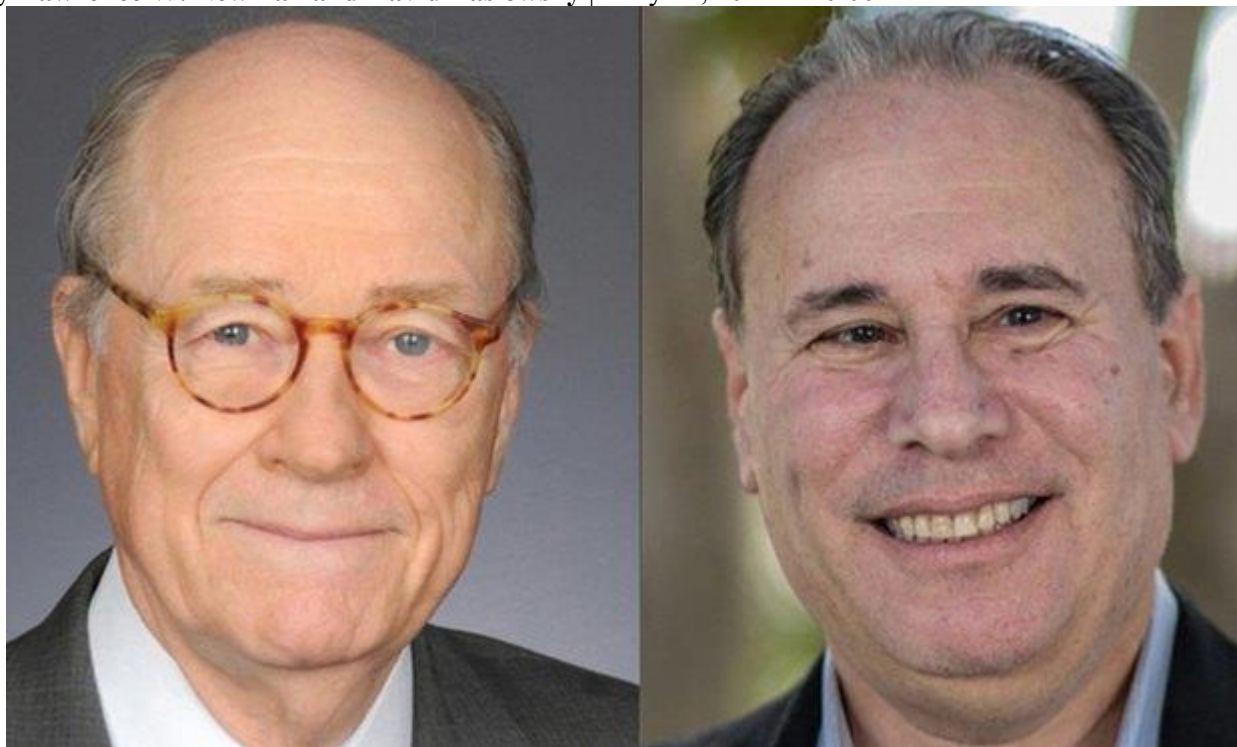


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Party-Appointed Arbitrators in International Arbitration: Criticized but Beloved

This article discusses the continued vitality of the party-appointed arbitrator function and how it is treated by international arbitration users and their counsel in the face of guidelines and rules that have an impact on it.

By **Lawrence W. Newman and David Zaslowsky** | May 22, 2024 at 10:00 AM



For a lawyer with a background of trying cases before juries in federal court, as Mr. Newman was doing in the early 1970s, learning about the practice in international arbitration of hearings before three arbitrators, with the contesting parties each appointing one, was a revelatory experience. Instead of planning for the eventuality of presenting to a federal civil jury of six members as triers of fact, counsel had to think, even before commencement of the proceedings, about the composition of a mini jury of one half of that trial court jury—and one that not only would serve as triers of fact but would also rule on issues of law. The power to appoint a tribunal member was a comfort and an opportunity, and of course, was also a power the exercise of which had to take into account that one's adversary also had the same power.

Time has passed since those earlier days, when the relatively few arbitrations compared to today were carried out with less scrutiny as to the qualifications of arbitrators and their appropriate role in proceedings. Today, with many more commercial and investment arbitrations worldwide, there is greater concern generally about the way such arbitrations are, or should be, conducted. Much is written and discussed in books, journals and conferences and in law school courses and made the subject of institutional rules and guidelines. The qualifications and role of arbitrators have not been spared this scrutiny and analysis.

