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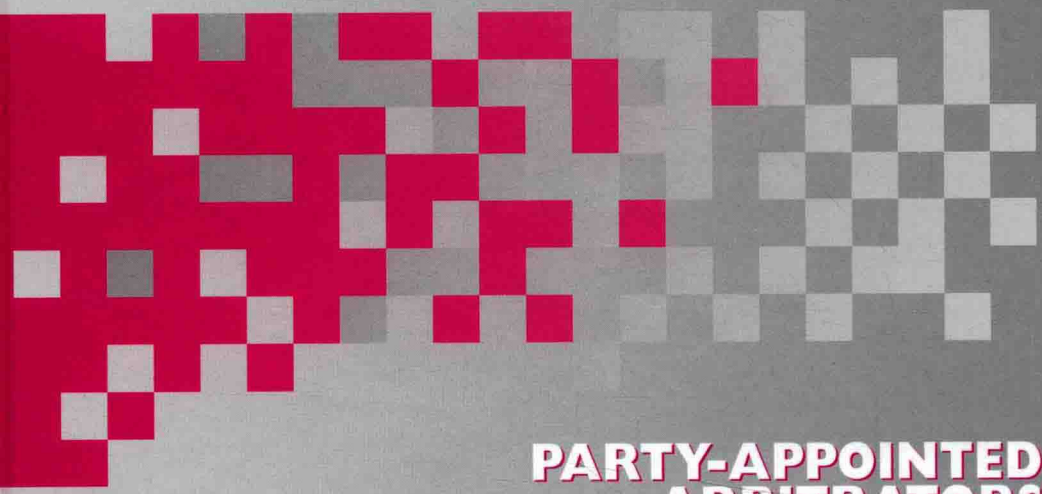

PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION

ALFONSO GÓMEZ-ACEBO

Wolters Kluwer

Party-Appointed Arbitrators in International Commercial Arbitration

Alfonso Gómez-Acebo

Wolters Kluwer

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VOLUME 34

Editor

Julian D.M. Lew, QC has been involved with international arbitration for more than 30 years as counsel and as arbitrator. He has held the position of Professor and Head of the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London since its creation in 1985. Until 2005, he was head of the international arbitration practice group at Herbert Smith. He is the UK member of the International Court of Arbitration of the International Chamber of Commerce (ICC), and a member of the ICC Commission and International Arbitration and the Council of the ICC Institute of World Business Law.

Introduction

Since its first volume published in 1993, this authoritative practitioner-oriented series has published in-depth and analytical works on niche aspects of international arbitration, authored by specialists in the field.

Objective

This authoritative and established series covering in-depth analyses of niche areas appeals to both practitioners and academics.

Frequency

A volume is published whenever an interesting topic presents itself.

The titles published in this series are listed at the end of this volume.

To my wife, Fanny Girardet
To my parents

List of Abbreviations

AAA	American Arbitration Association
A.F.D.I.	Annuaire Français de Droit International
Am. Rev. Int. Arb.	American Review of International Arbitration
Arb.	Arbitration (CIArb Journal)
Arb. Int.	Arbitration International
Arb. J.	Arbitration Journal
ASA	Swiss Arbitration Association
ASIL	American Society of International Law
ATF	Decision of the Swiss Federal Tribunal
Bull.	Bulletin
CA	Court of Appeal
CAS	Court of Arbitration for Sport
Cass.	French *Cour de Cassation*
CCP	Code of Civil Procedure
CEPANI	Centre belge d'arbitrage et de médiation
CIArb	The Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CPR	International Institute for Conflict Prevention and Resolution
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DAC	Departmental Advisory Committee
DIS	German Institution of Arbitration
Disp. Resol. J.	Dispute Resolution Journal
ECHR	European Court on Human Rights
FDI	Foreign Direct Investment

Fordham Int. L. J.	Fordham International Law Journal
Fordham Urb. L. J.	Fordham Urban Law Journal
Harv. L. Rev.	Harvard Law Review
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICC Bull.	ICC International Court of Arbitration Bulletin – renamed ICC Dispute Resolution Bulletin in 2015
ICC Court	International Court of Arbitration of the ICC
ICDR	International Center for Dispute Resolution (AAA)
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
ICSID Rev.	ICSID Review – Foreign Investment Law Journal
ILA	International Law Association
ILSA	International Law Students Association
ILSA J. Int. & Comp. L.	ILSA Journal of International and Comparative Law
Int. Bus. Law.	International Business Lawyer
Int. & Comp. L. Q.	International and Comparative Law Quarterly
J.D.I.	Journal du droit international (Clunet)
J. Int. Arb.	Journal of International Arbitration
LCIA	London Court of International Arbitration
L.C.L.	The Loeb Classical Library
Loy. L.A. Int. & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
L. & Pract. Int. Cts. & Tribs.	Law and Practice of International Courts and Tribunals
NAI	Netherlands Arbitration Institute
Nw. J. Int. L. & Bus.	Northwestern Journal of International Law and Business
NYC	New York Convention
obs.	Observations
PCA	Permanent Court of Arbitration (The Hague)
PCIJ	Permanent Court of International Justice
Pepperdine Disp. Res. L. J.	Pepperdine Dispute Resolution Law Journal

