Unilateral Appointments in International Commercial Arbitration. Is it time to change the way Arbitral Tribunals are constituted?

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Abstract

The proper constitution of an Arbitral Tribunal will determine the validity and enforceability of an award. This paper deals with the different problematic that multi arbitrator tribunals, in specific those panels formed under the scheme of party appointed arbitrators can face during the proceedings, analyzing the possibility of reducing the perverse incentives that an arbitrator might have in ruling in favor of his nominating party.

Key words: International Arbitration, Unilateral Appointments, Arbitrators, Impartiality and independence, perverse incentives.

Resumen

La conformación de los Tribunales Arbitrales determinara la validez y ejecutabilidad de un laudo. Este trabajo da un enfoque sobre las diferentes situaciones problemáticas que tribunales arbitrales, en concreto, los tribunales conformados bajo el esquema de nombramientos unilaterales se enfrentan durante los procedimientos, analizando la

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posibilidad de reducir los incentivos perversos que un árbitro pueda tener en dictar un laudo a favor de la parte que lo ha nominado. Palabras clave: Palabras claves: Arbitraje Internacional, Nombramientos Unilaterales, Árbitros, Imparcialidad e independencia, Incentivos perversos.

Introduction

The last part of a contract usually addresses the conflict resolution clauses. Such clauses tend to be of vital importance in international commercial relationships, since these clauses will determine the way that potential conflicts will be resolved. Hence, it is likely that parties will be in favor of agreeing to an efficient, impartial, and just method to solve any eventual disagreements.

In an international commercial relationship, parties tend to avoid the national courts systems, because it takes a considerable amount of time to reach a solution. In some cases, parties are concerned about corruption, and a perceived lack of a neutrality of the courts. These, among other factors, have contributed to the rise of Alternative Dispute Resolution Methods (ADR)\(^2\).

Even though ADR methods are far from being perfect\(^3\), it cannot be denied that there is a clear predominance of arbitration among traditional and alternative dispute resolution methods, in international contracts. The Institution of Arbitration has distinguished from other methods due to its flexible procedures,\(^4\) It is effectiveness in reaching a solution, and the facility for enforcement \(^5\) of the decisions that the arbitrators to a dispute reaches.

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\(^5\) The most recognized International instrument in enforcement is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards(1958), Hereinafter "New York" Convention. Another instrument of
The flexibility in arbitration procedures comes as a result of one of it is cornerstones: party autonomy. This principle entitles parties to a dispute to be the architects of the proceedings. This means, that parties are allowed to agree in a vast number of topics, including: (i) the number of arbitrators that will be responsible for reaching a decision; (ii) their time limit for reaching that decision; (iii) the selection of a method for choosing the arbitrators; (iv) the manner in which proceedings should be conducted; (v) The applicable law for to the dispute; (vi) to decide if the arbitration proceedings will be administered by an institution, or by the arbitrators themselves; (vii) determine which methods will be available to prove the facts of a dispute; and in general, (viii) any other factor that falls in the sphere of the parties autonomy.

The mandate, or objective that the members of an Arbitral Tribunal (sole or multi-arbitrator) is to reach a final and binding decision, an enforceable award. It is important to bring into account that the award ruled by the arbitrators, if dictated in one of the countries that has signed the New York Convention, the decision will be enforceable in more than one hundred and forty jurisdictions.

The consequences of having an award can be glorious or disastrous, due to the different places that the document can be enforced; hence, it is of great importance to study the way that this arbitral tribunals are constituted, specially those tribunals that are formed with more than one arbitrator.

The common practice in the multi arbitrator tribunals is that two out of the three arbitrators are unilaterally appointed by the parties, one each; and the third -the presiding-arbitrator, is selected by the arbitrators appointed by the parties. This brings up all type of situations, from collaborative arbitrators that fulfills their functions with due diligence; to

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interest is the Inter-American Convention on International Commercial Arbitration (1975), Hereinafter ‘Panama’ Convention.

rebellious arbitrators who refuse to participate on proceedings; and even the possible scenarios where the arbitrators issues an ugly dissent.

Experienced practitioners, such as Prof. Van den Berg, have made reports where it is evidenced that an elevated number of dissents are produced by the arbitrator that was unilaterally appointed by the party who loses the arbitration. The situation gets even more critical, when the dissents are used as the basis for a challenge, or to raise objections to the enforcement of the award.

This situation raises many doubts, and concerns about the method for appointing arbitrators, with a special connotation around the unilateral appointments. There are strong opinions that raises against the continuance of this practice, as it puts (or sometimes, it does) the perverse incentives that can exists in ruling in favor of the appointing party. The main idea surrounding the discussion is the possibility to get rid of doubts concerning the neutrality, impartiality, and independence of arbitrators, with the prohibition of the unilateral appoints. In order to protect the institution of Arbitration, since problems as this one, at the end of the day, affects the trust and confidence that this ADR method provides to the users.

Under this context, this paper has been divided into three parts. The first one will be addressing the relevant topics under the constitution of arbitral tribunals. The second,

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9 As discussed on section 3.2 of this work.

10 As stated in Bishop, Doak; Reed. Lucy ‘Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration’ (1998) 14 Arbitration International at 400, this term can either be interpreted broad, in order to encompass impartiality or neutrality, or specific, referring to the neutrality of nationality.

11 This paper has no intention of covering all the complexity that surrounds the constitution of the arbitration tribunals, nor dissenting opinions; it has been intended to give a general overview of these topics with enough references in case the reader would like to have a deeper analysis over such topics.
exposes some problems that multi arbitrator tribunals faces during proceedings, going from scheduling problems to dissenting opinions that puts in evidence the bias of an arbitrator. Finally, a third section devoted to analyzing the benefits that eliminating the practice of unilateral appointments could bring, if it would be possible to do so, and some possible alternatives to such a controversial appointment method.

Constitution of a Multi Arbitrator Arbitral Tribunal

Worldwide use and recognition of arbitration is a fact. The success of arbitration as the dominant method for dispute resolution has been the culmination of a long process. Great part of this success, has been as consequence of the United Nations role. From the work made under the ‘global government’, it can be mention the New York Convention back in 1958, and the work made under UNCITRAL. The adoption of the Convention, made-among other things- that signatory States cannot refuse the enforcement of foreign awards, unless is done under one of the causes determined under the Convention. On this process of success, it has to be mention the role of UNCITRAL in the unification of the most used practices in arbitration, and the creation of the Model Law of International Arbitration (1985). With the intention of the unification of arbitration legislation in the world, in order to have worldwide jurisprudence around the same concepts. The Model Law (ML), just like the New York Convention, establishes specific circumstances where a valid refusal of the enforcement of an award can be made. The ML also proposes specific causes to challenge an award. The former is brought into account, since one of the causes for the challenge of an award, and/or the refusal of enforcement it is due to anomalies during the constitution of the Arbitral Tribunal.

