

Christoph Müller | Antonio Rigozzi (Eds)

# New Developments in International Commercial Arbitration 2013

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# Pride and Prejudice in the Debate on Arbitrator Independence

MELANIE VAN LEEUWEN\*

«All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they will find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases, but because she shuts her eyes to all considerations extraneous to the particular case.»<sup>1</sup>

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\* The author is grateful to Mr. Emmanuel Foy and Mrs. Marie-Odile Désy for their assistance in researching the topic of this contribution.

<sup>1</sup> *Locabail (UK) Ltd v. Bayfield Prop. Ltd*, [2000] 1 Q.B. 451, cited in Gary B. Born, *International Commercial Arbitration*, (Kluwer Law International 2009), p. 1470.

## I. Introduction

Since arbitrators dispose of the parties' rights in a binding manner and their decisions are subject to minimal judicial review, it is essential for the integrity of the arbitral process and the legitimacy of its outcome that arbitrators be impartial and independent and act accordingly throughout the arbitral proceedings.

Anyone who has had both the experience of serving as an arbitrator on a three-member tribunal, the members of which have all been appointed by an arbitral institution, and as an arbitrator on a three-member tribunal, composed of two party-appointed arbitrators and a president, will have noted the difference in the dynamics within those tribunals. That difference is an interesting phenomenon in light of the fact that - whether party-appointed or not - arbitrators are bound by the same duty of independence and impartiality.<sup>2</sup>

Yet, recent empirical research shows that a significant majority of respondents (76%) prefer selection of the two co-arbitrators in a three-member tribunal by each party unilaterally.<sup>3</sup> On the basis of these statistics, the authors of the 2012 survey of the Queen Mary School of International Arbitration (concerning current and preferred practices in the arbitral process) conclude that «*the arbitration community generally disapproves of the recent proposal calling for an end to unilateral party appointments.*»<sup>4</sup> This strong preference would suggest that counsel and parties in

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<sup>2</sup> See IBA Guidelines on Conflicts of Interest in International Arbitration (2004), Standard 1; UNCITRAL Arbitration Rules (2010), Art. 11; ICSID Arbitration Rules (2006), Art. 6; ICC Arbitration Rules (2012), Art. 11; LCIA Arbitration Rules (1998), Art. 5; Swiss Rules of International Arbitration (2012), Art. 9; SCC Arbitration Rules (2010), Art. 14; ICDR Arbitration Rules (2009), Art. 7.

<sup>3</sup> FRIEDLAND PAUL/BREKOULAKIS STAVROS, *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, (Queen Mary University of London 2012), p. 5, available at: <http://arbitrationpractices.whitecase.com/>

<sup>4</sup> *Id.* p. 2.

arbitration have more confidence in – and have different expectations of – the arbitrators that they appoint unilaterally, than of the arbitrators, who are appointed by arbitration institutes.

The recent proposal that is alluded to above is Professor Jan Paulsson's proposal to do away with party-appointments altogether in order to avoid arbitrator-bias and the adversarial element that party-appointed arbitrators can introduce into the deliberation process. It was presented at his inaugural lecture «*Moral Hazard in International Dispute Resolution*» delivered on 29 April 2010, on the occasion of his acceptance of the Michael R. Klein Distinguished Scholar Chair at the University of Miami School of Law.<sup>5</sup> In Mr. Paulsson's view, the lack of impartiality of party-appointed arbitrators, which may manifest itself in more or less subtle manners, jeopardises the integrity of the arbitral process. Professor Paulsson firmly rejects the proposition that parties to an arbitration have a right – let alone a fundamental one – to unilaterally appoint «their» arbitrator. He further suggests that the solution to the problem is to be found in the abolition of the party-appointed arbitrator. Instead, he proposes three alternative methods of appointment: (i) all members of a tribunal are appointed by joint agreement of the parties; (ii) all members of a tribunal are appointed by an arbitral institution; or (iii) the parties can unilaterally select arbitrators from a pre-existing list of arbitrators.<sup>6</sup>

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<sup>5</sup> PAULSSON JAN, *Moral Hazard in International Dispute Resolution*, *Transnational Dispute Management*, Vol. 8 – Issue 2 (2011), p. 3.

<sup>6</sup> PAULSSON JAN, *Moral Hazard in International Dispute Resolution*, *Transnational Dispute Management*, Vol. 8 – Issue 2 (2011), p. 16.

Although it is true that the arbitral process is only as good as the quality of the arbitrators conducting it,<sup>7</sup> the question is whether Professor Paulsson's diagnosis of the hazard that party-appointments pose to the integrity of the arbitral process justifies the rather drastic remedy of extinguishing the species altogether.

While concerns over the impartiality and independence of arbitrators are by no means novel,<sup>8</sup> Professor Paulsson has certainly revived the debate with his lecture in 2010. Ever since this lecture, the debate has focussed on how the independence of arbitrators may or may not be affected by the method of their appointment.

In what Professor Paulsson characterised in 2010 as «a minority of one»<sup>9</sup>, he has received strong support from distinguished members of the arbitration community, as well as fierce criticism from equally distinguished members of that same community.<sup>10</sup> In light of the importance of

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<sup>7</sup> BISHOP DOAK/REED LUCY, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, Arbitration International, Vol. 14 – Issue 4 (1998), pp. 395-429.

<sup>8</sup> See e.g. RAU ALAN SCOTT, *On Integrity in Private Judging*, *Arbitration International*, Arbitration International, Vol. 14 – Issue 2 (1998); BISHOP DOAK/REED LUCY, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, Arbitration International, Vol. 14 – Issue 4 (1998); MOSK RICHARD/GINSBERG TOM, *Dissenting Opinions in International Arbitration* in: Liber Amicorum Bengt Broms (Finnish Branch of the International Law Association, Helsinki 1999); REDFERN ALAN, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, Arbitration International, Vol. 20 – No. 3 (2004); ROGERS CATHERINE A., *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, *Transnational Dispute Management*, Vol. 8 – Issue 1 (February 2011); KIRBY JENNIFER, *With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, *Journal of International Arbitration*, Vol. 26 – Issue 3 (2009).

<sup>9</sup> *Ibid.*

<sup>10</sup> For those in favour of Professor Paulsson's proposal, see e.g. VAN DEN BERG ALBERT JAN, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration* in: Mahnouch Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill Academic 2011);



arbitrator independence and impartiality for every arbitration (be it commercial or investment), the considerations on both sides of the spectrum merit being heard in the framework of a conference about recent developments in international arbitration.

Both sides of this debate raise the thorny issue of how personal views and beliefs can taint the arbitrator's mind-set in how he/she approaches the process, as well as his/her interactions with fellow arbitrators. Much like the main characters in Jane Austen's *Pride and Prejudice*, users of arbitration have much to gain from putting aside their preconceptions before drawing hasty conclusions.

