

# Kluwer Arbitration Blog

## The Call to Remove Unilateral Appointments: Seven Years On

Andrew Battisson, Cheryl Teo (Allen & Overy) · Monday, July 3rd, 2017 · YSIAC

In April 2010, Professor Jan Paulsson delivered his [inaugural lecture as holder of the Michael R. Klein Distinguished Scholar Chair at the University of Miami School of Law](#) where he expressed the view that the practice of unilateral appointments (or nominations) of arbitrators is a moral hazard which should be removed. This lecture sparked debate amongst commentators as to whether the practice of unilateral appointments of arbitrators should be abolished.

Seven years on, arbitration users have responded to Professor Paulsson's call for the practice of unilateral appointments to be removed with a resounding no: far from being removed, the practice of unilateral appointments remains standard practice in international arbitrations.

Whether the practice of unilateral appointments should be allowed to remain in international arbitrations turns on two key questions:

- Whether unilateral appointments undermine the legitimacy of the arbitral process and its outcome in the eyes of the parties; and
- Whether there are sufficient safeguards to protect against the risk of partiality and bias by unilaterally-appointed arbitrators.

### **Unilateral appointments enhance, not undermine, the legitimacy of the arbitral process and its outcome**

Professor Paulsson argued that “unilateral appointments are inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators”. According to Professor Paulsson, unilateral appointments result in the appointment of arbitrators who are not trusted by both sides. On the other hand, where each arbitrator is chosen jointly by the parties or appointed by a neutral institution, each arbitrator “is invested with an equal measure of confidence and an equal claim to moral authority”.

But it seems doubtful that “an equal measure of confidence and an equal claim to moral authority” (even if that could be achieved by joint appointment or appointment by a neutral institution, which is itself doubtful) necessarily translates to greater confidence in the tribunal or in the arbitral process as a whole.

As a number of commentators have observed, party involvement in the appointment of arbitrators ensures that the parties are invested in the creation of the tribunal, which legitimises the decision-making process in the eyes of the parties (see, for example, Charles N. Brower & 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*, 2012, Vol. 29, No.1, pp 7-44).

The following are just some of the examples which indicate a clear preference for unilateral appointments by arbitration users.

- According to the [2012 International Arbitration Survey by Queen Mary University of London](#), 76% of the respondents (comprising private practitioners, in-house counsel and arbitrators) said that for three-member tribunals, they prefer for the two co-arbitrators to be selected by each party unilaterally. This method of selection was favoured by all three categories of respondents, but notably more by private practitioners (83%) than by in-house counsel (71%) and arbitrators (66%).
- According to the [2015 International Arbitration Survey by Queen Mary University of London](#), respondents ranked “selection of arbitrators” as the fourth most valuable aspect of arbitration (with the three most valuable aspects of arbitration being “enforceability of awards”, “avoiding specific legal systems/national courts” and “flexibility” (in decreasing order)).
- Under the LCIA Rules, the default rule is that all arbitrators are selected and appointed by the LCIA Court, unless the parties agree otherwise. The LCIA statistics show that parties agreed to depart from the default rule in the majority of cases: of the 469 appointments made by the LCIA in 2016, only 197 (or 39% of the total appointments) were selected by the LCIA Court (with the other appointments selected by the parties or co-arbitrators) (see the [LCIA Facts and Figures 2016](#)).

Professor Paulsson himself recognised that the practice of unilateral appointments is “popular, in the sense of being perceived as a valuable opportunity on which many parties insist” (see [Jan Paulsson, Are Unilateral Appointments Defensible?](#), *Kluwer Arbitration Blog*, 2 April 2009).

If arbitration users consider the practice of unilateral appointments to be a valuable aspect of arbitration and insist on it, how then can it be said that this practice undermines the legitimacy of the arbitral process or its outcome?