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12 For differences between arbitration and litigation, see Redfern and Hunter at 1.86 to 1.125. Relevant legal provisions for the refusal for the recognition and enforcement of a foreign awards, due to complications during the conformation of the arbitral tribunal, can be found under Art.V of the New York Convention, and Art.36 of the Model Law. Art.34 of the Model Law deals with the setting aside of an Arbitration Award, where it also establishes causes for setting aside an award for improper constitution of a Tribunal.
In addition to what it has being mentioned, the study of the scope of the agreement concluded by the parties is a matter of great relevance. Since it is in the arbitration agreement where the intention of the parties is established. It is important to keep in mind, that in the religion of Arbitration, parties consent is sacred. The scope will determine which parties are bound to the obligation to arbitrate the disputes; it will determine the number of issues that are within the competence and jurisdiction of the arbitrators; the administration of the proceedings; the method for the arbitrations for making their decision: in law or by equity; the number of arbitrators, with their respective selection method(any method that violates the equality of the parties in the proceeding, will result in an unenforceable award); the place of arbitration, and may other possible provisions\textsuperscript{13} that can be concluded by the parties.

Having in mind the importance of the constitution of the Arbitration Tribunal. This section starts pointing out the main differences between arbitration and the national courts system. The second part of this section will be dedicated in addressing the constitution of Arbitral Tribunals. The section will deal with some general remarks of the selection of the tribunal, going through the difference of arbitration proceedings that involves an institution with those who do not uses one; the qualities required by the arbitrators for a particular dispute; some possible appointment methods for the selection of arbitrators; and a final subsection addressing the topic of the obligation of disclosure by arbitrators, and the eventual challenge of a Tribunal.

\textbf{Arbitration or Litigation?}

Notorious and numerous differences between these two systems of justice exist. An initial distinction can be made concerning the costs to access each system. In general terms\textsuperscript{14}, the cost to access the public system of justice are null or non-existent, while the entry fee for arbitration tends\textsuperscript{15} to be elevated, and reserved for a specific sector\textsuperscript{16}. Another difference can be made, if the time to have a final and binding decision is taken into account, since the periods of time will differ depending the method selected, usually having a faster decision when selecting arbitration over litigation; there is no right of appeal in arbitration, while many court systems have two courts of appeal\textsuperscript{17}.

A clear difference between each system is put into evidence at the moment of initiating the proceedings. To activate the Public Justice System, it is enough to present a claim to any of the judges that forms part of the permanent body of public servers available to hear disputes to the citizens of a determined territory. Obviously, the necessity of a competence and jurisdiction exam is necessary for the correct ventilation of the claim. In Arbitration, before presenting a claim the constitution of a Tribunal (or the selection of the sole arbitrator) is necessary, since there is no panel of arbitrators ready to hear any claim. Each Arbitration Tribunal is created for a particular dispute. This idea is consistent with the idea of having decisions faster that the Public System. However, not everything is easy during this part, since it could take considerable amounts of time- and money, of course- in the selection of arbitrators that will establish the Arbitral Tribunal that will be-hopefully-competent to hear the dispute.

\textsuperscript{14}Of course there are exceptions, e.g. when it is required to make a deposit of a percentage of the claim submitted. A point needs also to be made respecting the legal fees, which are not required in the Judicial System, but in a great number of countries the services of a lawyer are required in order to access the system.

\textsuperscript{15}The amount in dispute has to be taken into consideration, since it will determine the fees of the arbitrator(s), and in case of the selection of an Institution to administer the process it will determine that Institution’s fees. It has to be noted that in consumer arbitration the fees tend to be lower.

\textsuperscript{16}E.g. AAA Consumer Arbitration Rules is a set of rules that are designed to facilitate access and to eliminate an economic impediment.]

\textsuperscript{17}“International Arbitration Do’s and Don’ts” Publication by Swiss Arbitration Association, ASA, Special Series No.31 June 2009. For notable exceptions of arbitration cases, that has endless disputes the famous Dallah Case can help as a referent.
The previous fact stated above, brings in mind another difference: parties in arbitration have the possibility to decide the qualities they need, and desire in their arbitrators. This means, that in an agreement of arbitration it can be stipulated a number of characteristics (nationality, age, profession, academic degrees, experience in relevant sectors) that someone will be required in order to be eligible to form part of the Tribunal that will be in charge of resolving the dispute presented to the jurisdiction. This is a notable contrast with the Public Court System, since the one who appointed the judges that will resolve disputes, is no other than each national State. In this context, is important to bring into account that this is one of the main reasons why parties tend to select arbitration over litigation, since the possibility of selecting an experienced person who could rendered a valid and enforceable decision, can be quite handy in the presentation of a case.

Another important distinction of arbitration over litigation comes from the contribution of the Convention of Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention (1958). This Convention allows the enforcement and recognition of arbitral awards in approximately one hundred and forty countries, which can be said that is a number quite hard-or impossible- to obtain if a dispute is resolved via ordinary litigation.

As it has been stated, there are several differences between each process (along with plenty similarities) which can be interpreted in multiple and several ways. Depending of the interpreter it can be a favoring to one method or another. However, it cannot be ignored, that in order to have a prosperous arbitration system, it is required a proper coordination between the Judicial and the Private Justice system (Arbitration), in order to empower arbitrators in the compliance of their mandate.

**Selection of the Tribunal**
No talk about the selection of a Tribunal can be made without an agreement to arbitrate. That is, there can only be an arbitration proceeding where there is an arbitration agreement. The agreement reflects the parties will, it shows that parties have voluntarily agreed in going away from the ordinary jurisdiction of the national courts (maybe, in consideration of one of the multiples advantages of Arbitration) and have decided to resolve their conflicts with the use of private justice.

Hence, the very first step, is the verification of the existence of a valid arbitration agreement\textsuperscript{18}, the scope of the disputes that the parties have agreed upon, and the rest factors that the parties could have agreed for an arbitration proceeding: Place of Arbitration\textsuperscript{19}, number of arbitrators, qualities required in arbitrators, method for the constitution of the Arbitral Tribunal, application of a specific set procedural rules(such as UNCITRAL \textsuperscript{20}),or the submission to an Arbitral Institution(Such as the Stockholm Arbitration Institute, or The Arbitration Court of The International Chamber of Commerce), among many other things.

The identification of the factors agreed by the parties will make it possible to determine: the number of arbitrators that the parties are going to submit their dispute to; the qualities that those arbitrators will be required to have; and the selection method for the

\textsuperscript{18} The legal requirements of a valid arbitration agreement can be found in art 7 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter 'Model Law') and art. II of the New York Convention. Even, in the cases of a non valid or even an inexistent Arbitration Agreement, it will be the arbitrators composed and selected for the particular dispute the ones that will have to declare the lack of jurisdiction, in accordance with the worldwide recognized principle of Kompetenz-Kompetenz. For a discussion of the different currents that surrounds this complex, and yet marvelous juridical concept, please refer to Gonzalez de Cossio, Francisco, "El Principio Competence Competence Revisitado"

\textsuperscript{19} The Lex Arbitri, or the law of the place of arbitration is a relevant factor to be determined, since it is this Arbitration Law that will give a complemet of the parties agreement in those cases where there is no agreement made. A tacit agreement is to be interpreted that has happened. On determining the place of arbitration when no agreement exists between the parties, see: Born, Gary, (2001) 'International Commercial Arbitration: Commentary and Materials 2nd edition, Kluwer Law International. At pp. 573 - 614.