To that end, this contribution will first consider the aspects of the notion that an arbitrator is required to conduct him/herself and his/her duties with the requisite impartiality and independence (**Section II**). It will then analyse the arguments advanced by the critics of unilateral appointments and the arguments advanced by the proponents of the fundamental right to party-appointment of arbitrators (**Section III**). This contribution will conclude with an

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SMIT HANS, *The pernicious institution of the party-appointed arbitrator*, Columbia FDI Perspectives - Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment No. 33 (14 December 2010); NASSIB ZIADÉ, *L'éthique et l'arbitrage en matière d'investissement: grandeur et misère de la fonction d'arbitre*, Revue de l'arbitrage (2012). For Professor Paulsson's critics, see e.g. BROWER CHARLES N./ROSENBERG CHARLES B., *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, Arbitration International, Vol. 29 - Issue 1 (2013); MOURRE ALEXIS, *Are unilateral appointments defensible? On Jan Paulsson's moral hazard in international arbitration*, Kluwer Arbitration Blog (14 October 2010) available at <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/>; ELZROTH CARTER, *Inaugural Brower Lecture, Johnny Veeder Sets Out History Advantages of Party-Appointed Arbitrators*, ASIL Cables (7 April 2013), available at <http://69.195.124.65/~asilcabl/2013/04/07/in-inaugural-brower-lecture-johnny-veeder-sets-out-history-advantages-of-party-appointed-arbitrators/>.

analysis of the proposed solutions to protect international arbitration against the undesirable aspects of party-appointments (**Section IV**).

## **II. Impartiality and Independence**

It seems to be a universally accepted principle that arbitrators have an obligation to exercise their duties impartially, independently or both. The question arises as to what these rather abstract notions precisely entail and to whom the arbitrators owe such duty.

### **A. The notion of impartiality and independence**

In an attempt to establish the meaning of the requirement for impartiality and independence, four sources shall be considered: (i) arbitration laws and rules; (ii) case law; (iii) standards of conduct adopted by professional organisations; and (iv) legal commentary.

First, national laws<sup>11</sup> and arbitration rules<sup>12</sup> are unanimously general, if not vague, about the actual standard of

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<sup>11</sup> UNCITRAL Model Law, Art. 12(2); French Code of Civil Procedure, Art. 1456 («*Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate.*»); English Arbitration Act 1996, Section 24(1)(a) («*A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—that circumstances exist that give rise to justifiable doubts as to his impartiality*»); Swiss Private International Law Act, Art. 180(1)(c). («*An arbitrator may be challenged: (...) (c) if circumstances exist that give rise to justifiable doubts as to his independence*»).

<sup>12</sup> See UNCITRAL Arbitration Rules (2010), Art. 11; ICSID Arbitration Rules (2006), Art. 6; ICC Arbitration Rules (2012), Art. 11; LCIA Arbitration Rules (1998), Art. 5; Swiss Rules of International Arbitration (2012), Art. 9; SCC Arbitration Rules (2010), Art. 14; ICDR Arbitration Rules (2009), Art. 7.

impartiality and independence. The UNCITRAL Model Law has set the standard with the provision contained in Article 12(2):

*«An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.»*

Neither the many national arbitration laws, nor the arbitration rules that explicitly impose on arbitrators the duty to be and remain impartial and/or independent of the parties involved in the arbitration, positively state the norms that arbitrators have to comply with in order to meet that standard. To the extent substantive meaning is provided, the formulation is mostly negative, in that it enumerates a number of circumstances that shall in any case be considered as affecting an arbitrator's impartiality or independence. Section 8 of the Swedish Arbitration Act provides a good example:

*«An arbitrator shall be impartial.*

*If a party so requests, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Such a circumstance shall always be deemed to exist:*

- 1. where the arbitrator or a person closely associated to him is a party, or otherwise may expect benefit or detriment worth attention, as a result of the outcome of the dispute;*
- 2. where the arbitrator or a person closely associated to him is the director of a company or any other*

*association which is a party, or otherwise represents a party or any other person who may expect benefit or detriment worth attention as a result of the outcome of the dispute;*

*3. where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute; or*

*4. where the arbitrator has received or demanded compensation in violation of section 39, second paragraph.»*

The formula chosen by the Swedish legislator of circumstances «*which diminish confidence in the arbitrator's impartiality*» and which are deemed to exist if an arbitrator «*may expect benefit or detriment worth attention*» is subtle, yet all-encompassing. An arbitrator's judgment may be affected by an incentive that he or she may expect to receive if the arbitration has a particular outcome. However, as the *Himpurna v. Indonesia* case<sup>13</sup> sadly taught, an arbitrator's judgment can be equally influenced by a threat of physical danger. In the latter circumstances, an arbitrator has nothing to gain but, rather, something to lose, if the dispute is not decided in a manner that is satisfactory to the party that appointed the relevant arbitrator.

Therefore, if there is any circumstance that gives rise to a reasonable apprehension that an arbitrator may not decide the case before him or her based only on an open-minded assessment of the facts in the light of the applicable law,

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<sup>13</sup> See e.g. *Himpurna California Energy Ltd. v Republic of Indonesia* (UNCITRAL), Interim Award and Final Award, 26 September 1999 and 16 October 1999 in: Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2000 - Volume XXV*, (Kluwer Law International 2000), pp.153-166. In this case, the Indonesian co-arbitrator was allegedly kidnapped by Indonesian officials at the final stages of the arbitration.

that arbitrator ought to recuse him or herself. Under the Swedish Arbitration Act, whether there is an actual conflict of interest on the part of the arbitrator or only a doubt on the part of one or more of the parties to the arbitration, is irrelevant. In both cases the arbitrator will have to decline the appointment or step down. The difficulty with the Swedish formula is that it introduces a subjective element into the appreciation of what is worth attention and who judges what is worth attention. Reasonable minds may differ on these questions.

Second, decisions and judgments of national courts that have tested the standard of impartiality and/or independence in the context of: arbitrator challenges; setting aside applications; and attempts to resist enforcement,<sup>14</sup> are highly fact-specific. These decisions are generally formulated and applied differently from jurisdiction to jurisdiction and, as a result, do not provide general guidance as to the content of the standard by which arbitrators in international arbitration have to comply. Although some of them do offer interesting philosophical insights, they do not assist in establishing what type of behaviour an arbitrator has to display in international arbitration in order to comply with the requirement of impartiality and independence.<sup>15</sup>

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<sup>14</sup> By way of example, the challenge of Professor Gaillard in the UNCITRAL arbitration proceedings of *Telekom Malaysia v Republic of Ghana*, Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision of the District Court of The Hague of 18 October 2004; Challenge No. 17/2004, Petition No. HA/RK 2004.788, Decision of the District Court of The Hague of 5 November 2004. See also *S.A.J. & P. Avax v. Société Tecnimont SPA*, Court of Appeal of Reims, 2 November 2011, R.G. 10/02888. The Reims Court of Appeal decision was overturned by the French *Cour de cassation* in *Tecnimont SPA v J&P Avax SA*, *Cour de cassation, ch. civile 1*, (November 2010), (case no. 09-12716).

<sup>15</sup> *Locabail (UK) Ltd v. Bayfield Prop. Ltd*, [2000] 1 Q.B. 451 cited in BORN GARY B., *International Commercial Arbitration*, (Kluwer Law International 2009) holding that «[a]ll legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they will find them. They must do so without fear or

Third, unlike professional codes of conduct and deontological rules that regulate the client relations of professional service providers (such as lawyers and accountants), the compliance of which is supervised and the breach of which is sanctioned by a supervisory authority, there are no ethical rules that govern the relations of the same professionals with the parties to an arbitration when serving as arbitrators in international arbitrations. In order to fill that apparent gap, a number of professional organisations and associations have developed standards and ethical codes for use in arbitration.<sup>16</sup> In practice, the most widely used are the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration.<sup>17</sup>

The IBA Guidelines define the general principle as follows:

*«Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.»*

Again, there is no positive answer to the question of what an arbitrator must do to comply with this standard. The content of arbitrators' duties under the IBA Guidelines must therefore also be inferred from the negative standards

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*favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases, but because she shuts her eyes to all considerations extraneous to the particular case.»*; *Ury v. Galeries Lafayette*, Cour de Cassation, ch. civile 2, (13 April 1972), *Revue de l'Arbitrage* (1975), holding at p. 235 that *«an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be and it is one of the essential qualities of an arbitrator.»*

<sup>16</sup> See e.g. IBA Rules of Ethics for International Arbitrators (1987), available at [http://www.int-bar.org/images/downloads/pubs/Ethics\\_arbitrators.pdf](http://www.int-bar.org/images/downloads/pubs/Ethics_arbitrators.pdf); ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) available at <http://www.americanbar.org/>.