R.C.A.D.I.	Recueil des Cours de l'Académie de Droit International de La Haye
Rev. Arb.	Revue de l'arbitrage
Rev. Dr. Int. Dr. Comp.	Revue de droit international et de droit comparé
Rev. Int. Dr. Comp.	Revue international de droit comparé
SCC Institute	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
Spain Arb. Rev.	Spain Arbitration Review
Stanford J. Int. L.	Stanford Journal of International Law
Stockholm Int. Arb. Rev.	Stockholm International Arbitration Review
Tex. Int. L. J.	Texas International Law Journal
TGI	Tribunal de grande instance
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Y.B.	UNCITRAL Yearbook
UNECAFE	United Nations Economic Commission for Asia and the Far East
UNECE	United Nations Economic Commission for Europe
UNIDROIT	International Institute for the Unification of Private Law
U.N.Y.B.	United Nations Yearbook
U. Dayton L. Rev.	University of Dayton Law Review
VIAC	Vienna International Arbitration Centre
WIPO	World Intellectual Property Organization
Y.C.A.	Yearbook Commercial Arbitration

Foreword

The entitlement of parties to select an arbitrator of their choice has always been and still is considered a major factor which influences the acceptability and success of arbitration as a mechanism for international dispute resolution. Arbitration has its origin in the agreement of the parties to submit their dispute to the arbitration system of their choice, in the venue of their choice and with the number of arbitrators of their choice selected in the way they choose. The fact that in most arbitration laws and rules each party (or at least all claimants and all respondents) can select or nominate an arbitrator gives confidence to the system.

Party autonomy is the bedrock of international arbitration. National laws uphold the expressed will of the parties that their disputes should be resolved by arbitration and as to the form, structure and procedure of the arbitration chosen. Without this national law support of party autonomy, which is inherently required under the New York Convention, arbitration would be a significantly different system of dispute resolution, subordinate to national law and courts rather than supported and enforced by national laws. In almost all arbitrations where there are three arbitrators, two are party selected. This makes the party selected arbitrators an important and influential player in the arbitral system.

This is reflected in some of the conclusions expressed in the 2012 School of International Arbitration – White & Case empirical survey entitled *Current and Preferred Practices in the Arbitral Process*. This stated that 76% of those questioned for the survey expressed preference for the selection of the two co-arbitrators to be by each party unilaterally. The survey records the reasons why parties so strongly favour unilateral party appointments of the two co-arbitrators. First, it gives the parties control over the constitution of the tribunal and inspires confidence in the arbitral process. This in turn raises the legitimacy of the final award. Second, parties are better placed to know what skills and knowledge are required for arbitrators appointed to resolve the dispute. Another factor recorded is that some interviewees expressed distrust in the selection of arbitrators by arbitral institutions. In particular, the concern about the small and static pool from which some institutions pick their arbitrators, and that not all institutions pay sufficient attention to the availability of arbitrators.

There has also been debate about the role and responsibility of party selected arbitrators. What are his/her duties and to whom is a duty owed? Is it different to the role of the third and mutually appointed arbitrators? It is one of the continuing discussions whether the party selected arbitrator has, as a first duty, to represent and support the claims and arguments made by the nominating party. The effect of this approach is that the arbitrator may become no more than a second or internal advocate for the appointing party inside the tribunal. In such a situation arbitral objectivity and impartiality disappears or is reduced. It prevents the development of a collegiality between the members of the tribunal and may discourage a free flow of discussions, analyses and views during the deliberations of the arbitrators. The partial or not independent arbitrator can unbalance the tribunal and cancel out the benefits of a three arbitration tribunal; in effect there is only one arbitrator. This precludes or at least greatly reduces the advantage of testing between the tribunal members issues such as the weight and veracity of evidence, findings of facts, the construction of contractual terms and the application of relevant legal rules.

An alternative suggestion is that the party selected arbitrator should seek to ensure that the position of the nominating party is understood and considered in the tribunal's deliberations. This may cover political, cultural and economic background which are relevant to facts or contractual interpretation, and implications of the law of that country. However, this role should not affect the independence and impartiality of the arbitrators. By contrast, in this scenario it is agreed the arbitrator should also endeavour that the parties or the party who did not nominate the individual arbitrator is also understood and considered in deliberations.