\textsuperscript{20} UNCITRAL Arbitration Rules (2010). When parties refer to an specific set of rules, such as UNCITRAL, it helps that the parties can rest on the predictability already established under the rules, which means that most of factors that parties could agree on, will be already cover by the set of rules. The same is to happen, when parties give the administration of the proceedings to an specific institution, since it is usual that each institution have an specific set of rules.
constitution of the Arbitral Tribunal. The previous work, in order to consider the important and relevant factors for the proper constitution of the Arbitral Tribunal that will have the mission of rendering a valid and enforceable award.

It is important to keep in mind that the constitution of an Arbitral Tribunal that is not in accordance with the parties agreement, will result in the challenge of the award, or the rejection of recognition and enforcement, according to Article V of the New York Convention, And Articles 34 and 36 of the Model Law.

**Institutional or AD-HOC?**

When parties select an arbitral institution to administer the arbitration proceedings, it is to be understood that it is an institutional arbitration, and where parties have not selected one, is to be understood that it deals with an ad hoc arbitration.

Arbitration Institutes have their own body of rules, with the procedures already determined, liberating parties from the hard work of creating the set of rules that will rule the arbitral procedures of their eventual or actual disputes. Multiple advantages of selecting an Institution in running the administration of the proceedings are to be noted: the main reference will be that it gives the extra confidence that a specialized group of individuals, in arbitration, will take care that the proceedings run smoothly. Another perceived beneficial factor is the help that Institutions can give to practitioners in complicated proceedings such as the challenge of an arbitrator\(^21\). And a final, non-exhaustive, advantage could be the quality seal (depending of the institution) that is given to the process of selecting arbitrators, since it is usual that the candidates for becoming

arbitrators in a particular Arbitration Panel, needs to be approved by the Arbitration Institute.

A very important factor to have in mind is that arbitration institutes do not work for free. Institutions have the freedom to establish the method for charging the administrative fees; a common practice is that institutions charge a proportional value to the amount in dispute (usually set up in the annexes of the Institution Rules). But the latter, is not so negative after all, since any expenditures for the fees of Institutional fees will not be required to be made.

In ad hoc arbitrations, things are quite different, since parties have to establish their rules, instead of submitting themselves to the jeopardy of a set of Institutional Rules. It is usual that most of the the possible things to be agreed under an arbitration agreement is complemented by the lex arbitri provisions on that matter. Notwithstanding, that parties have the alternative to select already established rules, such as the UNCITRAL RULES.

In general terms, the monetary price of selecting a world-class arbitral center is justified, by the relief that can be obtained in proceedings such as the selection of arbitrators, and challenge mechanisms in the cases where justifiable doubts of impartiality and/or independence exists\textsuperscript{22}. Challenges in an ad hoc proceeding tend to be more complex, and with even more judicial intervention.

Finally, it can be said that there could be hundreds of arguments in favor or against of each arbitration method, but as many things in arbitration, it will have to be determined by the parties in their agreement, consecrating, once more and the principle of party autonomy.

\textbf{Sole or Panel}

\textsuperscript{22} It is to be noted that according to art.13(3) of the Model Law, the last word of a challenge procedure will always be the court of the place of arbitration, since it allows parties to recur to their instance. Another relevant, or important factor can be brought up with the example of the Arbitration Court of the ICC, which has a particular faculty of the revision of the award, to avoid any formal errors, somewhat of a quality control.
Another topic that gives plenty ideas to discuss, is the one surrounding the decision of the selection of the numbers of arbitrators in charge of resolving a dispute. The main concern over this topic, is the practical consideration surrounding the decision of the arbitrator or arbitrators: to have a decision that is capable of being enforceable in more than one hundred and forty different jurisdictions.

The usual in this matter, is to have disputes resolved by a panel of three arbitrators, leaving each party of the equation to select or appoint one arbitrator, and depending if the applicable rules, the third arbitrator is to be selected by the arbitrators already selected, or by a third body(such as an Institution).

On this matter, is relevant to bring what Article 10 of the Model Law stipulates, which gives the allows that: “The parties are free to determine the number of arbitrators”. Hence, it leaves the parties the possibility to choose the number of arbitrators they want for their dispute. In the case that the parties agree for Institutional arbitration, as established before, the relevant rules will be rendered to be applicable over the lex arbitri. For instance, Arbitral Institutions such as the ICC, stipulates that in the case of no agreement about the number of arbitrators, it will be will be resolved by a single arbitrator\(^2\). Other sets of rules, like UNCITRAL, specify quite the opposite, and promote disputes to be resolved, in case of no consensus, by a tripartite panel of arbitrators.

A discussion exists whether which method is the most effective for the adjudicative process that is enclosed in Arbitration. On one hand, supporters of Multi Arbitrator Tribunals, sustain that the process will be covered with more legitimacy, since each party will feel to be represented by one arbitrator that understands its culture, and share its legal

\(^2\) However, it leaves a discretionary power to the institution to decide to have the dispute solved with more than one arbitrator. Art.8(2) ICC rules A similar provision is set up by art 12 of the SCC rules, where it leaves the discretion to the SCC Board to determine according to the complexity of the dispute whether to have a panel or a sole arbitrator. Art. 7 UNCITRAL rules, in what concerns the number of arbitrators that is proposed under that set of rules.
background. Another reason supporting the collegiate tribunals is the fact that since there is no right to appeal in arbitration, parties will feel more confident to have three (or more) persons to hear the case

On the sole arbitrator supporting line, it comes the practical and handy way of thinking of a common and normal business man: amount of money that it will be necessary to spend in the dispute. A sole arbitrator is less expensive, compared to the costs of three arbitrators (unless that sole arbitrator is one of the 'big fishes' of arbitration).

Additionally, those who support the argument in favor of tribunals rest their position in the fact that collegiate panels are obliged to deliberate, that is, to conduct a series of exchange of opinions and points of view, which will end or lead to a more elaborated award. In this same line of thinking, supporters consider that three heads think better than one, and any decision reached, even in the case there is a dissenter, will be covered with more validity than the one made by a sole arbitrator.

On the other hand, those who claim for the efficiency behind having a sole arbitrators puts into the table a legitimacy argument. This goes on the line of having more legitimacy in award ruled by one person, without any inconsistencies, contradictions, or internal battles. Than one award made by three arbitrators, three different minds, and three different styles. The legitimacy factor is even raised, by the fact that the only appointment that has to be made, the appointment of the sole arbitrator, will be either be done in a consensual matter, or by a neutral institution, equilibrating each side of the equation.

\[\text{24 In England an El Salvador appeal is allowed. Article 69 of the British Arbitration Act(1996) deals with the point of the Appeals on Point of Law, however it leaves parties the faculty to decide to exclude this possibility. In El Salvador, things tend to be different. The reform of the Arbitration Act which passed in 2009, allowed the appeals of arbitral awards ruled in law(Art.66-A). The establishment of the appeals brought a lot of commotion in the juridical and business community, which as a result a constitutional process around the topic started (process 11-2010) which end up in the declaration of the constitutionality of the reforms. The author of this paper has express the repudiation of this situation in different public spaces opinions in local newspapers(LA PRENSA GRAFICA), and conferences organized by El Salvador Chamber of Commerce.}\]
Furthermore, supporters of sole arbitration proceedings considers that having only one arbitrator, makes the process more efficient, flexible, and faster, since schedule problems are considerably reduced and there are practically inexistent possibilities of having the tribunal truncated\textsuperscript{25}.