<sup>17</sup> IBA Guidelines on Conflicts of Interest in International Arbitration (2004), available at: <http://www.ibanet.org/>.

formulated within the IBA Guidelines with respect to the arbitrator's duty to reject an appointment in certain circumstances and the obligation to disclose certain circumstances prior to appointment or during the arbitral proceedings. The IBA Guidelines prescribe that an arbitrator is obliged to decline an appointment or withdraw from an arbitration in case he or she is unable to be impartial and independent,<sup>18</sup> or in case of actual bias from the arbitrator's own point of view.<sup>19</sup> Any doubts as to the ability to be impartial and independent should lead the arbitrator to decline his/her appointment.<sup>20</sup> An arbitrator is further obliged to disclose the existence of any circumstances that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence.<sup>21</sup> Although the standard of impartiality and independence recorded in the IBA Guidelines is often considered to be an objective one, the application thereof certainly involves several elements of subjective appreciation: (i) which doubts are reasonable and justifiable in the framework of the relevant facts?; (ii) which are the relevant facts?; and (iii) what does a reasonable third party think? Again, reasonable minds may differ on any of these questions.

Fourth, legal commentators have also considered the issue and have attempted to provide an answer to fill the vacuum of legislation, arbitration rules and case law.<sup>22</sup> There seems

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<sup>18</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, Part I, General Standard (2)(a).

<sup>19</sup> *Id.*, Part I, Explanation to General Standard 2(a).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Id.*, Part I, Explanation to General Standard 2(b). The «reasonable third party» test adopted in the IBA Guidelines has been taken from Art. 12(2) of the UNCITRAL Model Law.

<sup>22</sup> LEW JULIAN D.M./MISTELIS LOUKAS A./KRÖLL STEFAN M., *Comparative International Commercial Arbitration*, (Kluwer Law International 2003), pp. 255–273; GAILLARD EMMANUEL/SAVAGE JOHN (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999),

to exist a rather general agreement among the commentators that the impartiality requirement is a subjective standard, while the independence requirement is an objective standard. That is, impartiality is a subjective standard that goes to the state of mind of the arbitrator and which requires him/her to hear and judge the case in a neutral, unbiased, fair-minded manner, without prejudice with respect to any of the issues in dispute and without predisposition towards any of the parties involved in the arbitration.<sup>23</sup> Independence, however, is an objective standard that is aimed at ensuring the absence of unacceptable external relations or connections between an arbitrator on the one hand and one or more of the parties or counsel involved in an arbitration on the other.<sup>24</sup>

The fundamental purpose of both the impartiality and the independence requirement is to ensure that the arbitrator is unbiased and fair-minded. It is this neutral state of mind that will give parties the necessary confidence that the

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pp. 557–628; BORN GARY B., *International Commercial Arbitration*, (Kluwer Law International 2009), pp. 1461–1552; BLACKABY NIGEL/PARTASIDES CONSTANTINE AND AL., *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009), pp. 313–362.

<sup>23</sup> BISHOP DOAK/REED LUCY, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, Arbitration International, Vol. 14 - Issue 4 (1998), pp. 395-429; LEW JULIAN D.M./MISTELIS LOUKAS A./KRÖLL STEFAN M., *Comparative International Commercial Arbitration*, (Kluwer Law International 2003), pp. 258–261; GAILLARD EMMANUEL/SAVAGE JOHN (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999) pp. 561–575; BORN GARY B., *International Commercial Arbitration*, (Kluwer Law International 2009), pp. 1473-1474; BLACKABY NIGEL/PARTASIDES CONSTANTINE AND AL., *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009), pp. 326–338.

<sup>24</sup> LEW JULIAN D.M./MISTELIS LOUKAS A./KRÖLL STEFAN M., (Kluwer Law International 2003), pp. 255–273; GAILLARD EMMANUEL/SAVAGE JOHN (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999), pp. 557–628; BORN GARY B., *International Commercial Arbitration*, (Kluwer Law International 2009), pp. 1473-1474; BLACKABY NIGEL/PARTASIDES CONSTANTINE AND AL., *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009), pp. 313–362.



arbitrator will judge the issues in dispute on the basis of the relevant facts in light of the applicable law alone. In that framework, Gary Born has rightly pointed out that the distinction between the subjective standard of impartiality and the objective standard of independence may be of academic interest only, because subjective impartiality is virtually always established through inquiry into external, objective facts and circumstances.<sup>25</sup> A lack of independence is a matter of concern because it indicates the possibility of partiality or bias, which in turn can only be evidenced through showings of external relations or connections.

To summarise, both a lack of impartiality and the presence of relations or circumstances affecting an arbitrator's independence will result in the same undesirable effect, namely, the arbitrator will not judge the issues in dispute exclusively on the basis of an open-minded assessment of the relevant facts and the application of the law to those facts. It is a basic human right that in the determination of civil rights and obligations, a party is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.<sup>26</sup> If international arbitration wishes to offer a viable and credible alternative to litigation before state courts, it should at least be able to emulate that standard by ensuring that arbitrators are unbiased adjudicators, judging disputes on their merits only and without prejudice as to the issues in dispute or predisposition towards any of the parties. To that end, the requirements of impartiality and/or independence seem to have been universally accepted and have been laid down in national arbitration laws, arbitration rules and codes of

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<sup>25</sup> BORN GARY B., *International Commercial Arbitration*, (Kluwer Law International 2009), pp. 1473-1475.

<sup>26</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (4 November 1950), Art. 6, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

conduct. However, the risk remains that the typically wide and broadly framed formulae, leave too much discretion to the individual arbitrator<sup>27</sup> and to his/her self-diagnosis.

## **B. To whom do arbitrators owe their duty of impartiality and independence?**

As stated above, one of the conclusions of the 2012 Queen Mary Survey<sup>28</sup> was that 76% of users and counsel in international arbitration prefer party-appointments over institutional appointments for the constitution process of three-member tribunals. Anyone with considerable experience as counsel in international arbitration can confirm that preference on the part of clients. It is common practice that prior to the appointment of an arbitrator, a fair amount of due diligence is conducted by the appointing party and its counsel into the potential arbitrator(s), his or her professional experience, his or her academic writings and the previously issued arbitral awards that that arbitrator has rendered in other cases. When given the opportunity, it is only natural that a party will appoint an arbitrator, who - based on the outcome of such investigation - is deemed likely to view the issues in dispute in a manner that is positive for the case that it will be putting forward.

Arbitrators are very much aware of that fact. The late Professor Hans Smit attested to that fact in a manner that is rare but admirably honest:

*«I believe that true objectivity is possible only if all arbitrators are prepared to rule against the party that appointed them exactly as if they had been sitting as*

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<sup>27</sup> ROGERS CATHERINE A., *The Vocation of the International Arbitrator*, American University International Law Review, Vol. 20 (2005), p. 972.

