Kluwer Arbitration Blog

Party Nominated Co-Arbitrators: Battle of the Titans

Abayomi Okubote (Queen's University), Gidey Belay Assefa (Addis Law Group LLP), and Joy Njagi · Saturday, November 20th, 2021

On 12 October 2021, the Africa Arbitration Academy organized its annual debate themed "Battle of the Titans" as part of its 2021 Flagship Training Programme. The debate was moderated by Dr. Emilia Onyema, Professor of International Commercial Law, SOAS University of London and featured two pre-eminent arbitration practitioners – Prof. Gary Born and Prof. Jan Paulsson – discussing the motion: Party-Appointed Co-Arbitrators: Yes, or No?

To kick off the debate, the topic was put to the audience as a poll question and the result was 87% in favour of party-nominated co-arbitrators while 13% voted against it.

The Debate: Titans on the Battlefield

Prof. Gary Born argued in favour of the motion, noting that the topic is truly important, foundational, and critical to the health and future of international arbitration. His perspectives were two-pronged – historical origin and contemporary commercial practice.

Prof. Born described the practice of party-appointed arbitrators as ancient in its historical origin and ubiquitous in the contemporary practice of international law, arbitral institutional rules, and customary practice among parties and in different countries. It has enjoyed the status of being a fundamental aspect of international arbitration for nearly twenty centuries, as elaborated below. Therefore, opposing the motion poses a threat to the very foundation of international commercial and investment arbitration by taking away the right of parties to appoint co-arbitrators – an action that could drive parties away from arbitration.

He described consent as the foundation of international arbitration whereby parties choose to resolve their disputes through arbitration in a particular way and by a particular procedure. These procedural rights rooted in party autonomy are enshrined in the New York Convention under Articles 2(1) and 2(3). The right of parties to constitute a tribunal in the way they think best is further confirmed in Article (5)(1)(d) which permits non-recognition of awards where parties' agreed procedures in selecting arbitrators have not been followed. Interfering with this right would be a

strike on the very basis of the legitimacy of international arbitration, not only violating the New York Convention but also undermining the very reasons for international arbitration. He argued, “Arbitration is about allowing parties to decide how to resolve their dispute rather than imposing procedures/other means of dispute resolution on them.”

In demonstrating the historical context, Prof. Born noted that the practice of party-appointed co-arbitrators goes back to the first recorded uses of arbitration. The ancient Greeks used arbitration to resolve state-to-state and commercial arbitration invariably with three- or five-person tribunal; with one-or-two arbitrators appointed by each of the respective disputants. The co-arbitrators would agree on a presiding arbitrator. The Romans also used co-arbitrators in a similar way.

Throughout the Middle Ages, the practice was used. Similarly, in state-to-state arbitration, party-appointed co-arbitrators were the norm. For example, in a 1254 treaty, German States provided for resolution of state-to-state disputes among German principalities by a tribunal in which the disputing States themselves selected co-arbitrators. This is similar to the position in the treaty between Switzerland and France in the thirteenth century.

Moreover, contemporary practice affirms the preference of party appointed arbitrators. Exemplifying this, Prof Born referred to the QMUL 2012 Survey where a majority of respondents (76%) preferred selection of the two co-arbitrators in a three-member tribunal by each party unilaterally.

To bolster his argument, Prof. Born explained that commercial arbitration agreements, pragmatic commercial decisions and national legislation include provisions for parties to appoint their co-arbitrator, reflecting the fundamental characteristic of arbitration practice. Article 11 of the UNCITRAL Model Law provides a default solution where parties have not agreed how to constitute the tribunal. Several jurisdictions including Ethiopia, Kenya, Nigeria, Tanzania, Morocco, Rwanda have adopted Article 11 into their national laws. Leading arbitral institutions’ rules such as LCIA, ICC, SCC, KIAC and CRCICA among others follow uniformly in providing the default solution of party-appointed arbitrators. This default solution in institutional rules reflects the pragmatic learning, practical desires, and aspirations of practitioners over decades as to the desirability of the process.

The practice has been affirmed by stakeholders because in international arbitration where differences in perspectives, culture, legal regime, and language exist, parties need direct involvement in the constitution of the arbitral tribunal. This ensures that the tribunal consists of members who are familiar with the party’s case, background, and importantly, able to provide adequate attention and motivation to resolve the parties’ dispute.

In precis, Prof. Born argued that the notion that leading arbitral institutions are better placed to select arbitrators is incorrect as parties have greater incentive to select the tribunal properly and appropriately; an expert version of how their dispute can be resolved. Prof. Born also stressed that most institutional arbitrators are “male, stale and often pale”, therefore parties’ freedom to select their arbitrators is judicious.

Prof. Paulsson, on the other hand, prefers to use the term "unilaterally appointed arbitrators" rather than "party-appointed co-arbitrators", as discussed in this previous post. Quoting Prof. J. Martin Hunter, Prof. Paulsson stated that parties analyze their case and appoint a person whose intellectual disposition favors their thesis of the case. This is why he labels such arbitrators as unilaterally appointed arbitrators.

Prof. Paulsson was not against the motion; as he opined that unilaterally appointed arbitrators should not be forbidden, rather he posited that parties must consider, from the inception of a case, whether they want unilaterally appointed arbitrators. He believes his position on parties' right to appoint arbitrators had been misconstrued as favoring curtailing such right.