This lack of consensus, reflected on the different provisions either on national legislation level, or institutional rules level, opens the discussion surrounding the decision of selecting the number of members that a Tribunal should have, and most of all, which tribunal will rendered a more legitimate decision: a sole arbitrator, where no possible dissents exists, or a panel where it could be under the mask of a tripartite decision on the same direction, or a fractured decision with dissents.

As it has briefly been pointed, the debate is far away from being closed, and there are supporting arguments in each position.

### Qualities Required in Arbitrators

First and foremost, it is important to not confuse the possible requirements that parties might set up for the arbitrators of their dispute, with the requirement of ruling in equity or in law. Which means that the arbitrators, in application of the arbitral award, will have to reach their decision in the application of provisions of the applicable law; or, in the case equity is agreed, in accordance to the concept of what is just and equitable for them.

In principle, parties are free to agree whatever characteristics they want or need that the arbitrators that will have to listen and eventually resolve their dispute need to have, for the proper constitution of the Arbitral Tribunal. It is also necessary to have in mind, that there

\textsuperscript{25}Art.33(1) of UNCITRAL rules stipulates that in order to make a decision a majority is needed, and as it can be expected, not all the times a majority would be reached, resulting in truncated tribunals. Other rules, such as art.25 (1) of ICC rules, give the Chairman the faculty to take the decision alone when no majority can be reached. A similar provision is on art. 35 of the SCC rules. On Truncated Tribunals see: Born, Gary, (2009) ‘International Commercial Arbitration, Kluwer Law International at pag. 1586-1592.
is a general principle surrounding the ideality of person to become an arbitrator, and that is, the requirement of the potential arbitrator to be impartial, independent and with the capacity of understanding the dispute that will be ventilated under his wing.

On this matter, is to be brought up what the UNCITRAL Model Law and the leading rules of Arbitral Institutions establish. And basically, the different stipulations do not require that a person hold any special characteristics, in order to become an arbitrator. However, it does make it clear, after interpreting the relevant provisions\(^\text{26}\), that it is within the parties’ autonomy the possibility to agree on the qualities the arbitrator(s) might be required to have\(^\text{27}\). In Institutional Arbitrations, the person will have to be previously confirmed by the Institution before being appointed an arbitrator.

A topic that cannot be omitted in this section is the area concerning the duty of disclosure of an arbitrator, which is under a close relation with the topic of the ideality of an arbitrator. The disclosure\(^\text{28}\) can be defined as the procedural act where an appointed arbitrator discloses to all of the parties, and arbitrators involved during a particular arbitration dispute, any circumstances that could bring into doubt his impartiality, independence, or capacity for the present dispute\(^\text{29}\). The duty of disclosure, is of vital importance because it gives parties the option to challenge\(^\text{30}\) the appointment, and also because it promotes transparency and confidence\(^\text{31}\) in the arbitration proceedings. Once the tribunal is constituted according to the party agreements, and the arbitrators have

\(^{26}\) That is, Art.10 to 15 of UNCITRAL rules

\(^{27}\) For example, Art.33 of the Arbitration Law of the Republic of El Salvador establishes that for some types of arbitration, it is required to be a certified lawyer.


\(^{30}\) If no objection is made, it will be considered as a waiver of the party to challenge the arbitrator later on, leading to the confirmation of the arbitrator, and the eventual conformation of the Arbitral Tribunal. On challenge of arbitrators: Redfern and Hunter, supra note 3.

\(^{31}\) Rogers, Supra note 29 at 638
disclosed the possible causes of a challenge, the arbitrators have other obligations to comply\textsuperscript{32}.

**Appointments of Arbitrators**

The appointment of arbitrators, once again, is set up under the sphere of decisions available to the parties that agree to arbitrate. There is a vast possibility of scenarios of different methods for the selection, or appointment of arbitrators. Methods can be as diverse as a random selection from a list of names; a decision taken by a third neutral (or non-neutral) party; a consensual decision (and how hard is to obtain a consensus when two parties are in the middle of a dispute!); and more frequently, a direct appointment, also known as an unilateral appointments\textsuperscript{33}.

The use of one method over another will define the outcome of arbitration, since there are some methods that would guarantee the parties, no matter what the outcome of the result is, that there have been no symptoms of bias in the arbitrators, while there might be other ways of appointment that might give that sensation. In any case, is important to not forget art.34 and 36 of the Model Law and Article V of the New York Convention, since an arbitration agreement that do not gives equal possibilities to parties in the appointment of the arbitral tribunal, a possible invalidity or a refusal of enforcement can be the result.

In multi arbitrator panels, the usual practice establishes that each party will select one arbitrator\textsuperscript{34}, and the unilaterally party appointed arbitrators will select the third arbitrator, who will act as the chairperson of the dispute. It is to be noted that each party must cover the costs of the appointed arbitrators, and the honorary of the chairman are usually shared.

\textsuperscript{32} On the limits on the party autonomy: Pryles, Michael " Limits to Party Autonomy in Arbitral Procedures". On other obligations that arbitrators need to fulfill: Rogers, at supra note 29, at page 630-648.

\textsuperscript{33} On different appointing methods of arbitrators, see: Redfern and Hunter, supra note 3, at 4.29 to 4.37

\textsuperscript{34} In case of having a reluctant party to make the appointment, the model law allows that the party with an interest in the proceeding recurs to the courts in order to make the appointment.
This last subject, dealing with the main issues around this paper, since it brought up the questions whether the arbitrators that are unilateral appointed by a party (and usually, unilaterally paid by the nominated party), have the incentives to be ‘loyal’ to their nominees and ruled in their favor, in order to receive future appointments by the same material party (the company) or by the same formal party (the law firm representing the company).

Problematic Situation in Multi Arbitrators Tribunals

The question around the (perverse?) incentives that unilateral appointed arbitrators have has been set up. In the following section, the problems that multi arbitrator tribunals composed under a scheme of having a panel of three arbitrators, composed by a unilateral appointment made by each party of the dispute, and the third arbitrator nominated between the two party appointed arbitrators.

Problematic situations that under the previous scheme detailed arbitrators might face during Arbitral Proceedings are exposed under this section. It is not an exhaustive list, since it would be impossible to record all the potential behaviors without leaving some aside. Some of these situations are supported in the work of experienced practitioners35, while some are logic deductions, or anecdotic experiences. In any case, the section gives a significant list, in order to make a-valid-pause, and analyze if some of the problems can be eliminated, or, reduced by changing the appointment method.

General Remarks

One of the advantages of arbitration over litigation is the possibility of selecting the panel of persons who will hear and decide a dispute, in contrast with the already selected staff of

35 van den Berg, at supra note 8; also Arroyo at supra note 8; and Kirby, Jennifer (2009) ‘With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated’ 26 Journal of International Arbitration.
judges that court system offers. As a consequence, each dispute that is to be ventilated in Arbitration Proceedings will have an specific panel to deal with the complications of the case. Hence, the constitution of the tribunal is of vital relevance.

Parties have in mind one thing: winning the case\textsuperscript{36}. It would be naïve to think otherwise. The repercussion of selecting a non-biased arbitrator over a biased one is determinative of the dispute, because acting in one way or another will affect the arbitrator`s credibility, and in last instance, his or her capacity to persuade his or her colleagues.