<sup>28</sup> FRIEDLAND PAUL/BREKOUKAKIS STAVROS, *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, (Queen Mary University of London 2012), p. 2, available at: <http://arbitrationpractices.whitecase.com/>

*sole arbitrators. In my experience, that condition is not met in most cases. I have personally encountered this pressure. While I made clear to the lawyer who selected me that I would decide the case on its merits, I could not help feeling influenced by the knowledge that the lawyer who appointed me had done so because he had judged that that would best serve his client's interests.»<sup>29</sup>*

Considering that arbitrators are providers of adjudication services, whose professional success and income will depend (in part) on future arbitral appointments, the human need to please the appointing party and/or its counsel, may be felt more strongly by some arbitrators than by others. However strongly it is felt, that need will almost inevitably put a strain on the arbitrator's duty towards all parties to the arbitration to judge the case impartially and independently.

The fact that users of – and counsel in – international arbitrations may have different expectations from a party-appointed arbitrator compared to an institutionally appointed arbitrator, begs the question to whom the duty of impartiality and independence is actually owed. The answer to that question has traditionally been (and may still be) subject to legal and cultural differences.

Notably, in the United States a number of state laws and arbitration rules have historically distinguished between party-appointed arbitrators, referred to as «non-neutrals», and sole or presiding arbitrators, who are referred to as «neutrals». In those systems a party-appointed arbitrator was presumed to be partial to the party that appointed him/her, which was reflected in different ethical standards

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<sup>29</sup> SMIT HANS, *The pernicious institution of the party-appointed arbitrator*, Columbia FDI Perspectives - Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment No. 33 (14 December 2010), p. 2.

for party-appointed arbitrators than for sole and presiding arbitrators. However, as a result of legislative changes (and most notably the 2004 amendment of the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes)<sup>30</sup> the acceptance of overtly partisan party-appointed arbitrators is gradually being abandoned in the United States.

To our knowledge, outside the United States no such formal distinction has ever been made and the requirements of impartiality and/or independence have always applied in the same manner to both party-appointed arbitrators and presiding or sole arbitrators. However, that is not to say that in the international arbitration practice outside the United States, the standard of impartiality and independence has consistently been applied by (and to) party-appointed arbitrators and presiding or sole arbitrators alike.

Today, the general agreement is that in international arbitration overtly non-neutral arbitrators are no longer accepted. All arbitrators are required to be impartial and independent adjudicators, and must interpret and apply the governing law to the facts of the case.<sup>31</sup>

There also seems to be a general agreement as to the distinguishing and valuable contribution that a party-appointed co-arbitrator can and is well-placed to make. Traditionally, party-appointed arbitrators are selected by parties because of their particular expertise or knowledge (be it linguistic, cultural, technical, commercial, etc.), which they are able to contribute to the tribunal during the arbitral

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<sup>30</sup> ABA Code of Ethics for Arbitrators in Commercial Disputes (2004), available at: <http://www.americanbar.org/>.

<sup>31</sup> PAULSSON JAN, *Moral Hazard in International Dispute Resolution*, Transnational Dispute Management, Vol. 8 - Issue 2 (2011), p. 13; BROWER CHARLES N./ROSENBERG CHARLES B., *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, Arbitration International, Vol. 29 - Issue 1 (2013), p. 14.

process as well as during the deliberations. This gives the appointing party the confidence that there is a general understanding on the part of the tribunal of particular aspects of a case, the particular environment in which the dispute has arisen and/or the procedural expectations that parties from a particular jurisdiction may have.<sup>32</sup> The presence of an arbitrator, who can assist in clarifying misunderstandings arising from the culturally diverse environment in which the arbitral process takes place, is generally perceived as a useful function that the co-arbitrator can (and is allowed to) fulfil. Provided that this function is exercised within the bounds of impartiality and independence, the contribution of such expertise or local knowledge can be extremely valuable, may facilitate the dispute resolution process and is likely to raise the confidence that parties have in the arbitrators.

In light of the foregoing, it is clear that in today's international arbitration practice there is no place for different standards of impartiality and independence for party-appointed arbitrators on the one hand and sole or presiding arbitrators on the other. However, there continues to be room for the unique contribution that party-appointed arbitrators are able to make in terms of particular expertise or knowledge, provided that their contribution is made in a manner that enhances the understanding of the tribunal as a whole and not in a manner that is aimed at advancing the case of the appointing party only. The bottom line remains that if there is any reasonable or justifiable doubt as to the impartiality or independence of any of the arbitrators, each of them owes an independent duty to all of the parties involved in the arbitration to recuse him or herself.

Yves Derains rightly remarked that arbitrators are nowadays required to declare prior to their appointment in every

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<sup>32</sup> *Id.*, pp. 19-21.

arbitration that they are impartial and independent of the parties. They unanimously do. The question is how to ensure that they act accordingly.<sup>33</sup>

### **III. Why Party-Appointed Arbitrators Would Pose a Moral Hazard<sup>34</sup> or Would Be Untrustworthy<sup>35</sup>**

#### **A. Introduction**

Although partisan arbitrators may have been institutionalised and accepted in a number of US jurisdictions in the past, Professor Paulsson has received strong support for (and at the same time, encountered fierce opposition against) his views from both sides of the Atlantic, from lawyers with their roots in the common law system, as well as from lawyers who are schooled and practice in a civil law system. Paulsson's most fervent supporters have included Dutch Professor Albert Jan van den Berg, the late American Professor Hans Smit, the Attorney General of Singapore Sundaresh Menon SC, and former deputy secretary-general of ICSID and former secretary-general of DIAC, Nassib Ziadé of Lebanon.<sup>36</sup> Professor Paulsson's most vocal critics include the American arbitrator Charles Brower, French arbitration practitioner Alexis Mourre and the most well-known barrister

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<sup>33</sup> DERAIS YVES, *The Deliberations of the Arbitral Tribunal – «Retour au délibéré» arbitral*, in: *The Resolution of the Dispute – From the Hearing to the Award: ASA Special Series No. 29*, (Markus Wirth Edition 2007), p. 17.

<sup>34</sup> PAULSSON JAN, *Moral Hazard in International Dispute Resolution*, *Transnational Dispute Management*, Vol. 8 – Issue 2 (2011), pp. 1-21.

<sup>35</sup> BROWER CHARLES N./ROSENBERG CHARLES B., *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, *Arbitration International*, Vol. 29 – Issue 1 (2013), pp. 7-44; PARK WILLIAM W., *Arbitrator Integrity: The Transient and the Permanent*, *San Diego Law Review*, Vol. 46 (2009), pp. 629-704.

<sup>36</sup> NASSIB ZIADÉ, *L'éthique et l'arbitrage en matière d'investissement: grandeur et misère de la fonction d'arbitre*, *Revue de l'arbitrage* (2012).

in the practice of international arbitration, Johnny Van Vechten Veeder QC.<sup>37</sup>

## **B. The moral hazard**

Professor Paulsson's central proposition is that party-appointed arbitrators undermine the integrity of the arbitral process, or to use his exact words, pose «*a moral hazard*» to international arbitration. Professor Paulsson describes the hazard that party-appointed arbitrator pose in no uncertain terms:

*«Many persons serving as arbitrator seem to have no compunction about quietly assisting 'their' party; they apparently view the modern international consensus that all arbitrators owe a duty to maintain an equal distance to both sides as little more than pretty words, as though sophisticates in reality conduct themselves in accordance with a different sub rosa operational code.»<sup>38</sup>*

To illustrate the hazard that Professor Paulsson refers to, he described a number of disconcerting real cases and hypothetical examples of situations in which party-appointed arbitrators had to juggle competing interests that had the clear potential to affect their judgment of the dispute before them. One of the most telling examples Professor Paulsson advanced is the story of the American arbitrator in the

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<sup>37</sup> ELZROTH CARTER, *Inaugural Brower Lecture, Johnny Veeder Sets Out History Advantages of Party-Appointed Arbitrators*, ASIL Cables (7 April 2013), available at <http://69.195.124.65/~asilcabl/2013/04/07/in-inaugural-brower-lecture-johnny-veeder-sets-out-history-advantages-of-party-appointed-arbitrators/>; See also PERRY SEBASTIAN, *Party appointments are «keystone» of arbitration, says Veeder*, *Global Arbitration Review* (17 April 2013).

