President's Message

Forbidding unilateral appointments of arbitrators – a case of vicarious hypochondria?

The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not for centuries, even though, as it is often the case in successful systems, there are occasional problems. The principal source of the problem would seem to be that some arbitrators appointed by one of the parties place the loyalty to "their" party above their duty to reach a just and fair result.

Professor Paulsson, in his inaugural lecture at the University of Miami School of Law, now has proposed a solution to this occasional problem. He starts from the assumption that "unilateral appointments are inconsistent with the fundamental premise of arbitration: *mutual* confidence in arbitrators" (emphasis in the original). He believes that this results in "a feast of hypocrisy where the innocent are burned". His conclusion is "clearly to forbid, or at least rigorously police the practice of unilateral appointments".[1] Professor Paulsson saw himself "in a minority of one" but hoped to find himself "in the majority well before 2060".

The challenge launched to the well-established position quickly had the desired effect; the call for forbidding unilateral appointment was echoed by others. Professor Hans Smit attacked the "pernicious institution of the party-appointed arbitrator"[2]. A study by Professor van den Berg was called in support of the thesis in which it was argued that it is the losing party's arbitrators who write dissenting opinions[3] and that the "root of the problem is the appointment method", viz. unilateral appointments.[4]

If the problem is defined in this manner, the solution is not surprising: no more unilateral appointments; all arbitrators must be "selected by a neutral body", if they are not chosen jointly by the parties. An institutional requirement restricting appointments to "a pre-existing list of qualified arbitrators", according to Professor Paulsson, could pass "as a fairly intelligent compromise"; provided the list is "composed judiciously by a

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1 Jan Paulsson, Moral Hazard in International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010.

2 In The Vale Columbia Center on Sustainable International Investment, N° 33, 24 December 2010.

3 An observation on which Professor Paulsson also relies, referring to studies by Redfern and by Silva Romero.

4 Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in Arsanjani et al. (eds) Essays in Honor of W. Michael Reisman.

reputable and inclusive, international body, with in-built mechanisms of monitoring and renewal."

Some twenty years ago, Jan Paulsson, as he then was, wrote a scathing critique of a book by Antoine Kassis, a former Syrian Professor and, as Jan Paulsson recognised, a "talented lawyer with considerable gifts of exposition". Professor Kassis had examined institutional arbitration and in particular the ICC system. He found the system to be sick and proposed a cure which was quite impracticable and which has rightly been forgotten. Jan Paulsson demonstrated in his critique that the illness which Professor Kassis had diagnosed was imaginary and his book was a case of "vicarious hypochondria". Jan Paulsson concluded that Professor Kassis' "cure would mean killing the system", quoting Molière: *« Presque tous les hommes meurent de leurs remèdes et non de leurs maladies* ».[5]

The problem which Professor Paulsson has highlighted in his lecture is not as imaginary as the disease which Professor Kassis had diagnosed and his cure is not as absurd as that of Professor Kassis. Professor Paulsson's cure is not even impracticable, at least insofar as it concerns the restriction of the parties' choice to arbitrators from a list prescribed by an institution. It has been practiced in the past. Perhaps Professor Paulsson will find an institution which reverts to this practice and offers the type of arbitration which he favours. It then can be seen how attractive this system really is.

However, Professor Paulsson's lecture, beyond his provocative proposal, has the great merit of drawing again attention to a problem in arbitration; and this may well have been his underlying purpose. Irrespective of what one thinks about the proposed cure, the challenge deserves to be taken up in a wider debate. To start with, it might be worth considering the diagnosis: is the unilaterally appointed arbitrator an illness in arbitration or an important and even beneficial function? This diagnosis might assist in examining whether and how the function can be improved rather then being discarded. The objective of the present message is to invite you to share your experience and your thoughts on the issue. Here are a few questions to start the debate:

What is the problem? Is the fundamental premise of arbitration really "*mutual* confidence in arbitrators", as Professor Paulsson suggests, or is it not rather the confidence of a party that, beside the "neutral" chairman, there is at least one member of the tribunal who has some sympathy for it (which should not affect her impartiality). This consideration of sympathy or affinity would seem to be of great importance to many parties in particular in

[5] Vicarious Hypochondria and International Arbitration, in 6 Arb. Int'l (1990) 226, reviewing Antoine Kassis,Réflexions sur le Règlement de la Chambre de Commerce Internationale, les déviations de l'arbitrage internationale, 1988.

international arbitration where parties and tribunals often are of wide cultural diversity. It is the idea of having a friend (not an agent!) on the tribunal which provides comfort in the stress of the dispute.[6] A friend may say an unpleasant truth, but he may see to it that it is said in a manner that it does not hurt more than necessary. Is this concept as destructive as Professor Paulsson thinks and should it be banned? What do the users of arbitration expect of an arbitral tribunal in this respect?

If there is a problem, how serious is it really? How to describe the relationship of an arbitrator with the "appointor" – sympathy, affinity, a duty of care or complete neutrality? What is the perception of the other party and of the colleagues on the tribunal? How useful (or damaging) is it in the deliberations to have a member of the tribunal who has an affinity to one of the parties and sees to it that that party's case is properly considered? What is the threshold where this affinity becomes a problem and how frequent are the cases where this happens?

It would be of particular interest to hear about all those cases where tribunals have succeeded in managing the process, asking why they succeeded and at what price. What are the methods used by successful arbitrators to reach consensus within the tribunal, despite different agenda pursued by the members of the tribunal and what are the circumstances in which such methods succeed or fail?

One of the interesting points raised in the discussion by Professor Smit concerned the bargaining that occurs in deliberations: in order to reach unanimity within the tribunal, the chairman or the majority may have to make "concessions" to the arbitrator appointed by the losing party. One may see this as an encroachment on principles of justice or as a contribution to rendering the award more acceptable to the losing party, thereby promoting voluntary compliance and restoration of the commercial relationship between the parties. How frequent is such "bargaining"? Can it be avoided or can its impact be limited; if so, how could this be done?

What are the cases where the process failed? How frequent are the cases of duress, where arbitrators from certain countries, if they want to return home and continue their career, have no choice but to vote for the Government or other entity that has appointed them? In what other circumstances does an arbitrator refuse to join the majority or even to participate in the deliberations? How frequent are the cases where such arbitrators become obstructive to the point of laying the ground for annulment of the award or opposition to its

[6] This is why the "inclusiveness" proposed by Paulsson does not seem to respond to the problem.

enforcement? What about leakage? What are the strategies that can be pursued in such situations by the majority or the chairman?

In terms of strategy, what is the potential of good communications, diplomacy and cultural sensitivity and what are the limits of what can be achieved by them? What is the role of an arbitrator's international reputation, compared to the position in the "home community"? What can the other members of the tribunal do in order to avoid that the process breaks down or is unduly delayed? What can be done in order to protect the award against attacks for which the obstructive arbitrator will have laid the foundations? When everything fails, are there any remedies or sanctions, for instance reporting the conduct of the obstructive arbitrator, inviting the other party to challenge him; is a challenge by the other members of the tribunal or by the chairperson conceivable?

A debate on these and many other questions might improve our understanding of a critically important feature of arbitration; perhaps it might also become the subject for a future conference of ASA. The comments of the readers of this Bulletin are of great interest to us. Please let us know your views. The debate might conclude that Professor Paulsson was right after all and we should ban unilateral appointments; or we may realise that such appointments are not perceived as an illness in arbitration but as a precious feature which must be protected.

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