Arbitrators that form part of Tribunals in International and Local Arbitrations, are expected to be neutral\textsuperscript{37}, independent and impartial. The common scenario is to have a tripartite panel, where each side of the equation has selected one, and the two party appointed arbitrators agree in the name of the chairperson. The parties are jointly responsible for the costs of all three arbitrators, subject to any ultimate allocation of costs. Furthermore, all of the three arbitrators are expected to be neutral, independent and impartial.

For the appointing party, the selection of an arbitrator will consume a considerable amount of time\textsuperscript{38}, research about the capacities of potentials arbitrators will be necessary previous the appointment. Not to forget, that the nominee has to understand the factual issues that are going to be presented. Furthermore, it is logical that the appointing party will try to select an arbitrator that will be sympathetic to the appointing party views, which does not necessary means that will not be carrying all of its duties with diligence, impartiality, independence, and neutrality.

\textsuperscript{36} Paulsson, Jan (2010) 'Moral Hazard in International Dispute Resolution' 25 ICSID Review, at 11.
\textsuperscript{37} Of course, like everything in life, there are exceptions. In the United States of America, there exists a somewhat common practice of having non neutral arbitrators panel, to resolve the disputes. For further information, please refer to Chernick R.; Gaitis J.M.; Davidson R.B. (2006) 'Non Neutral Arbitrators' 3 Transnational Dispute Journal.
\textsuperscript{38} Guides for the proper selection of arbitrators has been created by practitioners. One of this was created by Bishop and Reed, supra note 10.
Common Problems in Arbitral Tribunals

Innocent and non-drastic situations, although still irritating problems can be presented. It is common that the hearing, or scheduling conference, has to be postponed on repeated occasions due to the busy agendas that international arbitrators\textsuperscript{39} usually have. Although some of these problems can be practically harmless, there have been reports\textsuperscript{40} of annulment of awards due to this situation.

Common scenarios of frequent communication between one party and ‘it’s’ arbitrator has been commonly reported. In this matter, there are international Guidelines that point out this type of behavior as not proper\textsuperscript{41}. However, is not to confuse or to create a general prohibition of communication between arbitrators and parties, but it has to be clear that the exchange of opinions between arbitrators and one of the parties in private is forbidden\textsuperscript{42}. In addition, arbitrators need to be reluctant of engaging private meetings\textsuperscript{43} with one party, because of the possible creation of bias appearance, which eventually, could open a window to a possible challenge of the arbitrator, and/or the award.

Commentators\textsuperscript{44} have also noted arbitrators who make themselves unavailable just before the start of a hearing, with the only aim of delaying the arbitral procedure. The excuses presented are innumerable, from false illness, to personal compromises. In the same context, there have been incidents where arbitrators resign at the last minute, which

\textsuperscript{39} Rogers, supra note 29, at page 646
\textsuperscript{40} For Case law of vacated awards for scheduling problems see: Born, supra note 20 at pag. 844 .
\textsuperscript{41} IBA rules on Ethics for International Arbitrators, rule 5.3 forbids this behavior.
\textsuperscript{42} For example, IBA Rules on Ethics for International Arbitrators. Rule 5 allows communication prior to its appointment, in order to check availability and capacity to hear the case. To read on some of the topics that might be addressed during the meetings. See also: Bishop and Reed, supra note 10 at pag. 27-31
\textsuperscript{43} The ICC will refuse to appoint an arbitrator who spends approximately 50-60 hours with the appointing party reviewing the case. This according to: Bishop and Reed, supra note 10 at pag.
\textsuperscript{44} See Kirby, at supra note 3435.
obviously complicates things\textsuperscript{45}. The cases of biased behavior in the realization of a hearing are also not so uncommon\textsuperscript{46}.

As anticipated, the period of the deliberations\textsuperscript{47} is not controversy free, and it can be filled with different situations. The concept of deliberation can be said, in a simplified matter that is the process in which the arbitrators reach to their final decision of the dispute that they had the obligation, and opportunity to resolve. However, a warning is to be made in this matter, due to the small quantity of information available, since deliberations are governed under the strictest rules of confidentiality.

Notwithstanding the latter, some of the different situations that can be faced under the context of a deliberation are the following: consensus in the decision to be taken by all the members of the tribunal; concessions between the arbitrators\textsuperscript{48}, in order to reach an unanimous decision; or when no consensus can be reached, the issue of dissenting opinion\textsuperscript{49}, as a matter of discontent by the arbitrator with different criteria to the majority, or to the presiding and deciding vote.

\textsuperscript{45} E.g. Appointing new arbitrators, repeating procedures, rescheduling, etc.
\textsuperscript{46} As illustrated by Lisa Bench Nieuwveld (2011), ‘Oral Hearing and Party-Appointed Arbitrators: Guess?? Yep! That’s Who Appointed Them! On Kluwer Arbitration Blog. As a matter of fact, I had the personal experience of facing a biased arbitrator during an interrogatory procedure the party appointed arbitrator(by the other party) was ruthless enough for correcting the witness in several occasions, during a direct interrogatory conducted by a member of the team i was part of.
\textsuperscript{47} On deliberations Madsen, Finn & Eriksson, Peter; (2006) ’Deliberations of the Arbitral Tribunal- Analysis of Reasoned Awards From a Swedish Perspective’ 2 Stockholm International Arbitration Review. See also: For Different examples of Inadequate Internal Deliberations See also at Born, supra note 20 20 at page 844 .
\textsuperscript{48} Most chairman prefer to take decisions unanimously, some co arbitrators use this fact to try to extract concessions from the chairman in exchange for their vote. As stated by Kirby, supra note 35 at p.348. In the same line of thinking, “try to persuade the other panel members to reduce the award in favor of their party in return for joining them in an unanimous award. This compromise will ordinarily be attractive to the chair of the panel, for his or her reputation for obtaining unanimous awards may increase the likelihood of being appointed to future panels. Even if the award is not affected, the party-appointed arbitrator may bargain for not awarding counsel fees” as stated by Smit, Hans (2010) "The pernicious institution of the party-appointed arbitrator – 33 Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment.
\textsuperscript{49} On dissenting opinions see: Lew, Mistelis at supra note 1 at 24-45; Redfern and Hunter, supra note 12 3 at 9.187 – 9.183; Arroyo, supra note 8; Madsen, supra note 46 47 at pag.31-36. For Opinion against dissents see: Redfern, Alan (2006) 'Dangerous Dissents', 3 Transnational Dispute Resolution at pag.8-12; Mosk, Richard &
Just like persons, dissenting opinions come in different sizes and shapes.

A prominent commentator tends to classify dissents as good, bad and ugly. The good dissents\(^{50}\), are those that are short, polite, but yet, allows the arbitrator to express his discrepancy with the decision taken by the majority. The bad\(^{51}\), are those type of dissents where the arbitrator expresses a disagreement in the reasoning, showing some bad temper, but not going to the extreme of attacking his/her colleagues. And finally, the ugly\(^{52}\) dissents, are those dictated when the arbitrator, in addition to disagree with the majority's decision, and in essence, with the rationale used by his colleagues, takes the opportunity to attack the way the proceedings where held, alleging serious procedural violations, and leaving the award vulnerable for a challenge or refusal of recognition and enforcement\(^{53}\).