<sup>38</sup> PAULSSON JAN, *Moral Hazard in International Dispute Resolution*, *Transnational Dispute Management*, Vol. 8 – Issue 2 (May 2011), p. 7.

*Loewen* case.<sup>39</sup> In that case the arbitrator, a former US federal judge, had been appointed by the United States and had met with the US Department of Justice prior to his appointment. During that meeting the arbitrator was told by officials: «*You know, judge if we lose this case we could lose NAFTA.*» He remembered his answer as having been: *'Well if you want to put pressure on me, then that does it.'*<sup>40</sup> However, this meeting was never disclosed during the arbitral proceedings and was revealed by that arbitrator only many years later at a symposium.<sup>41</sup> This case, in which the US was victorious, and the disclosure of the arbitrator was made years after the arbitration had been completed, led Professor Paulsson to conclude that in light of the pressure put on that arbitrator, the parties' dispute was not adjudicated by an impartial and independent tribunal.<sup>42</sup>

### **C. Cases of bias**

In order to assess whether party-appointed arbitrators are in fact as hazardous or untrustworthy as Professor Paulsson suggests, one needs to consider how the risks associated with party-appointments manifest themselves in practice. The problem is that often they do not. Or rather they do not manifest themselves in a manner that is apparent to outsiders, including sometimes to the other arbitrators and the party/parties that did not nominate the arbitrator in question. In many cases the lack of impartiality and independence is so entrenched that its effect on the manner in which the dispute is decided may never be known.

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<sup>39</sup> The *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID (NAFTA) Case No. ARB(AF)98/3, Award on Merits (26 June 2003).

<sup>40</sup> PAULSSON JAN, *Moral Hazard in International Dispute Resolution*, Transnational Dispute Management, Vol. 8 – Issue 2 (May 2011), p. 8.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Id.*, p. 9.



The cases in which it does become apparent that an arbitrator is affected by a lack of independence and/or impartiality can roughly be divided into four categories.

First, there are the cases in which an arbitrator has conflicting interests such as: financial interests in the outcome of the case or in a party; a close personal relationship with a party or its counsel; a non-financial interest in the relevant project, a dispute or the subject matter; a public position taken on the specific matter in dispute; a prior or (worse) continuing working relationship with a party or one of its affiliates; or an adverse representation against a party involved in the arbitration. In each of these cases, arbitrators must disclose the relevant circumstances as they may cause a reasonable party to have justifiable doubts with respect to the impartiality and independence of the arbitrator in question.

Second, there are the cases in which partisan or hostile behaviour of a party-arbitrator towards one (or more) of the parties raises concerns. In addition to the fact that such behaviour is likely to alienate both the other co-arbitrator and the president of the tribunal, if openly displayed, it can also provide the party against which the bias is directed with ammunition for a challenge action. More problematic are the cases in which such partisan or hostile behaviour is only displayed during the deliberations with the other arbitrators and where, as a result of the principle of secrecy of the deliberations, the parties have no knowledge of the lack of impartiality and/or independence and are thus unable to address it.

Third, there are the cases in which co-arbitrators leak confidential information from the deliberations of the tribunal to the appointing party before the final award is rendered, thereby helping that party to establish an effective settlement strategy. Obviously, the party that is on the receiving end of that information is unlikely to challenge its

party-appointed arbitrator, while the other party or parties will most probably never know that information was leaked. In the meantime, the secrecy of the deliberations has been violated and, as a result, the foundation of the collegial decision-making process has been violated.

Fourth, there are the cases in which the lack of independence or the impartiality of a party-appointed arbitrator manifests itself after the arbitral proceedings have been completed, notably when the party-appointed arbitrator issues a dissenting opinion in favour of the appointing party with the award. Professor Paulsson's concerns about party-appointed arbitrators seem to have been corroborated by empirical research published by Professor Albert Jan van den Berg in 2011.<sup>43</sup> Professor van den Berg conducted a survey of the then 150 published investment treaty awards and the 34 dissenting opinions that were issued in those cases. Professor van den Berg found that with one exception, all dissenting opinions were issued by the arbitrator who was appointed by the party that lost the arbitration and were in favour of that party.<sup>44</sup> A nearly 100% score.<sup>45</sup> Professor van den Berg expressed serious concern about the fact that dissenting opinions have become common practice in international investment treaty arbitration, while Mr. Alan Redfern expressed similar reservations in 2003, with respect to commercial arbitration, where his research revealed that of the 24 dissenting opinions issued in ICC arbitrations in 2001, 22 of these were

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<sup>43</sup> VAN DEN BERG ALBERT JAN, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration* in: Mahnoush Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill Academic 2011), pp. 821-843.

<sup>44</sup> *Id.*, p. 824.

<sup>45</sup> REDFERN ALAN, *The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad, the Ugly*, *Arbitration International*, Vol. 20 - No. 3 (2004), pp. 223-242.

in favour of the appointing party.<sup>46</sup> The problem with indications of arbitrator bias that surface only after the final award has been rendered is that in most jurisdictions a parties' right to challenge an arbitrator is by then extinguished.<sup>47</sup> On this basis, Professors van den Berg and Paulsson insist that the root of the problem is the appointment method and that, accordingly, the solution is to be found there.<sup>48</sup>

#### **D. Do parties have a right to party-appointment?**

Professor Paulsson's proposal to save the arbitral process from contamination by party-appointed arbitrators was bound to generate some controversy in the international arbitration community, however it has in fact caused a heated debate. In this debate, a number of arbitration practitioners who consider that parties in international arbitration have a fundamental right to appoint their arbitrators have taken issue with Paulsson's views.

In an article with the revealing title «The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded», Messrs. Brower and Rosenberg take issue with Professor Paulsson's suggestion that party-appointed arbitrators are inherently untrustworthy and prone to violating their duty of impartiality and

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<sup>46</sup> *Id.*, p. 234.

<sup>47</sup> An exception being the English Arbitration Act (1996), which allows final awards to be challenged on grounds of a serious irregularity. Pursuant to Section 68 (2)(a) of the English Arbitration Act, a serious irregularity includes the tribunal's failure to comply with its obligations of impartiality under Section 33.

<sup>48</sup> VAN DEN BERG ALBERT JAN, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration* in: Mahnoush Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill Academic 2011), p. 834.

independence.<sup>49</sup> Their reasoning is primarily based on the assumption that parties have a fundamental right to appoint their arbitrator:

*«[i]t is beyond debate, however, that at the time Paulsson expressed his views, such right had in fact existed for decades, even centuries, and that this right has been one of the most attractive aspects of arbitration as an alternative to domestic litigation.»<sup>50</sup>*

Messrs. Brower and Rosenberg claim that the right to appoint a party is a *«basic principle of arbitration.»<sup>51</sup>* They infer the existence thereof from practice in State-to-State and investor-State arbitration going back to 1794, as well as from other indications that States *«closely hold their right to meaningful party appointment.»<sup>52</sup>* However, the reality of today's international arbitration practice is that most arbitrations do not involve a State party at all. One can certainly question whether the particular concerns of States are that constituting arbitral tribunals to adjudicate disputes almost invariably involving public interests, are of relevance to private parties constituting arbitral tribunals to decide their commercial disputes.

