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Party-appointed Arbitrators: the Lesser of Two Evils?

Cornel Marian (Stockholm Arbitration & Litigation Center (SALC)) · Wednesday, February 22nd, 2012

Recent events in Romania have added a new twist to the debate on party-appointed arbitrators after an arbitration institute centralized the power to appoint arbitrators in one person and decided to remunerate the individual. By now, arbitration practitioners should be well aware of the arguments for and against party-appointed arbitrators. There is little to add to the works of Jan Paulsson delineating the risk of bias inherent in the party-appointed arbitrators and the discussion that followed. Institutional appointment of arbitrators offers the ideal solution for mitigating the risk with party-appointed arbitrators, or does it?

Let's turn the spotlight on Romania. What if an arbitration institution modified its rules so only one appointing authority (an individual) would appoint the arbitrators in all disputes? Imagine that an arbitration institute provided that the individual appointing authority, designated by the institute, would take a substantial fee for making such appointments.

It is hard to imagine how an institute would concentrate the arbitrator-appointment process in one individual and pay that individual. But the Chamber of Commerce and Industry of Romania (CCIR) did exactly that with its new Organizational Rules article 11(2). Following the appointment of Bogdan Olteanu as the new president of CCIR's Court of Arbitration, CCIR modified its organizational rules in mid-January 2012 so that article 14(8) provides for a sole appointment authority that would be remunerated 10 % of the arbitration fee for its services. The appointment authority rests now solely with the President of the CCIR (Mihai Vlasov) for a renewable mandate of seven years. If such modification did not create enough controversy, CCIR's new Arbitration Rules article 89 holds that all arbitrations in Romania would be conducted in the Romanian language unless all three arbitrators were foreign. These modifications caused three notable figures of the Romanian arbitration community—Crenguta Leaua, Flavius Baias and Viorel Mihai Ciobanu—who served on the Board of the Court of Arbitration to resign in protest.

Putting aside the issue of language, the modifications of the CCIR rules effectively create the worst-case scenario for institutional appointment. Not only does the arbitration institute deprive the parties of any power in the appointment process, but the institute also concentrates the appointment power in one individual. That individual now derives a financial benefit. With these modifications, the risk of bias shifts from the parties to the institution. And, while the risk of bias in arbitration proceedings may be easily controlled on a case-by-case basis through set-aside or arbitrator-replacement proceedings, institutional bias is considerably more difficult to manage.

In Romania, three notable figures had the audacity of stepping down in protest and object to such

modifications. At this point, it is uncertain what effect have these objections had on CCIR. In the case of CCIR, the centralization of authority caused blatant violations of institutional autonomy and impartiality. We would hope that CCIR has an opportunity to reevaluate its processes.

In any future cases, in Romania or elsewhere, it is harder to imagine how any risk that is less blatant than the one faced by CCIR would be effectively managed. The case of CCIR provides a unique insight on what may go wrong when the institution consolidates the appointment power and attaches financial benefits to it. For an institution to charge for administrative services arising from the appointment process is one thing. But for one individual to derive a financial benefit in appointing arbitrators for the equivalent of 10 % of the arbitration fee is completely different.

It is not as if CCIR had a problematic appointment process before these modifications. Quite the opposite. Prior to these modifications, the parties in CCIR arbitration proceedings could appoint arbitrators from a public list that was managed by CCIR. The closed-list proceedings balance the interests of the parties with institutional control. What follows now is unclear. On 14 February 2012, CCIR updated and published its closed lists of arbitrators and presiding arbitrators. At this point, the appointment power remains, however, with one individual per the amended rules.

It is not clear what will be the ultimate outcome. It may be that CCIR, under the wise move of notable Board members, will amend its rules so as to correct this broad consolidation of power. Romania's arbitration culture is a living organism whose growth is exciting to watch. As a transitional economy, Romania has confronted complex legal issues that gave rise to countless commercial and investment arbitrations. The process itself has not been all that smooth. Following a bold move, Romania joined NATO in 2004 and the European Union in 2007. To this day, there are four claims pending with ICSID arising from the transitional period. We would really hope that the issue with CCIR is corrected soon, as the arbitration community in Romania has made a rich and meaningful contribution to the development of law over the years.

It would be easy to dismiss this issue as an isolated incident concerning the experiences of a developing arbitration institute that may, in the near future, implement checks and balances to correct for the centralization of power in one individual. Dismissing the CCIR modifications as being specific to an arbitration culture in transition would inevitably detract from the powerful message of what this issue has shown. At the very least, these modifications underline what may go wrong when the arbitration institutes take the party-appointment matters in their own hands. The argument here is that CCIR has shown much more. It has shown that arbitral institutes are not perfect organizations that may always be trusted.

Even if a system of appointment distinguishes between the practices of various institutes, the question still remains of who is best suited for handling the risk of bias and impartiality. While taking on an arbitrator in court is one thing, taking on an arbitration institute is a whole different matter. Is it possible that the current system of party-appointed arbitrators, as imperfect as it may be, is the lesser of two evils?

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