

Oral Hearing and Party-Appointed Arbitrators: Guess?? Yep! That's Who Appointed Them!

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It is interesting to see what can happen sometimes during an oral hearing for an arbitral proceeding. I have noted from my esteemed colleagues that they have witnessed a very interesting phenomenon – watch the arbitrators – can you tell who appointed whom? Should you be able to?

Having worked for most of my career in The Netherlands before returning to my home country, the USA, I was a little surprised by what I noted and what I heard. Yes, I know about party appointed arbitrators. No, I did not realize that they could be so “non-neutral” as to be able to actively ensure the side of the party appointing is adequately considered and understood. Is that truly impartial and fair? Yes, this debate can be heard elsewhere and I have located a couple quality articles on the topic. Yet, my shock remains. I understand that in theory, if both parties have someone at least sympathetic to their culture, side, etc. then that may provide a balanced and fair panel. The party-appointed party may ensure that culture mistakes in communication are understood or approaches appreciated.

The question I ask myself should this be allowed? What concerns me is when you can actually tell who appointed the arbitrator by the questions they ask. Is that not taking it too far? Is the actual practice failing to reflect the fairness of the theory?

I have not witnessed this one-sided practice – at least not to such an obvious extent. Everyone knows that with a three arbitrator panel, the third arbitrator typically comes from a neutral country. This is completely understandable as to ensure no bias towards a certain culture, style or system exist. However, why would anyone want any member of the panel almost advocating for the other party – even if allegedly they have someone doing that for their own side? How can the parties ensure that the arbitrator they appointed will advocate to the same degree as the other side?

The concept of party appointed arbitrator – i.e. a non-neutral arbitrator so-to-speak is not universal and certainly not everyone would accept such a notion. Moreover, not every arbitrator agrees with or supports this notion. Therefore, they may either avoid any quasi-advocating activity or simply do it to a lesser degree because their personal views on it differ from the other party-appointed arbitrator. Then is the process truly fair? Some promote the practice of selecting an arbitrator who perceives your side favorably (or at least you believe it does) as one of the perks of international arbitration – the ability to shop around for the arbitrator. True, but shopping around for the most qualified arbitrator would remain a perk even if such an arbitrator is not free to ensure that your side is fully heard (versus the other party's side). All arbitrators should equally ensure they fairly hear the

evidence and understand both sides. Advocating a parties' side - isn't that the attorneys' job? What I would recommend to clients is: shop for the RIGHT attorney to advocate your case and the RIGHT arbitrator who will fairly ensure all parties are being heard. If you have the right attorney, your side will be adequately advocated.

If this practice of overtly asking questions, etc to the favor of the party who appointed you continues, however, there is no way to ensure an entirely fair process for the reasons already set out above. It requires all panelists to openly consider every angle of both parties' side to ensure a fair hearing. Perhaps simply looking to a neutral sole arbitrator is something to consider.