not aim to only select an arbitrator from the same country or culture, based on the assumption that the arbitrator will be more sympathetic or have a better understanding of their case because of the commonalities,[12] which is a point that opponents of Paulsson's approach agree with. The reason behind this is that individuals who frequently engage in international business are more likely to share a common understanding of aspects and expectations of the international business community rather than hold 'nationalized' perceptions; contrasting the assumption that individuals from that same culture or company are more focused domestically and more sympathetic.[13]

Perhaps one of the strongest arguments in favour of unilateral appointments where there are three arbitrators is that three arbitrators with different points of view enhance the tribunal's evaluations of the parties' submissions, which improves the overall arbitral process.[14] This argument relies on the premise that diverse viewpoints are more likely to lead to a correct decision. On the other hand, some argue that the 'three heads are better than one' approach does not apply in arbitration.[15] However, a three-member tribunal may also be used for certain tactical reasons such as increasing the cost of arbitration in hopes that a counterparty may withdraw their claim because they cannot afford to pay the fees, or by appointing a completely biased arbitrator whose tactical actions delay the arbitration.[16] From the author's experiences, parties request for extensions to pay as well as requests for separate advances on costs due to a lack of capital. This occurs more frequently than one may expect.

As a whole, from the above discussion, there are many serious considerations that need to be addressed with regards to the appointment of arbitrators.

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[12] Jan Paulsson, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law: Moral Hazards in International Dispute Resolution, at 8 (Apr. 29, 2010) (transcript available at http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf) [hereinafter *Paulsson*].

[13] *See Mourre*, *supra* note 1, at 383.

[14] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1669 (2nd ed. 2014).

[15] *See Paulsson*, *supra* note 12, at 11.

[16] *See Kirby*, *supra* note 7, at 339.

(B) Challenges to Arbitrators

The most prevalent argument against the unilateral appointment of arbitrators is that there exists a potential bias of arbitrators towards the party that appointed them. This is best addressed by examining how often challenges are made against arbitrators and the rate of success of such challenges. The standard that the ICC uses for challenges is that, "*challenges are decided by the Court using an objective test, rather than a subjective 'in the eyes of the parties' standard*."[17] However, "[t]his is not a totally objective standard, but rather a subjective test, which takes into account independence viewed 'in the eyes of the parties'."[18] In this regard, Whitesell mentions that the standard applied by the ICC Court of Arbitration on whether to confirm an appointment is an objective one.

Without taking a look at the statistics on challenges, one may speculate that unilateral appointments lead to a high number of challenges to arbitrators. However, looking at statistics on challenges, the number of occurrences of challenges being brought and of those that have been successful is extremely small. For example, under the ICC Rules from 1999 to 2008, the ICC Court of Arbitration decided a total of 316 challenges.[19] More recent statistics from 2013 indicate that 66 challenges were brought to the ICC Court with only four being successful.[20] These figures may be contrasted with those of the LCIA; in the thirteen years between early 1996 and May 2009, only 24 challenges were referred to the LCIA Court.[21] Unfortunately, these statistics do not indicate whether the arbitrator was appointed by a party or by the institution. However, it is likely that in the majority of the cases, the appointment would have been made by the former.

From the above examination of the ICC and LCIA statistics on challenges to arbitrators, it can be said that challenges do not frequently occur; a successful challenge is particularly rare. With the ICC and LCIA being two of the largest arbitration institutions, it can be expected that the statistics presented by these institutions are reflective of arbitration in general. These statistics support the notion that arbitrators are not generally biased advocates for the parties that appoint them.

(C) Institutional Appointments

The 2012 White and Case/Queen Mary Survey indicated that only 7% of parties prefer the appointment of an arbitrator by an institution or appointing authority.[22] However, the author believes that, based on the author's experience of working at various arbitration institutions, the frequency of institutional appointments are much higher and do not reflect the parties' preference in the above-mentioned survey.[23]

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[17] Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC INT'L CT. OF ARB. BULL. 26 (Supp. 2007).
[18] *Id.* at 10.
[19] Jason Fry & Simon Greenberg, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases*, 20-2 ICC INT'L CT. ARB. BULL. ¶ 69 (2009) [hereinafter *Fry & Greenberg*].
[20] *See 2013 Statistical Report*, *supra* note 3.
[21] *See Fry & Greenberg*, *supra* note 19, at ¶ 121.
[22] *Current and Preferred Practices in the Arbitral Process*, 2012 WHITE AND CASE / QUEEN MARY INTERNATIONAL ARBITRATION SURVEY, at 5 (Jun. 10, 2015), *available at* http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf.
[23] *See 2013 Statistical Report*, *supra* note 3 (summarizing arbitrator appointments and confirmations: Nominations by parties, - 55.68%; Nominations by co-arbitrators - 14.6%; Appointments by Court upon proposal from ICC National Committee or Group - 20.69%; Appointments directly by Court - 8.58%; Appointments by an authority other than the Court - 0.45%).

When parties rely on an institution to make an appointment, the institution making the appointment must be a legitimate one, free of cronyisms and other problems where legitimacy comes into question.[24] When an institution makes the appointment of an arbitrator, the institution will pick an arbitrator whose profile, experience and other characteristics will suit the dispute. Many times, when parties try to agree on a sole-member tribunal, they spend a considerable amount of time corresponding regarding a suitable arbitrator. When this fails, a request is then made to the institution, resulting in wasted cost and delaying the composition of the arbitral tribunal. It is preferable, to save this time and costs, that parties agree at the very outset that an institution make an appointment.