Further, in a later article published in 2013, Professor Paulsson appeared to have no objection to unilateral appointments where parties have expressly stipulated that there should be unilateral appointments. Professor Paulsson clarified that his proposal was merely that the “default rule (to be applied whenever the parties have neither jointly nominated the entire tribunal nor expressly stipulated that there are to be unilateral appointments) should be that all arbitrators are appointed by the neutral appointing authority” (see [Jan Paulsson, Must we Live with Unilaterals?](#), *ABA Section of International Law*, 2013, Vol. 1, Issue 1, pp 5-9).

This appears to be a shift from Professor Paulsson’s original position. Consider the following situations where three arbitrators are to be appointed (and the parties are properly advised):

- There is an express agreement to arbitrate under rules which default procedure is that each party is entitled to nominate an arbitrator (for example, the ICC Rules or the SIAC Rules) and no express agreement by the parties to the contrary.
- There is an express agreement to arbitrate under rules which default procedure is that all three arbitrators are to be appointed by the institution (for example, the LCIA Rules) and an express agreement, contrary to the default procedure, that each party is entitled to nominate an arbitrator.

Is there really a material difference between these two situations, such that unilateral nominations

in the former situation should not be allowed whilst unilateral nominations in the latter situation should be allowed? I think not: an agreement to arbitrate under particular rules is an agreement on the default procedure of appointment under those rules. In both cases, the parties, with the benefit of legal advice, agreed that each party shall be entitled to nominate a co-arbitrator. Indeed, in both cases the principle of party autonomy dictates that the parties' agreement that the co-arbitrators are to be selected by unilateral nominations must be upheld.

### **Safeguards against bias and partiality**

Professor Paulsson argued that parties exercise their right of unilateral appointment with the overriding objective of winning in view, which results in "speculation about ways and means to shape a favourable tribunal, or at least to avoid a tribunal favourable to the other side".

In a similar vein, Professor Martin Hunter wrote: "when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias" (Martin Hunter, *Ethics of the International Arbitrator*, 53 Arbitration 219, 1987, pp 222-223). This is admittedly an honest and largely accurate description of the approach which many take when looking for a party-appointed arbitrator.

But there is little (beyond anecdotal) evidence of a material risk of bias and/or partiality by party-appointed arbitrators. In any event, contrary to Professor Paulsson's view that existing checks and balances are inadequate to guard against the "menace" of unilateral appointments, I believe that there are sufficient safeguards (both formal and informal) to protect against the risk of bias and partiality by party-appointed arbitrators.

- First, most institutional rules require arbitrators to disclose any circumstances that may give rise to doubts as to the arbitrator's impartiality and/or independence.
- Second, most institutional rules allow parties to challenge and remove an arbitrator if circumstances exist that give rise to doubts as to the arbitrator's impartiality and/or independence.
- Third, an award may be challenged if the tribunal has failed to act fairly and impartially (under the English Arbitration Act) or if a party has been denied its right to be heard (under the UNCITRAL Model Law and most national arbitration laws).
- Lastly and importantly, the other members of the tribunal are helpful and effective checks against any improper behaviour by a party-appointed arbitrator which may not be apparent to the parties (for example, attempts by a party-appointed arbitrator to improperly influence the decision of the tribunal during the tribunal's deliberations). It is unlikely that such behaviour would go unnoticed by the other members of the tribunal (unless such behaviour is so subtle as to go unnoticed, in which case its effect on the decision of the tribunal would be highly questionable). It is not simply that the other members of the tribunal may exclude a biased and partial arbitrator from its deliberations. Indeed, such exclusion would itself be improper. Rather, arbitral rules could provide for a procedure by which members of the tribunal may bring to the attention of the parties and/or the institution any improper behaviour which constitutes impermissible bias or partiality by any member of the tribunal. The parties and/or the institution may then take the appropriate steps to remedy the situation.

### **Conclusion**

There is admittedly some truth to the criticisms which have been levelled against the practice of

unilateral appointments. However, I believe that abolishing the practice of unilateral appointments would be an overreaction to these criticisms. It would also undermine the principle of party autonomy, which is undeniably the cornerstone of international arbitration. We should have a little more faith in the decision of parties on their preferred method of constituting a tribunal, the ability of arbitrators to abide by their duties, and the safeguards which protect the arbitral process from impermissible bias and partiality.

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