To exemplify his position, Prof. Paulsson narrated how he came to think about the dangers of unilaterally appointed arbitrators. During his tenure as President of the LCIA, he overheard two young staff members commenting on what in their opinion was a well-conducted arbitration that resulted in a laudable award. Upon further engagement with them on what a well-conducted arbitration and laudable award would entail from an institutional perspective, he concluded on a list of requirements – (1) the award was rendered on time, (2) the arbitrators did not ask for more money – the deposit was enough, and (3) the award made sense – it was clear and easy to understand. He further noted that the default LCIA rule which allows the Institution to appoint arbitrators where parties failed to agree to three arbitrators had been applied in that case.

This moment prompted him to further probe into LCIA arbitrations and he found that the "good arbitrations" tend to be the ones where the three arbitrators were appointed by the institution. While in other arbitrations which involved unilaterally appointed arbitrators, there was usually a dissenting opinion and, in many instances, respondents sabotage the proceedings and make life impossible for claimants. He noted that such challenges take time, cost more money, and present a high risk of the tribunal not reaching a final award.

Hence, he noted that the debate is not about what is allowed and what is not; rather, it is about strategically considering the ways to avoid the danger of unilaterally appointed arbitrators. He proposed that parties should include a clause in their arbitration agreement for the appointment of good individuals from the beginning and this can be achieved by allowing the institution to appoint the arbitrators. Admitting that not all institutional appointments are great (there are challenges of transparency, the fight against clientelism and the fight against culture), Prof. Paulsson argued that institutional appointments save parties from a respondent who is dead set on harming claimants at any cost including any conceivable way of sabotaging the arbitration such as appointing an arbitrator who may resign at critical times, or appointing an arbitrator whose sole aim may be to defend respondent's case.

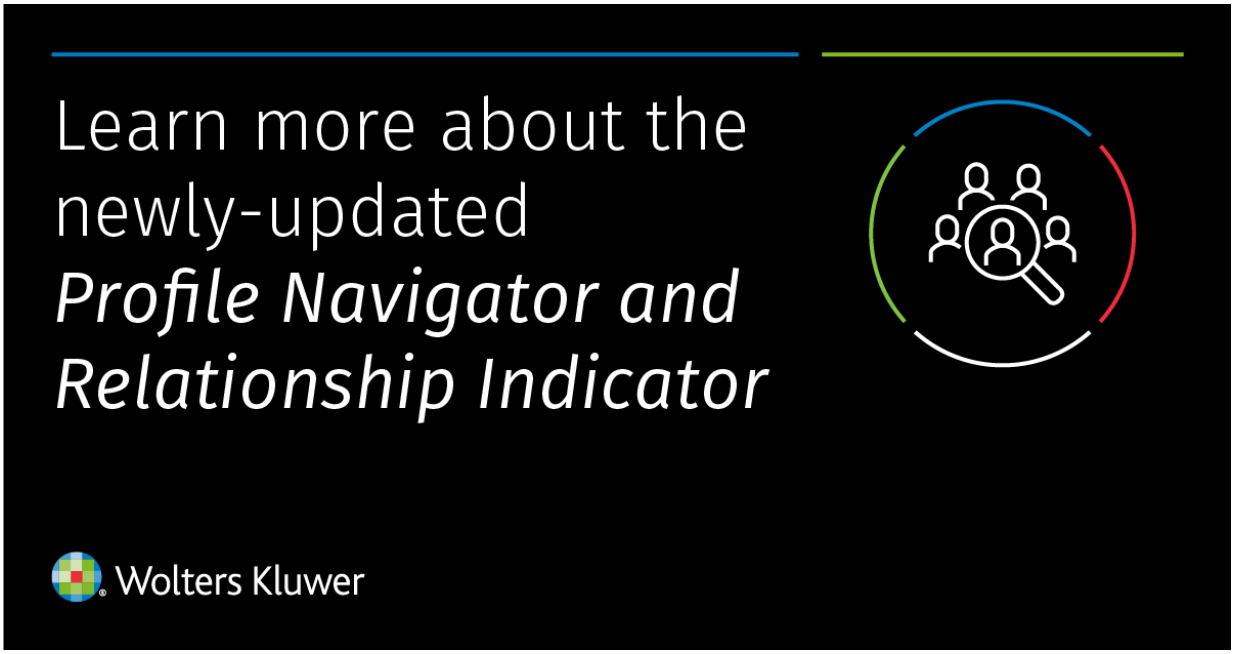
In further consideration of the issue of dissenting opinions, Prof. Paulsson noted that many studies on dissenting opinions including those at the ICC, reveal that over 98% of dissenting opinions were given by the arbitrators appointed by the losing party. In his opinion, this fact suggested that unilaterally appointed arbitrators are often not appointed for the progress of the arbitral reference and relying on the presiding

arbitrator to be a buffer may not be sufficient.

Conclusion

The debate was a real contest between the two international arbitration gladiators with a lot of dicing and slicing. Prof. Born underscored the reasons for the continued practice of party-appointed co-arbitrators. In support of his arguments, he noted how the practice of party-appointed arbitrators was ubiquitous, uniquely applied throughout history and supported by contemporary commercial practices. Prof. Paulsson, on the other hand, retreated from arguing against party-appointed arbitrators. Rather, he explained the dangers of unilaterally appointed arbitrators and the usefulness of default rules which allow the institutions to appoint the three arbitrators.

While Prof. Paulsson deviated somewhat from the main motion at hand, he successfully swayed a portion of the audience as the final poll results were 66%-34% after the debate.



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