As noted in the above citation, Messrs. Brower and Rosenberg further submitted that party-appointments are one of the most attractive aspects of arbitration as an alternative to domestic litigation.<sup>53</sup> Their suggestion is that the right to party-appointment would be one of the prime reasons why a party would opt to submit to arbitration

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<sup>49</sup> BROWER CHARLES N./ROSENBERG CHARLES B., *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, *Arbitration International*, Vol. 29-Issue 1 (2013), p. 8.

<sup>50</sup> *Id.*, p. 9.

<sup>51</sup> *Id.*, p. 13.

<sup>52</sup> *Id.*, p. 11.

<sup>53</sup> *Id.*, p. 9.

rather than to the jurisdiction of a State court. This argument is not entirely convincing. The reality of the commercial practice is that parties submit to international arbitration principally for two reasons: (i) because they have no confidence in the neutral adjudication of disputes before the courts of the home jurisdiction of their contractual counterparts; and (ii) because they will not be able to enforce a judgment of a local court against their contractual counterparts in the jurisdictions where their assets are located. The role that a party itself can play in the constitution of a tribunal is rarely the predominant reason that a party will opt for arbitration. It is, rather an additional benefit that each party will naturally seek to apply in a way that will advance its case and its interests in the most optimal manner.

The authors further distinguish between nominating an arbitrator who a party believes will be biased in his favour - which Messrs. Brower and Rosenberg also dismiss as improper - and nominating an arbitrator who a party believes may be more inclined to view the case in its favour based on a past judicial or professional track record, which the authors accept as justified.<sup>54</sup>

The first category of arbitrators, i.e., those with an actual bias in favour of a particular party, would, in any event, be disqualified on the basis of General Standard 2(a) of the IBA Guidelines. The second category of arbitrators, i.e., those with a particular past judicial or professional track record, is a more difficult category to regulate. Any party that is offered the option to select an arbitrator will endeavour to identify an individual who, on the basis of published decisions, publications, lectures etc., is thought to be the most likely to understand and accept the case as put forward by the appointing party. The question is at what point the

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<sup>54</sup> *Id.*, p. 17.

«intellectual baggage» that comes with a past judicial or professional track record transgresses the boundary of impermissible prejudgment of the subject matter, also referred to as issue conflict. Can individuals who have analysed a particular subject matter in the past and who have taken a particular position on relevant issues be considered as sufficiently open-minded so as to meet the impartiality requirement? Or perhaps more to the point, does absolute impartiality exist? Isn't the perception of every human being – arbitrators in this context – tainted by his or her prior professional experiences?

In respect of Professor Paulsson's premise that both parties must have mutual confidence in the arbitrators, Messrs. Brower and Rosenberg make an interesting distinction between confidence in an arbitrator trusted by both parties and confidence in the arbitral tribunal as a whole:<sup>55</sup>

*«The fact is that 'confidence' is what parties have in the arbitral tribunal as a whole, not in each and every one of the individual arbitrators. Parties to an arbitration will accept a result, viewing it as the product of a legitimate adjudicatory process, if they have confidence in the tribunal as a whole. This is the tribunal that they themselves had a say in constituting. Not only did each side select an arbitrator, but both had the opportunity to have a say in the selection of the chairman of the tribunal.»*

Thus, the position of Messrs. Brower and Rosenberg is that parties have to have confidence in the tribunal as a collegial body but not necessarily in each of the individual arbitrators comprising that tribunal. The suggestion appears to be that a party that does not have confidence in one of the arbitrators (typically the arbitrator appointed by its opponent), should have confidence in the two other

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<sup>55</sup> *Id.*, p. 13.

members of the tribunal to steer the arbitral process away from – and keep the arbitral award clear of – any improper influence of that party-appointed arbitrator.

How does this distinction relate to the standard of impartiality and independence formulated in national laws, arbitration rules and the IBA Guidelines? Inherent in the reasoning of Messrs. Brower and Rosenberg seems to be an acceptance that the non-appointing party will have to live with an arbitrator in whom it has no confidence. However, pursuant to the IBA Guidelines, the non-appointing party certainly does not have to live this situation if it is caused by facts or circumstances that «*in the eyes of the parties, give rise to doubts as to that arbitrator's impartiality or independence*» as described in Part I, General Standard 2(b) and 3(a) thereof.<sup>56</sup>

Messrs. Brower and Rosenberg then continue to analyse Professor van den Berg's empirical research on dissenting opinions and criticise his methodology,<sup>57</sup> emphasising that in 78% of the investment treaty cases cited by Professor van den Berg, no dissenting opinion was issued. Messrs. Brower and Rosenberg conclude that the effective 22% dissent rate in investment treaty arbitration, compares rather favourably to those of the United States Supreme Court (62%), the High Court of Australia (19-36%) and the Supreme Court of Canada (25-37%).

Messrs. Brower and Rosenberg conclude that Professor van den Berg's empirical study fails to establish any impropriety on the part of party-appointed arbitrators by issuing dissenting opinions. They consider that the fact that there was no dissent in 78% of cases demonstrates that the vast majority of party-appointed arbitrators are actually impartial.

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<sup>56</sup> IBA Guidelines on Conflicts of Interest in International Arbitration (2004), available at: <http://www.ibanet.org/>.

<sup>57</sup> *Id.*, pp. 31-32.

Accordingly, they submit that *«dissenting opinions by party-appointed arbitrators should more properly be viewed as 'the reflection of their shared outlook with the party who appointed them, rather than dependency or fear to alienate such party.»*<sup>58</sup>

Contrary to the suggestions of Professor Van den Berg, Messrs. Brower and Rosenberg are of the opinion that dissenting opinions offer a unique tool to produce better arbitral awards, given that a dissent is likely to bear out the weaknesses in the majority's decision and thereby force the majority to redress such weaknesses in the factual and legal foundation of its decision.<sup>59</sup>

The unequivocal conclusion of Messrs. Brower and Rosenberg is that there is no merit in the position of Professors Paulsson and van den Berg that the practice of party-appointment is at the root of problems related to impartiality and independence of arbitrators in international arbitration. The authors conclude:<sup>60</sup>

*«(...) Paulsson and van den Berg's critiques of the status quo, based on their shared presumption that party-appointed arbitrators are untrustworthy, are unsupported. To the contrary, as well as the well-established right of the parties to choose the arbitrators and the ability of a member of the tribunal to express differing views in a dissenting opinions are significant elements of perceived legitimacy, the authors believe that restricting them as proposed by Paulsson and van den Berg, definitely would impede the further development of the field.»*

At the annual meeting of the American Society of International Law in April 2013, British arbitrator Johnny V.V.

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<sup>58</sup> *Id.*, p. 32.

<sup>59</sup> *Id.*, p. 34.

<sup>60</sup> *Id.*, p. 44.



Veeder QC delivered the inaugural Brower lecture «*The Historical Keystone to International Arbitration: the Party Appointed Arbitrator – from Miami to Geneva*». During his lecture, Mr. Veeder gave an interesting historical analysis of the Alabama Claims, which the United States of America and Great Britain agreed (by treaty of 1872) to submit to arbitration in Geneva. The five member arbitral tribunal that adjudicated the dispute comprised two party-appointed arbitrators – the US ambassador to Great Britain and the Lord Chief Justice of England and Wales – and three arbitrators appointed by sovereigns. In the course of the arbitration, the United States sought to introduce further claims for indirect damages, to which Great Britain objected. Veeder explained how the two party-appointed arbitrators managed through a series of informal measures to prevent the arbitration from being derailed. Through the intermediary role played by the party-appointed arbitrators, a permanent adjournment of the arbitration was avoided, and thereby ultimately a war was averted. It is interesting to note that, like Messrs. Brower and Rosenberg, the manner in which Mr. Veeder values the contribution of party-appointed arbitrators is also motivated by reference to arbitral practice involving two States.