Ugly dissents are truly a Pandora box specimen. Some notorious examples of this gender of dissents, has been the case where the arbitrator started pointing out that parties were not given equal opportunities to present the case\(^{54}\); other factual cases, are the exclusion of the

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\(^{50}\) The author exemplifies this type of dissents with two ICSID cases: Aminoil v. Government of Kuwait (1982) and Ultrasystems Inc. v. Islamic Republic of Iran. Redfern, supra note 7 Page 226-228

\(^{51}\) Idem at pag 228

\(^{52}\) Idem at pag.229

\(^{53}\) Mosk and Ginsburg , supra note 489 at pag,280 commenting the position of Levy, upon which the dissenting opinions are purely made with the intention of vacating an award, state that "this argument assumes that the arbitrator has no interest in respecting the duty of impartiality or independence". In this sense, I consider that the issuance of a dissent is not a reason to consider the bias of the arbitrator, although it is a factor to take into a consideration.

\(^{54}\) The English case F Ltd v M Ltd [2009] EWHC 275 (TCC), gives an example of an award that was set aside based on the dissenting opinion of an arbitrator which exposed the irregularities in the conduct of the proceedings. Comments on this can be found Richmond, Francesca (2009) "English court sets aside an award on the basis of serious irregularity, but confirms the doctrine has limited scope". On Kluwer Arbitration Blog. Another example is presented by the Iran-US Claims Tribunals in the case between Avco Corporation and Iran Aircraft Industries, comments on this case can be found on Mosk and Ginsburg , supra note 8 49 pag. 281; also: commenting the same case: Born, supra note 19 20 at pag..836 – 840.
arbitrator from the deliberations\textsuperscript{55}; and even accusing the rest of the Tribunal of being partial and non-neutral\textsuperscript{56}.

There are also situations where arbitrators promise to issue a dissent in certain date for the purpose of delaying the delivery of the award; without any doubt, that this type of behavior helps the party who appointed the ‘dissenting’ arbitrator to gain time for a possible settlement. Under this context, there have been cases where the arbitrator sends a copy of the draft award\textsuperscript{57} to one of the parties, giving them vital information for negotiating with the other party.

Furthermore, a case where the arbitrator admits to have acted in a non-neutral\textsuperscript{58} way, favoring the party who appointed him, has happened in previous occasions. Finally, there have been outrageous cases where arbitrators crossed the line of a civilized behavior and threatened other arbitrators in causing them a physical harm\textsuperscript{59}.

\textbf{Is It Time to change the Way Arbitral Tribunals are Constituted?}

\textsuperscript{55} That situation is best illustrated by the case between UNCITRAL Arbitration CME vs The Czech Republic(sept 13, 2001), where an arbitrator issued a dissent where he accused his colleagues among other things of exclude him from the deliberations. Comments about this case can be found on Redfern, supra note 7 at Page 229-230 and page 238 -240; Redfern, supra note 48 49 at page 8—9 ; van den Berg, supra note 8, pag.828. See also: Gaillard, Emmanuel & Savage, John (1999) 'Fouchard Gaillard Goldman on International Commercial Arbitration. Kluwer Law International at parra. 1373, to read more on proper deliberations "the requirement for deliberations will be satisfied if each of the arbitrators is given an equal opportunity to take part, in a satisfactory manner, in the discussions among the arbitrators and in the drafting of the award

\textsuperscript{56} Unscrupulous situations can also be expected after ugly dissents. An example can be found in the Klockner v. Cameroon ICSID cases series, where the dissenting arbitrator, which was appointed by Klockner, became Klockner’s counsel on a subsequent arbitration against Cameroon, as annotated by van den Ber, supra note 8 at pag.828 and Madsen supra note 46 47 page. 22-24.

\textsuperscript{57} Paulsson, supra note 37 38 at pag.5

\textsuperscript{58} As what happened in the Loewen Case, where the arbitrator appointed by the United States recognized that he acted in an partial way in favor of the appointing party, as annotated by Paulsson, supra note 37 38 at pag.5-8.

\textsuperscript{59} As reported on The Times, 8 nov 1984 on the behavior of two arbitrators in the IRAN-US Claims Tribunal, where one arbitrator threatened the other by throwing him down the stairs of the Peace Palace. As reported on Redfern, supra note 7, at fn 12, Page 3.
Problems that a Tribunal might face cannot be attributed exclusively to one of the two type of arbitrators (chairperson or unilaterally appointed), but, depending on who originates the situation, a doubt of the neutrality, independence, and impartiality of the arbitrator might be raised. That doubt has repercussions on the Institution of Arbitration as a whole, as it damages the trust that the method generates.

In a considerable amount of cases there has been an incentive for an arbitrator in showing his loyalty by ruling in favor of his nominating party, this in order to get future nominations. This situation raises the question of whether it could be possible to eliminate the perverse incentives that exists by simply changing the appointment method; or if the costs of changing the method are too high, and it deals with only a marginal number of ‘perverse’ arbitrators, which could be solved by the market itself.

Unilateral Appointments, the Genesis of All Evil?

The Psychology Behind the unilateral Appointments

Behind every great man there is a great woman; and behind every unilateral appointment, there is a party intent on winning the case. The idea that three minds think well than one, is the main reason why complex arbitrations usually haves tripartite panels of arbitrators for resolving a dispute.

The winning intention of the appointing of an arbitrator will sometimes be reflected in the confidence that is given to the counsel that there will be at least one member of the

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60 An example that supports the statement can be found on the dissenting opinion issued by the chairman of the case Tokio Tokeles Vs. Ukraine, ICSID Case No ARB/02/18, IIC 258(2004) As reported on Cited on Rees, Peter J; Rohn, Patrick 'Dissenting Opinions: Can they Fulfil a Beneficial Role?' (2009) 25 Arbitration International at fn31, page 336.

61 Parties need to raise challenges to the arbitrators in as soon as they become aware of the factor that raises a doubt of their impartiality, since it could be possible that they lose the rights for a challenge of the award on a later stage. For more, read Pinsolle, Philippe’ The challenge of awards rendered by biased arbitrators - do not lose your rights’ (2008), 5 Transnational Dispute Journal.

62 See: Bishop and Reed, supra note 10 at pag. 10. See also: Kirby, supra note 34 35 at pag. 337. Although the author believes that the increased confidence in party appointed arbitrators is not so founded, because in her opinion there is an exaggerated view of how much impact a co arbitrator usually has on a case.
tribunal who will be receptive to his or her ideas. That signifies that the unilateral appointed arbitrator serves as a transmitter and translator\textsuperscript{63} of the opinion of the party who appointed him or her, since it is under his duty to fulfill the obligation of transmitting his nominee case to the rest of the tribunal. It is important to mention, that in some cases the cultural differences between the parties are of such proportion that in order to completely understand one party's actions someone who shares legal and cultural background with them is needed.

Another usual idea behind the logic of unilateral appointments\textsuperscript{64} is that the arbitrator is in the obligation to consult his appointing party to make the selection of the presiding arbitrator, which gives the material party a sense of “proximity and control of the process”\textsuperscript{65}. In other occasions, the justification of unilateral appointment of an arbitrator comes with the idea that that his or her nominee will help to win the case\textsuperscript{66}.