The overwhelming view is that in international arbitration party selected arbitrators should be neutral, impartial and independent from the party and the lawyer or law firm that has nominated him or her. Whilst parties invariably nominate an arbitrator who they believe is experienced and appropriate for the case and will be open minded and fair, some say they also believe the arbitrator will be sympathetic to their case. This choice might be influenced by the arbitrator having written something relevant on an issue involved, or even the perceived understanding that the arbitrator would look favourably on particular arguments or approaches or has been involved in similar cases with the result sought by the nominating party. In investment arbitration there is the perception that some arbitrators generally favour the state or the investor.

It is in this context that there has been recent discussion whether it would be preferable for all arbitrators to be appointed by the institution or some other independent appointing authority. In these circumstances, the arbitrator would owe no special duty or other gratitude to a nominating or appointing law firm or party, and would have been selected objectively. The proposal for central appointment of all arbitrators by institutions has gained little traction primarily because parties are unwilling to lose the right of choice of arbitrator and through that choice to influence the way the arbitration is managed and conducted.

The selection of the tribunal is invariably a major factor in how the arbitration will be conducted. The role and power of arbitrators, and party nominated or appointed arbitrators in particular, has not been as thoroughly reviewed and studied as many other aspects of international arbitration. This is strange bearing in mind that it is the

arbitrators who largely determine and control the arbitral process from the time of their appointment until the award is issued.

This book provides an insight into many issues which naturally arise from unilateral nomination or appointment of an arbitrator by opposing parties. These include the contents of and limits to the right of the parties to make unilateral appointments, and whether the standard of impartiality and independence from party appointed arbitrators in international arbitration is expected and realistic. In this context there is also the question whether a different standard of impartiality and independence in party appointed arbitrators as opposed to the third/presiding or sole arbitrator should be acknowledged. The IBA Guidelines on Conflicts of Interest in International Arbitration, which have had a significant influence on the understanding of the requirements for independence and impartiality of arbitrators, presume that party selected arbitrators are subject to the same rules as third and presiding arbitrators. Further issues considered include whether party selected arbitrators pose more problems in practice than those independently selected (presenting a comparative empirical study of problems of bias taking into account the method of appointment of the arbitrator).

The author, Dr Alfonso Gómez-Acebo is commended for his work on this topic. This book, adapted from his doctoral dissertation, makes a significant contribution to the knowledge and discussion on all issues of party selected as opposed to independently selected arbitrators. It will be of assistance to academics, courts, arbitral institutions, practitioners and arbitrators in understanding and determining issues concerning the duties of party nominated or appointed arbitrators and their overriding obligations of impartiality and independence.

Professor Julian D M Lew QC
London, March 2016

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I am in deep gratitude to Fanny Girardet, an extraordinary woman to whom I have the fortune to be married. Her tireless loving care during the years of research made it all possible.

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I am also very grateful to my son Mateo and my daughter Olivia. They do not know it yet, but they have played a crucial role in all the good things this book may contain.

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CHAPTER 1
Introduction

1-1 The initial motivation for this book, when I barely knew anything about arbitration, was a sort of love-hate fascination with the possibility for each party to appoint one of the members of an arbitral tribunal. I had been said that arbitrators are private judges and it was intriguing to me that party-appointed arbitrators did not fulfil two elementary requirements of any judge in the world: not being chosen by one of the disputing parties and not having the right to remuneration come out of the choice of one of the disputing parties.

1-2 After years of practice in international arbitration, my fascination with unilateral nominations had grown in the opposite direction of love and hate. While unilateral nominations sometimes brought added value to the arbitration, on other occasions they were no more than an encumbrance one had to live with. How was it that arbitration end-users so often had resorted to this unpredictable feature of arbitration, where good and evil seemed to live together?

1-3 Much has been written about party-appointed arbitrators in international arbitration. I owe a word of gratitude to all the authors who preceded me in devoting time and effort to such curious creatures. Beyond intellectual coincidences or discrepancies, they have all inspired this work. How could one possibly forget, for instance, René David's pioneering attempts to open the debate in modern times about the convenience of requiring the impartiality and independence from party-appointed arbitrators in the course of his work at UNIDROIT in the 1950s? Or Pierre Lalive's works on the neutrality of arbitrators and the delicate matter of whether a different standard of impartiality and independence of party-appointed arbitrators should be acknowledged? Or the reflections by Eugenio Minoli, Pierre Bellet and Robert Coulson on the possible different roles of non-neutral party-appointed arbitrators? Or those of Martin Hunter, Andreas Lowenfeld, Julian Lew, Loukas Mistelis and Stephan Kröll on the special role of impartial and independent party-appointed arbitrators? Or the contribution by Doak Bishop and Lucy Reed on acceptable unilateral communications between unilateral appointors and appointees? Or Thomas Clay's work on the arbitrator? Or Marc Henry's