With respect to dissenting opinions in favour of the appointing party, Mr. Veeder observed that these do not necessarily demonstrate inappropriate links between the dissenting arbitrator and the losing party, but rather are the sign of a good debate in the deliberative process:

*«a good dissent is the sign of a healthy intellectual vigour within arbitral deliberations, rather than the evidence of any fatal malady in the system of party-appointed arbitrators.»*<sup>61</sup>

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<sup>61</sup> ELZROTH CARTER, *Inaugural Brower Lecture, Johnny Veeder Sets Out History Advantages of Party-Appointed Arbitrators*, ASIL Cables (7 April 2013), available

With respect to the facts of the *Loewen* case as relayed by Professor Paulsson, Mr. Veeder argues that these are insufficient to find that any impropriety had actually occurred and, moreover, highlighted that the award rendered had been unanimous, making it «*utterly inconceivable*» that the other arbitrators could have been pressured into finding in favour of the United States.<sup>62</sup>

Mr. Veeder reiterated the importance of the preference of users of arbitration to have a certain degree of ownership in the arbitral process. In conclusion, Mr. Veeder stated that the system of party-appointment is «*the keystone of international arbitration and that we should be wary of abandoning a well-established tradition without cause.*»<sup>63</sup>

Professor Paulsson's concerns with respect to party-appointed arbitrators, met with criticism not only from practitioners originating from a common law legal system but also from practitioners who have their roots in a civil law tradition. While French arbitration lawyer, Mr. Alexis Mourre, shares some of Mr. Paulsson's concerns with respect to party-appointed arbitrators that have a tendency to favour the appointing party, his main argument for maintaining the system is that it is what the market wants. In that framework, Mr. Mourre pointed out that in almost 60% of the ICC cases and 50% of the LCIA cases, the parties chose to depart from the default rule of institutional appointment in order to exercise influence in the selection of the arbitral panel and that the parties believe that through this selection

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at <http://69.195.124.65/~asilcabl/2013/04/07/in-inaugural-brower-lecture-johnny-veeder-sets-out-history-advantages-of-party-appointed-arbitrators/>.

<sup>62</sup> PERRY SEBASTIAN, *Party appointments are «keystone» of arbitration, says Veeder*, *Global Arbitration Review* (17 April 2013), p. 2.

<sup>63</sup> *Id.*, p. 4.

they are provided with a certain degree of control over the arbitral proceedings.<sup>64</sup>

Along the same lines as those set out by Messrs. Brower and Rosenberg, Mr. Mourre insisted that parties select arbitrators based on their reputations and that arbitrators appointed as «hired guns» will not, over time, succeed in the arbitration community.<sup>65</sup> He observed that «*the problem of partisan arbitrators is more a survivance of progressively disappearing old misconceptions than the expression of structural faults of a dispute resolution system that is diverse and should remain so.*»<sup>66</sup>

#### **IV. The Proposed Solutions**

In order to avoid incidents of arbitrator bias influencing the arbitral process and the deliberations, Professor Paulsson proposes «*to forbid, or at least rigorously police, the practice of unilateral appointments.*»<sup>67</sup> Such a prohibition on, or the policing of, unilateral appointments would obviously have an impact on what many parties and arbitration practitioners consider to be the parties' valuable right to choose «their» arbitrator.

Professor Paulsson firmly rejects the notion that parties have a right to appoint their arbitrator, and states that if such right exists at all, it would certainly not be a fundamental one.<sup>68</sup> Paulsson recognises that the perceived «right» of

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<sup>64</sup> MOURRE ALEXIS, *Are unilateral appointments defensible? On Jan Paulsson's moral hazard in international arbitration*, Kluwer Arbitration Blog (14 October 2010), p. 2, available at <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/>.

<sup>65</sup> *Id.*, p. 3.

<sup>66</sup> *Id.*, p. 4.

<sup>67</sup> PAULSSON JAN, *Moral Hazard in International Dispute Resolution*, *Transnational Dispute Management*, Vol. 8 – Issue 2 (May 2011), p. 11

<sup>68</sup> *Ibid.*

parties to appoint «their» arbitrator is a widely held expectation, entangled with the practice of international arbitration to such an extent that it will be hard to undo.<sup>69</sup> However, he insists that the legitimacy of arbitration is based on the confidence that both parties have in the arbitral tribunal and the arbitral process, as opposed to the parties' right to appoint an arbitrator who will understand the appointing party and is likely to influence the tribunal in such a manner that it will win:

*«The original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence. Why would any party have confidence in an arbitrator selected by its unloved opponent?»<sup>70</sup>*

Paulsson diagnoses the parties' attachment to their perceived right to appoint an arbitrator as a fear of being excluded:

*«It seems more than plausible that what is truly at work here is not so much a concern about undefined cultural particularities as the simple fear of being treated as an outsider. Now this is a matter of highest importance, but unilateral appointments are more likely to exacerbate the problem than to resolve it. The real answers lie in ensuring that the arbitration process is inclusive so that no one is a «foreigner» and in enhancing the confidence both sides have in the institutions charged with the essential task of ultimately appointing truly neutral and able arbitrators.»<sup>71</sup>*

The solutions proposed by Paulsson are three-fold: (i) either all members of a tribunal be appointed by agreement of the parties; or (ii) all members of a tribunal be appointed by an arbitral institution; or (iii) all members of a tribunal be

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<sup>69</sup> *Id.*, p. 16.

<sup>70</sup> *Id.*, p. 11.

<sup>71</sup> *Id.*, p. 15.

selected by the parties from an arbitrator list provided by an arbitration institution. Paulsson holds the highest hopes for the third solution, that is, institutional appointments made from a pre-existing list of qualified arbitrators.<sup>72</sup>

While Professor Paulsson insists on the importance of finding an alternative to party-appointment, he recognises that the solution of pure institutional appointment has significant drawbacks:

*«the sole defence [against] unilateral appointments to which I have no answer is that it is a pragmatic response to an inability to trust the arbitral institution to appoint good arbitrators (...)*

*many if not most arbitral institutions are empty edifices waiting for someone to bother to dismantle them.»<sup>73</sup>*

In light of their attachment to party-appointment as a basic principle underlying international arbitration, it is unsurprising that Messrs. Brower and Rosenberg dismiss Paulsson's suggested solution that arbitrators be appointed from pre-existing arbitrator lists:

*«[it] is undesirable because it infuses politics into the system and creates an artificial barrier to entry. Potential arbitrators must have close connections with the States involved or with the appointing institution to be included on the institution's list of potential arbitrators. Otherwise wannabe arbitrators will wage an extensive lobbying campaign of the former or to the latter.»<sup>74</sup>*

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<sup>72</sup> *Id.*, p. 16.

<sup>73</sup> *Id.*, pp. 19-20.

<sup>74</sup> BROWER CHARLES N./ROSENBERG CHARLES B., *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, Arbitration International, Vol. 29-Issue 1 (2013), pp. 22-23.

