

# Kluwer Arbitration Blog

## The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?

Ank Santens (White & Case LLP) · Tuesday, June 28th, 2011 · White & Case

CIETAC's Vice Chairman and Secretary General recently [announced](#) at a conference in London that CIETAC may soon permit parties to select arbitrators from outside the CIETAC list. As the CIETAC Rules currently allow parties to appoint off-list only if they have agreed to do so, this announcement suggests that CIETAC may in the future allow off-list appointments even where the parties have not reached such an agreement. This change was cited as one of a number of ways in which CIETAC is working to accommodate the expectations of foreign parties. If implemented, virtually none of the major international arbitration institutions will require that parties appoint arbitrators from a closed list (the Court of Arbitration for Sport is the only prominent international institution that maintains a closed-list procedure; ICSID Annulment Committees are appointed from a closed list, but the appointments are made by the Chairman of the Administrative Council of ICSID on the advice of the Secretary-General, not the parties).

The move by CIETAC is in contrast to a recent proposal made by Jan Paulsson [on this forum](#) and [elsewhere](#) that party appointments be made from closed lists. Mr. Paulsson's proposal stems from his thesis that party appointments of arbitrators must be forbidden or at least rigorously policed in order to avoid bias of the party-appointed arbitrator in favor of the appointing party. His ideal solution is that any arbitrator be chosen jointly by the parties or be selected by an institution. Recognizing, however, that the party-appointed arbitrator institution is deeply ingrained in arbitration practice, Mr. Paulsson raises a number of more pragmatic alternatives, including the proposal that party appointments be made from closed lists (Mr. Paulsson's other proposals are outside the scope of this blog). The result of this proposal, Paulsson argues, is that arbitrators are selected from a pool that has been vetted by the institution and whose members are less likely to be beholden to the appointing party.

We question whether requiring parties to appoint arbitrators from a closed list would eradicate or significantly reduce any bias in party-appointed arbitrators. While in such a system an arbitrator who is *not* on the list would be sure that he or she would not get appointed, it is unclear that the reverse is true, *i.e.*, that those who *are* on the list would be assured enough of appointment that any bias in favor of the appointing party, which the desire to be reappointed would otherwise engender, would be diminished. Appointment-bias arises because an arbitrator believes that reappointment, by the same party or by others, depends on how much he or she favors the party that appointed him or her. It is hard to see how inclusion on a closed list would provide such assurances to arbitrators that they would not consider the effect of their decisions on future appointments, unless the lists were so limited as to virtually guarantee appointments. Having a list that is small enough

effectively to eliminate the parties' freedom of choice cannot be the objective.

Moreover, a short closed list would arguably *aggravate* some of the causes of appointment-bias. One commentator has advocated for stricter standards of independence and impartiality for CAS arbitrators precisely because the appointments are made from a closed list, not least because it increases the chances that repeat, even quasi-systematic, appointments may be made. *See* Antonio Rigozzi, *Challenging awards of the Court of Arbitration for Sport*, 1 J. Int'l Disp. Settlement 217, 237-238 (2010). Arguably the most openly partisan party-appointed arbitrator the authors ever encountered was appointed from a closed list and was appointed repeatedly by the party whom he openly favored.

Finally, the vetting of arbitrators is practicable only with a short list and, even with a short list, it is questionable whether vetting for bias is feasible. Except in extreme cases, bias is often too subtle to be noticed by or proven to the arbitral institution, let alone to support the rather drastic decision to remove an arbitrator from the list. Indeed, those institutions that do have close lists appear to make their selection based on objective qualifications rather than lack of bias. For instance, S14 of the *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes* states that the CAS list shall be composed of "personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language."

If closed lists, as we conclude, serve at best a marginal function in the eradication of bias in party-appointed arbitrators, should they nevertheless be favored for whatever little impact they may have? The answer depends on the other pros and cons of closed lists. We examine some of these below.

Turning first to the drawbacks, a closed list can make finding a suitable arbitrator extremely difficult. Mr. Paulsson lauded the approach of the CAS, characterizing its list as "lengthy and inclusive." Aside from the fact that a lengthy list, as shown above, does little to diminish appointment-bias, finding a suitable arbitrator among only around 270 candidates can be difficult after one takes into account the diverse nature of disputes even within a specialized field, the avoidance of repeat appointments and other conflicts of interest, availability, and desired qualifications in terms of technical expertise, nationality, personality, case management skills, and familiarity with the relevant legal system(s). For a discussion of this issue, *see Lazutina & Danilova v. CIO, FIS & CAS*, ATF 129 III 445, Swiss Supreme Court (Tribunal Fédérale) (2003). This problem is compounded for frequent users of such a closed-list system because they are required to find not just one, but several, suitable arbitrators from a finite list, keeping in mind that they will likely want a more or less common matrix of arbitrator qualifications.

In addition, closed lists give the arbitral institutions tremendous power. It is questionable whether the politicizing and lobbying of arbitral institutions that would come with closed lists is a lesser evil than bias in certain party-appointed arbitrators. Closed lists also arguably pose a hurdle to new entrants who need to convince an arbitral institution to include them on their list before being able to receive an appointment from the institution or parties arbitrating before it.

Many reasons have been provided to support the use of a closed list. In China, commentators have cited the inexperience of parties and their inability to make rational decisions regarding appointments (*see* Weixia Gu, *The China-Style Closed Panel System in Arbitral Tribunal Formation – Analysis of Chinese Adaptation to Globalization*, 25 J.Int'l Arb.121, 131 (2008)). Mr.

Paulsson, too, cites inexperience of the parties as a basis for a closed-list system. It is the role of counsel to guide and advise their client through the legal process, including arbitrator appointments. In any event, this concern could be addressed by providing parties and their counsel with access to a reference list by which they are not bound. It is interesting that most institutions do not publish such lists, thus denying parties the guidance of the institution with respect to the selection of arbitrators. The ICC, the LCIA, and the SIAC do not publish reference lists. The ICDR and WIPO publish their lists for energy and domain name disputes, respectively, but do not publish their other lists. Conversely, the PCA maintains two public lists of arbitrators, the first comprised of arbitrators with “known competency in questions of international law” and the second comprised of arbitrators with expertise in environmental disputes. Should such a service be part of the array of services provided by arbitral institutions? This question merits its own blog.

It has also been put forward that closed lists promote greater coherence in decision-making (*see Lazutina*). The inconsistencies in the approaches of the various committees in the recent wave of annulment decisions at ICSID seems to indicate that tribunals appointed from a closed list produce no more coherent awards than regularly appointed tribunals. It is unclear how listed arbitrators are somehow better placed to study developments in a particular area of law, including its jurisprudence. As to the efficiency argument (*see Lazutina*), the ability of parties to access potential arbitrators quickly is accomplished just as easily with a reference list by which the parties are not bound.

In sum, in our view the closed list is a practice that we should continue to move away from, rather than move back to. Mr. Paulsson and others are right to seek solutions to the bias issue that the current party appointment system raises, but a closed list is not the answer. As shown above, it is questionable that a closed list reduces bias in party-appointed arbitrators; if short, it may well have the opposite effect. Any bias-reducing effect that closed lists may have is in our view largely offset by the problems that they create. Finally, the positive effects of closed-list systems can also be accomplished with the use of a well-maintained reference list. Careful promotion of these lists by the arbitral institutions, particularly to inexperienced parties, might be a good place to start.

*By Ank Santens and Heather Clark*

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