We discuss in this column the continued vitality of the party-appointed arbitrator function and how it is treated by international arbitration users and their counsel in the face of guidelines and rules that have an impact on it. In doing so we acknowledge and refer to the recent analysis and discussion in the article, “Reconceptualizing the

Party-Appointed Arbitrator and the Meaning of Impartiality” in 64 Harvard International Law Journal (Number 1, Winter 2023) by Catherine A. Rogers (the Rogers article), Professor of Law at Bocconi University, a renowned scholar of ethics in international arbitration.

As Professor Rogers describes in her article, the convention of multi-arbitrator tribunals with members appointed by the parties has identifiable origins in ad hoc arrangements made by sovereign states to achieve resolution of disputes after negotiation has failed. Thus, in the famous cases involving the “war vessel” Alabama and various other vessels that had been provided in the U.S. Civil War to the Confederacy by Great Britain in violation of its 1861 neutrality proclamation, a “tribunal of arbitrators” of five members was established in Geneva by the two contesting parties. Each of the parties appointed one and the remaining three came from Italy, Switzerland and Brazil. Resolution was reached in 1872 in the form of significant damage awards in favor of the United States. The arbitrators appointed by the two contesting parties were clearly partisan officials of their governments and the fact that the awards were infrequently unanimous permitted an inference that arbitrators appointed by one of the contesting parties had frequently not joined the majority.

A century and a half later, in 1981, an international agreement provided for disputes by U.S. claimants against the government of Iran (and government-government claims) arising out of the 1979 regime change in Iran through arbitration under the then-recently established (1976) Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The treaty implementing that agreement provided for a three-chamber tribunal, each chamber comprising three arbitrators—one appointed by the United States, one appointed by Iran and a third chosen from a different country.

The result was something of a two-level dispute resolution system: presentations by claimant’s counsel and opposition by Iran, and separate efforts by the two party-appointed arbitrators to persuade the chairman of the panel. In our experience as frequent litigants before the tribunal, there were virtually no awards of the Tribunal in favor of claimants that were unanimous.

As international arbitration became more widely used for both commercial and investment disputes, there was, in 2010, an attack on the way in which these disputes were being heard by three-arbitrator panels, with two members appointed by the parties. Jan Paulsson, a prominent professor, counsel and arbitrator, argued—in a speech and an article—that party-appointed arbitrators should be done away with, on the ground that their being unilaterally appointed is inconsistent with the parties’ “mutual confidence in arbitrators.” Jan Paulsson, Moral Hazard in International Dispute Resolution, 25 ICSID Rev. F. INVESTMENT L.J. (2010) 339, 341.

This position was vigorously disputed by Charles Brower and Charles Rosenberg in a lengthy law journal article in 2012, “The Death of the Two-Headed Nightingale: Why the Paulssen-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded”, World Arbitration and Mediation Review, vol 6.3 (2012), pp. 619-680. Brower and Rosenberg observed, in dealing with Professor Paulsson’s arguments, that “...the right to appoint an arbitrator is included in nearly all of today’s major international arbitration rules and many of the world’s domestic laws...”

Today, 12 years after this contretemps, arbitrations with party-appointed arbitrators are still prevalent, although there remain concerns as to what is properly expected of party-appointed arbitrators once they have been appointed to their positions

The oft-repeated stricture today, embodied in rules and guidelines, is that arbitrators, including both the chairperson and those who were appointed by the contesting parties, must be and remain independent and impartial with no distinction between them as to their obligations. It must be said, however, that there is a strong sense that these guidelines are not strictly followed. Experienced arbitration counsel, guiding their clients with respect to the selection of a party-appointed arbitrator, will consider how their choice will affect the outcome of the case.

As one prominent law firm stated in a published alert on key considerations for the selection of party-appointed arbitrators, “The objective of any party facing the selection of a party-appointed arbitrator is to maximize chances of winning.” Thus, according to the advice given in the alert, parties have the “incentive to name arbitrators of stature and independence, even as they look for an individual predisposed by experience in favor of the positions likely to be advanced by their side during the arbitration.”

The cynical, but oft-repeated, distillation of what a party wants from a party-appointed arbitrator is that they appear to be unbiased, but in fact do what they can to favor their appointing party. As the late English counsel and arbitrator, Martin Hunter, put it, “[what] I am looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.”