Mr. Veeder, for his part, also disagrees with the proposed solution of abandoning the practice of party-appointments and entrusting arbitration institutes with the task of appointing all arbitrators.<sup>75</sup> Mr. Veeder submitted that the tradition of party-appointment ensures a rich pool of potential arbitrators<sup>76</sup> and does not hold faith in the proposed solution of institutional appointment: «*I wonder now whether the proposed solution is not far worse than the ailment, if it be an ailment at all.*»<sup>77</sup>

Finally, Mr. Mourre also doubts that eliminating unilateral appointments will yield a higher level of confidence of the parties in the arbitral process. In his opinion, which he shares with Messrs. Brower and Rosenberg, a ban on unilateral appointments in favour of institutional appointments actually poses a risk in that it shifts the problem of undue influence from the parties to the institution:

*«It could create a distance between the arbitral community and the users of arbitration. Arbitrators would look less at the parties and more at the institutions, which all have their own degree of internal politics and their bureaucracy. The risk would exist that arbitrators progressively move from their current culture of services providers, close to the needs and requirements of the users, to a culture of arbitral public servants or, even worse, of arbitral politicians. No one has to gain from such an evolution.»*<sup>78</sup>

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<sup>75</sup> PERRY SEBASTIAN, *Party appointments are «keystone» of arbitration, says Veeder*, Global Arbitration Review (17 April 2013).

<sup>76</sup> *Id.*, p. 1. In the same vein, BROWER CHARLES N./ROSENBERG CHARLES B., *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, Arbitration International, Vol. 29-Issue 1 (2013), p. 24.

<sup>77</sup> *Ibid.*

<sup>78</sup> MOURRE ALEXIS, *Are unilateral appointments defensible? On Jan Paulsson's moral hazard in international arbitration*, Kluwer Arbitration Blog (14 October 2010),

## V. Conclusion

The pride and prejudice in the debate on arbitrator independence seems to be born out of the desire for propriety, which seems to involve different criteria and different expectations in different legal traditions. Our perception as to what behaviour is proper and what is not seems to lead to judgment of the values of others on the basis of our own frame of reference. Like Mr. Darcy in Jane Austen's great novel, whose intelligence, slightly anti-social behaviour and decorum were perceived by those who did not know him as excessive pride, these characteristics were particularly appreciated by those who did know him. Just like Mr. Darcy and Ms. Bennet, who were forced to spend time in each other's company and thereby ended up overcoming their prejudices and judgment of each other, the practice of international arbitration requires users, practitioners and arbitrators from different legal traditions and cultures to work together and to co-exist. In light of that reality, there is certainly hope that the differences described in this article can also be overcome in the interest of the legitimacy of the arbitral process and arbitral awards.

The common ground in the debate on arbitrator independence that seems to have been found over the last three years is that the universally accepted requirements of impartiality and independence, recorded in arbitration legislation, arbitration rules and the IBA Guidelines, have not always guaranteed the adjudication of disputes by a tribunal composed of three neutral arbitrators, who all have a fully open-mind in respect of the factual and legal issues in dispute. Objectively as the standard may be formulated, the application thereof depends in large part on the subjective

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p. 3, available at <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/>.

apprehension of circumstances by (and the self-diagnostic abilities of) arbitrators. For that reason, and despite the omnipresence of the requirements of impartiality and independence in the relevant laws, rules and regulations, the reality of today's international arbitration practice is that bias in party-appointed arbitrators has not been entirely extinguished.

As to whether the absence of prejudice or predisposition on the part of *all* arbitrators is a problem or not, there is no common ground. Certain debaters are of the view that each of the parties ought to have confidence in all of the arbitrators, while others accept that not every party may have the same degree of confidence in each of the arbitrators individually as long as they have confidence in the arbitral tribunal as a whole.

There is also a difference of opinion as to whether the influence of a party-appointed arbitrator on the arbitral and decision-making processes undermines or enhances the legitimacy of the arbitral process and, ultimately, the arbitral award. In the same vein, views are divided as to the question of whether dissenting opinions contribute to the quality of the deliberative process and thereby to the quality of the award or whether they undermine the collegial decision-making task that the tribunal is entrusted with. Some practitioners from the common law tradition, from which the practice of dissenting opinions originates, tend to be more at ease with a possible partisan stance of party-appointed arbitrators than their civil law colleagues because they trust that inappropriate influences are ultimately counterproductive in the deliberative process. These commentators consider that a good dissenting opinion is a sign of a healthy intellectual debate between arbitrators, in which the majority view has prevailed.

The proposal to abolish unilateral party-appointments with the objective of safeguarding neutrality in the adjudication of



disputes through arbitration is controversial. In the first place because the large majority of users of arbitration, as well as a large proportion of arbitration practitioners, believe that the party's right to select one's arbitrator is a fundamental right, a basic principle of arbitration, or an acquired right stemming from a well-established tradition that should not be abandoned without due cause. In the second place, the proposal to do away with party-appointments is controversial because of widespread concerns about the ability (or rather inability) of arbitration institutes to appoint arbitrators in which parties have full confidence. Importantly, these concerns are shared by both proponents and opponents of the proposal to abolish party-appointments. There is therefore a fundamental lack of trust in arbitration institutes when it comes to one of their core tasks, namely the appointment of arbitrators.

Commentators on both sides of the spectrum appear to be concerned about the quality of the arbitral process and the legitimacy of arbitral awards, which are directly linked to the quality of the arbitrators. They all seem to agree that it is important that the pool of arbitrators be expanded and diversified by being inclusive as opposed to exclusive. However, opening the door to anyone who wants to be an arbitrator is not the solution as the wish to be inclusive must be counterbalanced by quality control.

High quality adjudication services can only be provided by those who have the requisite skills. What do these skills include? Intellectual rigour, analytical competence, the ability to run arbitral proceedings, diplomacy, language, neutrality, impartiality, independence, open-mindedness, social skills? What makes a good arbitrator? Probably the same as what makes a good judge. In most, if not all, jurisdictions the selection process for judges is a very involved one and only the most qualified individuals with proven abilities and

credentials will be able to obtain a prestigious position in the judiciary.

The control necessary to ensure that arbitrators fulfil their functions with the requisite impartiality and independence and deliver the quality services that parties are entitled to, is to be exercised by the arbitration institute in its supervisory capacity. Over the last couple of years, arbitration institutes have already made important steps in that direction by introducing measures obliging arbitrators to disclose facts and circumstances that may give rise to reasonable doubts as to their impartiality and independence, measures aimed at reducing the average duration of an arbitration, as well as measures aimed at ensuring the actual availability of arbitrators.

However, more can and must be done by the arbitration institutes in order to build the trust that users and practitioners need to have in the institutes when they exercise one of their key functions: the appointment of arbitrators.

A start could be made in the selection process of arbitrators. Whilst both the judiciary and organisations of professional service providers have basic entry requirements in terms of formal education (and most of them also impose an obligation of continuous education on their members), none of the major arbitral institutions maintains objective education requirements that have to be complied with before an individual can serve as arbitrator in arbitrations administered by that arbitral institutions.

The logical step following entry and continuous education requirements, is regulatory supervision. The judiciary and organisations of professional service providers both have deontological rules that their members have to comply with, and non-compliance is sanctioned by a supervisory authority.

However, neither the regulatory nor the supervisory authority exists within any of the arbitral institutions.

While entry requirements, continuous education obligations and regulatory supervision may not extinguish partiality and bias in arbitrators altogether, they will certainly reduce the potential for arbitrator bias, increase the quality of the adjudicatory services provided by arbitrators and thereby improve the legitimacy of international arbitration as an independent and neutral form of international dispute resolution.

