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Do Party Appointments Encourage Compliance With Awards?

Paul Baker (Clyde & Co. LLP) · Thursday, October 25th, 2018 · YIAG

Party-appointed arbitrators have recently been the subject of much debate in the arbitration community. There are those who see the ability to 'choose' an arbitrator as one of the fundamental pillars of arbitration. For others, it is a time- and cost-consuming exercise leading to potential conflicts and an increased likelihood of arbitrator challenges, both of which undermine the arbitral process and its reputation.

One arbitration textbook (which shall remain nameless) contains the comment that the parties' ability to participate in the appointment of the tribunal makes the parties more likely to comply with the resulting award. At first glance this would appear to make some sense. Where the competence of the tribunal is known and respected then a 'correct' result is anticipated and there should be no reason to challenge or appeal the award or resist enforcement (save in exceptional circumstances). In this vein, even a losing result should be perceived as fairly reached and, as such, complied with.

In this paper we consider whether it is really the case that parties' ability to nominate an arbitrator impacts their attitude to enforcement.

Appointing the tribunal

In the 2018 Queen Mary International Arbitration Survey: The Evolution of International Arbitration, 39% of survey participants placed the ability of parties to select their own arbitrator as one of the three most valuable characteristics of arbitration. This is consistent with anecdotal evidence both from parties and advisors that it is ideal, but not imperative, to have nominated or appointed a member of the tribunal. Such engagement with the make-up of the tribunal should naturally encourage confidence that the tribunal possesses the skills that party desires to determine the dispute in hand.

For this reason, many arbitration agreements set out the tribunal appointment mechanism. Commonly this will be the joint appointment of a sole arbitrator or a panel of three with each party nominating one arbitrator and the co-arbitrators nominating a Chair.

Other arbitration agreements make no provision for appointment and instead default to the relevant arbitral rules or legislation. Others will, perhaps deliberately, leave the appointment structure to those relevant rules and institutions or courts.

Under the LCIA Rules (whereby parties nominate rather than appoint arbitrators) if the parties

have not agreed the mechanism by which the tribunal will be appointed, the default position, absent any agreement of the parties for the mechanism for appointment, is that the LCIA appoints all members of the tribunal. In practice, the LCIA leave it open to the parties to agree on party-nominations and a variety of methods can be used (names provided by LCIA, ranking/striking out from a list of names etc.) Often, though not always, the appointment of a three-member tribunal will be resolved by one party nomination per side and a joint Chair nomination by the two tribunal members or appointment of the Chair by the LCIA.

Under the ICC Rules, where the parties have provided for a sole arbitrator but no mechanism for appointment, they may agree a joint nomination or the sole arbitrator will be appointed by the ICC Court. Where the parties have provided for three arbitrators but no mechanism for appointment, each party shall nominate one arbitrator failing which the appointment will be made by the ICC Court.

It is therefore clear from these institutional rules that party autonomy in choosing the tribunal is encouraged by the institutions.

There is, however, usually a degree of compromise in any tribunal. In the case of a sole arbitrator, while a party may have the opportunity to agree a jointly appointed arbitrator, it is standard for that appointment to be one of compromise rather than either party's first choice. Where a party appoints its arbitrator to a panel of three, the parties have participated in the appointment of one third of the tribunal but they could well be dissatisfied with two-thirds of the tribunal (particularly if it had no involvement in the appointment of the Chair). In these ways, party-appointment may not result in the appointment of a tribunal in which either party has its complete confidence.

Independence and impartiality

The important topics of independence and impartiality come into play too. While parties and their advisors will always try to appoint an arbitrator who they believe will correctly determine the dispute, the arbitrator remains independent and impartial. Yes, concerns such as bias, repeat appointments and 'hidden' conflicts related to the involvement of funders are topics that take up a lot of column inches in arbitration but, on the whole, international arbitrators are not appointed to be partisan, they are appointed to understand the case and reach the correct result on the law and facts.

Why comply?

There are of course a myriad of reasons why a party would comply with an award including acceptance of the result following a fair process, resignation to the finality of the result and reputational concerns.

A review of case law under Arbitration Act 1996, s.103 under which parties resist enforcement of awards yields no supporting evidence either way.

a. In 2015 there were three s103 decision:

– one Court of Appeal decision which was considered by the Supreme Court in 2017[1)] (so won't be double-counted here)

– in the second[2)] a sole arbitrator was appointed but the judgment does not say how he was appointed

– in the third[3] the parties each appointed one arbitrator and the two co-arbitrators appointed the Chair

b. In 2016 there is only one reported decision[4] which involved a three-person tribunal. While the judgment does not say how the panel was appointed, it is not unreasonable to think that the parties would have appointed one arbitrator each.

c. In 2017 there were five reported decisions on AA 1996, s.103,[5] of these:
– in two the parties appointed their own arbitrators;
– in two it is unclear how the tribunal was constituted; and
– in one the party was resisting enforcement on grounds that defendant was not given proper notice of the arbitration proceedings and as such the defendant did not participate in appointment of the tribunal.

With the benefit of educated guesses, in half of the cases the parties were involved in the appointment of the tribunal. This is of course insufficient and not sufficiently accurate data to draw any firm conclusion.[6] Perhaps what it does indicate is that the numbers of applications seeking to resist enforcement remain low. This in turn, indicates that a large number of awards are complied with without enforcement being challenged. With a degree of frustrating circularity this brings us to the question of why parties comply with awards and if the presence of a party-appointed arbitrator is a factor.

It appears that regardless of the parties' participation in the appointment process, unsuccessful parties will regularly consider whether there is scope for challenge or appeal a final award and consequently whether there is any just cause for resisting enforcement. Presumably in the majority of the cases this is not intended to be disrespectful to the tribunal or the arbitral process, it is simply seeking to understand whether additional steps can be taken in the best interests of the unsuccessful party. While it may be the case that the users of arbitration like to think that parties comply with awards following the fair outcome of a legitimate process parties agreed to enter into, we have seen no definitive evidence to link this to the parties' ability to participate in the appointment of the tribunal.

References

?1 *IPCO (Nigeria) Ltd v Nigeria National Petroleum Corporation* [2017] UKSC 16

?2 *H & C S Holdings Pte Ltd v Rbrg Trading (UK) Ltd* [2015] EWHC 1665 (Comm)

?3 Malicorp Ltd v Government of the Arab Rpublic of Egypt and others [2015] EWHC 361 (Comm)

?4 Pencil Hill v US Citta Di Palermo S.p.A [2016] EWHC 71 (QB)

?5 Lexis Library search 2 July 2018. *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) – enforcement resisted on grounds that defendant was not given proper notice of the arbitration proceedings. Defendant did not participate in appointment of the tribunal; *Viorel Micula and others v Romania and another* [2017] EWHC 1440 (Comm) – each party appointed one arbitrator; *Eastern European Engineering Ltd v Vijjay Construction (Proprietary) Ltd* [2017] EWHC 797 (Comm) – it is unclear from the judgment how the tribunal was constituted or appointed though it is likely that the tribunal was a sole arbitrator (there is reference to arbitrator rather than arbitrators in the judgment); *IPCO (Nigeria) Ltd v Nigeria National Petroleum Corporation* [2017] UKSC 16 – it is unclear from the judgment how the tribunal was constituted; *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2018] 1 All ER (Comm) – each party appointed an arbitrator, the Chair was appointed by CIETAC.

?6 Expanding the search to include another popular arbitral seat – Hong Kong – yields similarly inconclusive results. Utilising the same three year sample size (2015-2017) provides just one relevant case from each year. In none of the three cases does the judgment specify the means by which the tribunal was appointed.

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