There are arbitrators with particular experience as party-appointed arbitrators and there are incentives for them to follow Professor Hunter’s suggestion. For an experienced and active arbitrator, for whom getting appointments in multiple cases is highly desirable, there are twice as many opportunities for appointment as party-appointed arbitrator as there are for appointment as chairperson.

Consequently, some may say that there are arbitrators who may be incentivized to develop a reputation as effective party-appointed arbitrators, so that they will be appointed by the same or other parties in the future. As Professor Rogers said, “Some critics argue that arbitrators appointed by a party have a financial incentive to ‘serve’ the party who appointed them in hopes of securing future appointments.” Rogers article, pp. 149-50.

Inappropriate activity by an arbitrator is difficult for anyone outside the tribunal to detect in its entirety. Some party-appointed arbitrators may be overtly partisan by, for example, making comments and asking questions in hearings intended to benefit the party that appointed them. Although interventions by arbitrators in hearings may be valuable for clarifying portions of the record or help in out salient issues in the case, some arbitrators could go further by, for example, introducing, for the benefit of one side, theories not advanced by that party’s counsel. Such partisan conduct might help to lead to an award in favor of the party that appointed the arbitrator, but there is a risk that a chairperson will give less consideration to the positions taken by a “wing” arbitrator who is perceived to be overtly partisan.

There are few, if any, guardrails on arbitrators’ behavior once they have been appointed. Section 10 of the Federal Arbitration Act can be understood as forbidding biased conduct on the part of arbitrators. It provides that a court may make an order vacating an award “where there was evident partiality or corruption in the arbitrators.”

However, alleged “evident partiality” in the form of partisan behavior by arbitrators has, from what can be gleaned from a perusal of summaries of reported cases, infrequently, if at all, been a basis for court challenges to arbitral awards under Section 10. Losing parties in arbitration may have found it easier to pursue arbitrators’ undisclosed relationships that can be characterized as conflicts of interest than to try to show conduct by a party-appointed arbitrator in the proceedings that may arguably reflect his or her evident partiality.

It is an oft-repeated shibboleth that party-appointed arbitrators have the right—or perhaps even the duty—to make sure that the position of the party that appointed them is clearly understood by the other members of the tribunal. It is not uncommon for party-appointed arbitrators, including those on the same panel, who conduct themselves vis-à-vis the other arbitrators on this basis but ultimately vote on the basis of the merits of the case.

It is worth noting that this understanding of the scope of generally acceptable permissible conduct for party-appointed arbitrators is not shared by everyone in the international arbitration community. The recently promulgated Code of Best Practices in Arbitration of the Spanish Arbitration Club (2019) states:

Arbitrators who are unilaterally nominated do not have the special role or duty of ensuring that their nominating party’s case is adequately understood by the other members of the arbitral tribunal, or any other special role or duty with regard to their nominating party’s case, except as otherwise agreed by the parties [see Section 73].

Time will tell whether this admonition has been heeded, made the subject of agreement by the parties or ignored.

All in all, it is not realistic to believe that the right of parties to agree that they will appoint their own arbitrators is going to go away, even if it might make life more complex for arbitrators. Professor Rogers recognizes this reality and suggests a “reconceptualized role of the party-appointed arbitrator,” one that “acknowledges” that “party-appointed arbitrators may have important obligations that differ from those of the chairperson...” and that “arbitrator appointment effectively requires a certain degree of unilateralism to ensure representativeness on the tribunal.”

She also suggests that acknowledgment of the reality of the party-appointed arbitrator necessitates a kind of “fine-grained analysis about the meaning of impartiality.” Rogers article, p. 200.

In considering the role of party-appointed arbitrator it is important to take into account that there are a great many unanimous awards in international arbitration and far fewer dissents. Although some unanimous awards may represent compromises to appease an arbitrator appointed by a losing side who might otherwise have dissented, many undoubtedly reflect that party-appointed arbitrators have been convinced by the evidence and arguments from the side favored by the tribunal majority. That is to say, party-appointed arbitrators often vote with their conscience rather than for the party that appointed them. It may therefore be that many party-appointed arbitrators are endeavoring to persuade both of the other arbitrators rather than just the chairman.

This as it should be. Hard-working and thoughtful arbitrators who rule on the basis of a full understanding of the legal and factual issues are what the parties should want and expect. Parties have a way of getting some assurance of this by tribunals including arbitrators selected by them.

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