Not all institutions use the exact same methods and procedures to select an arbitrator.[25] For example, in the case of ICC, in many instances, a national committee of a certain country makes a recommendation of an arbitrator to the Court of Arbitration. In comparison, the Singapore International Arbitration Centre ("SIAC") or the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") appoints arbitrators from an existing publicly available list based on their expertise and other factors such as availability that make them suitable for the arbitration. When making an appointment, institutions take into account all information (including correspondence between the parties) that they have about a dispute to determine various issues such as the number of arbitrators (when not specified) and the arbitrators to be appointed.[26] In this regard, institutions are familiar with a significant pool of arbitrators and their reputations and make considerably informed decisions prior to the appointment of an arbitrator. Institutions have a high stake in maintaining their own reputations when appointing arbitrators and thus, should be considered very capable in making arbitrator appointments.

5. Time Considerations

Various factors surrounding arbitrator selection affect the time it takes for an award to eventually be rendered. For example, when parties must jointly appoint a sole arbitrator, parties attempting to agree on an arbitrator may, in many cases, request extensions for time to decide. In some disputes, after lengthy discussion, the parties still cannot agree and thus will request the relevant institution to make the appointment for them. The 2013 ICC statistics reveal that out of the 240 appointments of a sole arbitrator only 51 appointments occurred through the agreement of the parties.[27]

One can draw the assumption that in many cases where the ICC has appointed a sole arbitrator, parties would have probably first attempted to agree on a sole arbitrator. As has been highlighted throughout this article, a sole member tribunal will clearly save costs. Having an institution responsible for the appointment of that sole arbitrator at the outset will lead to increased cost savings and increased efficiency in a multitude of ways.

In terms of the numbers of arbitrators to comprise a tribunal, a sole-member tribunal can lead to a faster overall result than three.[28] Along these lines, a sole-member tribunal will also make the scheduling of hearing easier in comparison to a three-member tribunal because of the lower number of possible scheduling conflicts.

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[24] *See Paulsson*, *supra* note 12, at 13.
[25] *See Mourre*, *supra* note 1, at 381.
[26] *See Fry & Greenberg, supra* note 19, at ¶ 16.
[27] *See 2013 Statistical Report*, *supra* note 3.
[28] Yu Jin Tay, *Reflections on the Selection of Arbitrators in International Arbitration, in* 17 INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE?, ICCA CONGRESS SERIES 112, 113 (Albert Jan van den Berg ed., 2013).

6. Conclusion

From a cost analysis position, having a sole-member tribunal appointed by an institution is the most cost effective approach for the appointment of an arbitrator. This can assist in making international arbitration a fast and cost effective alternative to resolving disputes in national courts. Despite the perception of many parties that they will increase their chances of success through the unilateral appointment of an arbitrator, this does not seem to be the case. A party being able to select its own arbitrator does not pay off in comparison to the additional costs incurred by having a three-member tribunal. Unfortunately, in many disputes, the number of arbitrators is determined when a boilerplate arbitration clause is drafted, without consideration being given to the amount at stake in any potential dispute. When parties must appoint an arbitrator there are many considerations that are taken. There is considerable consensus in the scholarship in this area. The author agrees with the view that, "*if parties really want to enhance their chances of success, they should appoint experienced, impartial arbitrators rather than super-advocates.*"[29]

Along these lines, if a party is considering the appointment of a biased arbitrator, doing so may work against them. Appointing an 'advocate arbitrator' who goes beyond ensuring that all arguments are considered will likely give co-arbitrators a negative impression and could make them more sceptical of the party that made the appointment because of their choice of a co-arbitrator. This could likely also result in co-arbitrators not giving the 'advocate arbitrator's' opinions much weight.[30] Paulsson points to two studies that indicated that 95% of dissenting decisions are made by an arbitrator appointed by the losing party. However, he goes on to state "*it may simply be that the appointing party has made an accurate reading of how its nominee is likely to view certain propositions of law or circumstances of fact.*"[31] The parties in these disputes are worse off economically with a dissenting opinion from their party-appointed arbitrator than having an institution appoint a sole-member tribunal. This is because despite their party-appointed arbitrator deciding in their favour they still lost and had incurred more costs for the three-member tribunal than a sole-member tribunal. In this respect, "*... in practice, if a party wins the vote of the chairman, it wins the issue to be decided; if it does not, it loses. This is why it is the vote of the chairman, and only the vote of the chairman, that is decisive.*"[32] This reinforces the argument that a well-respected arbitrator is the best choice for appointment, and not one who will act as an advocate. A well-respected arbitrator does not necessarily mean the most senior or busiest arbitrator in the world; instead, this can be a diligent arbitrator who demonstrates knowledge of the dispute as well as capabilities as an arbitrator to his co-arbitrators. In addition to the selection of a well-respected arbitrator, for arbitration users, rather than believing that appointing a particular arbitrator will allow them to influence a dispute, it may be worth taking an alternative approach to arbitrator appointment. That alternative approach to arbitrator appointments is having a sole-member tribunal appointed by an institution to take away the counter-party's chance to appoint an arbitrator; this would surely result in the dispute being decided by a truly neutral arbitrator without detriment to either party.

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[29] *See Mourre*, *supra* note 1, at 385.
[30] *See Kirby*, *supra* note 7, at 349.
[31] *See Paulsson*, *supra* note 12, at 9 *citing* Alan Redfern, Dissenting Opinions in International Commercial Arbitration: The Good, The Bad and The Ugly, Freshfields Lecture (2003), *in* 20 ARB. INT'L, 2004 at 223; Eduardo Silva Romero, *Brèves observations sur l'opinion dissidente*, *in* LES ARBITRES INTERNATIONAUX, SOCIÉTÉ DE LÉGISLATION COMPARÉE LÉGISLATION COMPARÉE 179-186 (2005).
[32] *See Kirby*, *supra* note 7, at 346.