It is clear that the method of unilateral appointment gives confidence to the parties to a dispute, and is also one of the biggest advantages that arbitration has over litigation, since it allows that parties of a dispute to select a person with certain qualities that will assure that the conflict between the parties is not only ventilated, but also understood by someone who is capable to understanding the matter in controversy. That can be exemplified, in cases where multi-disciplinary tribunals are formed, or experience practitioners in different industries are appointed as arbitrators.

\textsuperscript{63} See: Paulsson, supra note 37,38 who consider that nowadays there are no real differences between one party and the other, notwithstanding their respective positions in the globe. Hence, it is no longer an advantage attributable to the party appointed arbitrators.

\textsuperscript{64} In the majority the occasions, either because the applicable rules establish that procedure, or, because parties have agreed in that method of selecting a third arbitrator.

\textsuperscript{65} Mourre, Alexis ‘Are unilateral appointments defensible? On Jan Paulsson’s Moral Hazard in International Arbitration’(2010) on Kluwer Arbitration Blog

\textsuperscript{66} See: Paulsson, supra note 37 38 at 9; where he refutes this argument, since in his perspective, it is contradictory to have the parties believe that the arbitrator that is selected by them is going to be relevant factor for the outcome of the case, and the duty of impartiality with which they are bound.
The Controversy

‘I don’t trust this party, why would I trust the arbitrator that they have appointed?’ The logic behind the controversy is quite simple, if the commercial relations between two or more companies have gone to the extreme of initiating arbitral proceedings, how can the parties have confidence that the arbitrators selected by their ex-business partner will undertake its duties in an impartial and neutral manner? Of course, a great amount of this matter is determined by the reputation of the parties in dispute and the arbitrator itself. It is not unusual that a dishonest party appoints an arbitrator, who, instead of behaving as an impartial decision maker, will cross the line and advocate for the nominating party. As Hans Smit comments states, “the presence of a partisan arbitrator on a panel will normally reduce, if not eliminate, the free exchange of ideas among the members of the panel. The chair will be less receptive to arguments that appear to be moved by partisan considerations or may join one of the arbitrators”.

An idea that throws more wood into the fire, states that the practice of unilateral appointments creates a “disadvantage of a party who is 100% right and would be fully upheld by an objective decision-maker. It may favor an unscrupulous party who has no basis to seek to reduce his debt except the perception that arbitration may let him get away with it.”

Finally, it is to bring into consideration that the opponents of unilateral appointments suggest that this practice is jeopardizing the Institution of Arbitration as a whole, since it

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67 See: Bishop and Reed, supra note 10, at pag. 10 and 30; Paulsson, supra note 37 38 at pag. 5-8.
68 See Smith at supra note 37, 48.
69 See: Lew Mistrellis, supra note 1 at Parra 10-5; Paulsson, supra note 37 38 at pag.12; also Paulsson, Jan ‘Are Unilateral Appointments Defensible?’(2009), On Kluwer Arbitration blog
gives an image of a system in decadence\textsuperscript{70} for the lack of independence and impartiality of the decision makers, i.e., the arbitrators.

Factors to take into account

At this point, it has been clear that there are positive and negative factors surrounding unilateral appointments, and the tendency to hold this practice responsible for being the genesis of all evils in international arbitration seems to be going on a raise. Therefore, it is important to analyze the factors that are considered to be the proof of this seed of evilness, and the reliability of changing this practice.

One of the most recurring illustrations of the lack of impartiality of an arbitrator is said to be echoed on the high percentage of dissenting opinions in favor of the appointing party. However, it is important to bring into consideration that the issuance of a dissenting opinion is the exception\textsuperscript{71} of the general rule of unanimous award, as it can be confirmed in statistical reports\textsuperscript{72}; furthermore, the numbers show that these cases are going on a down.

Nonetheless, the fact that no dissent is produced does not guarantee that the arbitrators have acted in an impartial manner; as already exposed, it is quite common to have

\textsuperscript{70} Matthews, Joseph M. "Difficult Transitions Do Not Always Require Major Adjustment – It's Not Time to Abandon Party-Nominated Arbitrators in Investment Arbitration"(2010), 25 ICSID Review At pag. 51 -52; where the author suggests what unilateral appointments really show is the hypocrisy of the system.

\textsuperscript{71} Paulsson, supra note 67.38.

\textsuperscript{72} See Arroyo supra note 8; van den Berg supra note 8 at page 824 where it shows that, from 150 cases he analyzed, he found 34 dissenting opinions, in which the majority were issued in favor of the party who appointed the dissenter. Also on page 832 Proff van den Berg shows the decreasing tendency of dissenting opinions in ICC arbitrations: 8.6 per cent in 2004 ; 5.8 in 2005; 5.1 in 2006 ; 7.7 \% in 2007; and 5.6 \% in 2008. In this context, it is relevant to bring up the statistics that the Deputy Secretary General of ICC, Simon Greenberg, kindly provided me the following statistics for the year 2008: There was a total of 407 ICC awards that year. 229 of those awards came from a three member tribunal. Of those 229 awards, there were 31 dissenting arbitrators. Of these 31 dissenting arbitrators: 12 were written by the co-arb nominated by Claimant. 13 written by the co-arb nominated by Respondent .1 written by the Chairman. 5 of the dissent were unanimous, so we do not know which arbitrator it was Of the 12+13=25 dissenting co-arbitrators who were identified: 23 of those dissents were in favour of the party that nominated the co-arbitrator. 1 dissent was in favour of the party opposing the nominating party. 1 dissent did not appear to take a clear side.
compromises\textsuperscript{73} between the arbitrators ensuring a beneficial result to his appointing party, in order to reach a unanimous award. In the same context, other factors such as biased behaviors during the proceedings are to be taken into account.

Another factor that cannot be ignored is the extremely high costs that changing the practice of unilateral appointments\textsuperscript{74} could take. Not only the economic costs, but also the transactional costs behind the change.

The first factor to take into account is that it is a practice engrained in the culture of arbitration. Users of arbitration, and practitioners, feel comfortable with this factor under the Institution of Arbitration. It gives each party the opportunity of selecting the judges for the dispute, which translates in confidence in winning the case.

What has been stated is reflected in the market itself, where the majority of institutional rules and national arbitration laws have the unilateral appointments as a predetermined method of composing multi-arbitrator tribunals. Free market principles and competition suggests that as long as it is possible to enforce awards that are produced by tribunals conformed by party appointed arbitrators, parties agreements will keep supporting such practice.

The latter brings up that what makes a system reform quite impossible to conceive is that it will require not only changing hundreds of Institutional Rules and National Laws; but also International Conventions such as the NY Convention and the Panama Convention will need to be reformed also.

\textsuperscript{73} See Kirby on supra note 47, 48.

\textsuperscript{74} In favor of unilateral appointments Sacerdoti, Giorgio 'Is the party-appointed arbitrator a “pernicious institution”? A reply to Professor Hans Smit’ (2011) 35 Perspectives on topical foreign direct investment issues by the Yale Columbia Center on Sustainable International Investment; Mourre, Alexis 'Are unilateral appointments defensible? On Jan Paulsson’s Moral Hazard in International Arbitration'(2010) on Kluwer Arbitration Blog. See Also: Matthews, supra note 68 70 where the author defends unilateral appointments, in the sense that, for the moment, there is no better option for the parties, although it recognizes the possibility of the figure to come to an end. The author also proposes to change the oath taken by the party appointed arbitrators in ICSID cases, other than eliminating the practice.
Even in the case where the change was possible, the benefits out of this decision are marginal compared to all the trouble that it took to get through. Additionally, it is not possible to guarantee such benefits, that is, eradicating the negative aspects of the practice, since it could be that the users of arbitration switch to another ADR method, as a protest of losing their ‘right’ to appoint the Tribunal.

**Alternatives to Unilateral Appointments**

Although there are high costs in changing the default rules, it is always a possibility that the parties agree in the method for the selection, hence, the possibility to exclude such practice is always an option. This section, as suggested by the title, provides different alternatives available to the parties.

**Sole Arbitrators**

A recommendation for a sole arbitrator can be made, either stipulating that the appointment has to be done in consensus between the parties, or by agreeing in the name of a third party who will be responsible to make it.

The logic behind supporting a sole arbitrator is the following: since both of the parties have the right to appoint one arbitrator with the expectation that its nominee will be successful

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75 As stated by Mourre, idem: “A general ban on unilateral arbitration could have undesirable consequences. 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”.
in persuading the third arbitrator\textsuperscript{76}, then the effect of the co-arbitrators should annul the other one\textsuperscript{77}; hence, the process becomes no different (except for the prices) than having a SOLE arbitrator\textsuperscript{78}.

Some of the obvious problems that this proposal could bring are that it is possible that the parties will not be able to agree on the name of the arbitrator, or will not be entirely satisfied by the appointment made by the Institution. In addition, there can be cases of such complexity that having a single arbitrator could not be enough.

**Appointments Made by a Third Party**

A second alternative, is to conclude an agreement where all the appointments, or at least the appointments related to party appointed arbitrators, are to be decided by a third neutral party\textsuperscript{79}, an option available either in Institutional or ad hoc proceedings.

The biggest advantage of this solution is that it is likely that the quality of the proceedings and the award will increase\textsuperscript{80} as a consequence of having a higher level of collegiality\textsuperscript{81}. Another interesting point to highlight is that if all arbitrators are being selected by a third neutral party, such institution could decide to include individuals with specific knowledge in determined subject, which could bring something extra\textsuperscript{82}.

Some criticism can be raised in the establishment of this method. There could be unsatisfied users by the selection made by the Institution. Another problem will be with the

\begin{itemize}
\item \textsuperscript{76} It is to bring into consideration that the Institutional Rules of the most prestigious Arbitration Centers Stipulates that the Chairman can decide a case by its own, in case no majority is reached. ICC Rules art.25(1); LCIA Rules art26(3), SCC rules, art.35(1), CIETAC rules art.43(5).
\item \textsuperscript{77} Kirby, supra note 345 at pag. 350
\item \textsuperscript{78} Idem, at pag. 347.
\item \textsuperscript{79} Paulsson, supra note 38 at pag.16. For this purpose, Paulsson exemplifies his proposal with the Court of Arbitration for Sport, which has it seat in Laussane and works with arbitrators that are registered in their lists.
\item \textsuperscript{80} Kirby, supra note 35 at Idem, at pag.350.
\item \textsuperscript{81} Mourre, supra note 72-74.
\item \textsuperscript{82} On repeated appointments see: Slaoui, Fatima-Zahra ‘The rising issue of ‘repeat arbitrators’: a call for clarification’ (2009) 25 Arbitration International, pp. 103-119. In the conclusions the author encourages to have some diversity inside the Arbitral Tribunal, having experts in the substantive field and in the procedural.
\end{itemize}
small pool of available professionals, which could promote the repeated appointments of arbitrators, contributes to an increase of challenges of arbitrators, making procedures less expeditious. Another area of trouble could be the high entry costs to form part of the pool of available arbitrators, problem of great concern especially to new arbitrators.

**Blind Appointments**

Another option available is to keep confidential the name of the appointing party, in order to promote the free exchange of ideas between arbitrators during the period that last the proceedings, and especially during the deliberations, since it guarantees (in the file at least) that none of the parties will feel pressured in affirming one side or the other.

The main problem with this solution is that it is not so reliable in practice, where it would be extremely easy to find out which party appointed who; although, in theory, it is still an option, in addition to the applicability trouble in the cases of ad-hoc arbitrations.

**Non-Neutral Arbitrators**

A final alternative proposal is the one taken by Han Smit where he proposes that: party-appointed arbitrators should be banned unless their role as advocates for the party that appointed them is fully disclosed and accepted. Which in other words, he advocates the

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83 Other institutions have experimented with a variety of other practices, such as “blind appointments” (i.e. seeking to ensure that nominees do not know who appointed them) as stated by Paulsson, supra note 67 38 at pag. 12
84 In an exchange of communications of the author with Christian Alberti, Assistant Vice President of the International Centre for Dispute Resolution, he mentioned that this is not a standard ICDR practice; yet, it is not unusual either.
85 Smith, supra note 4948.
acceptance of non-neutral\textsuperscript{86} arbitrators as it happens in domestic arbitrations in the United States.

The interesting point of this proposal is that, even though it jumps to the other side of the equation, it gives a clear solution to the hypocrisy problems that party appointed arbitrators present in some cases. This proposal might require some reforms as well, but the big difference is that these do not contemplate any prohibition, and would allow the parties to retain some control on the formation of the Tribunal.

\textbf{Concluding remarks}

The arbitration Agreement establishes the main factor to be taken into account in any arbitration proceeding. It is under the agreement to arbitrate that it will be possible to determine the proper constitution of a particular Arbitral Tribunal for a specific dispute. Hence, it can be said that the constitution of the arbitral tribunal is a crucial moment, where the agreement made by the parties needs to be respected and enforced in different aspects such as: the number of arbitrators, appointment method selected, qualities required in arbitrators, place of arbitration, set of procedural rules, among other factors.

The failure in the establishment of a Tribunal in accordance to the parties agreement, or that performs in an impartial, independent and neutral manner, can lead to dreadful results. Either by having an award that is going to be set aside or even worse, by having an unjust award that can be enforceable all over the world.

The personal traits, ethical values, and capacity of each of the arbitrators will be determinant in the creation of an environment of cooperation and harmony in the Activities of the Tribunal. The success of the creation of such environment will be reflected in the quality of the conduct of the proceedings, and, ultimately, in the award.

\textsuperscript{86} See Chernick, Gaitis, Davidson, Supra note 35.
Emphasis must be made that, in most cases, tribunals present minor and insignificant setbacks, which leaves the tribunal with the opportunity to take out their responsibilities without any major complication. However, there are some other cases where the tribunal faces serious problems, situation which reminds that there is always a possibility of having a biased arbitrator. Furthermore, since the parties are free to select the person who is going to act as their party appointed arbitrator, and have the obligation of remunerating him or her, it is not so hard to have doubts of the independence of the nominees.

In addition, the system of unilateral appointments provides a perverse incentive which directs the arbitrator to advocate for its appointing party, since this could be profitable in the future by having a reappointment by the same party, in a different case; in spite of being expected that arbitrators take care of their duties in an objective and impartial manner.

In the market of alternative dispute resolution methods, notwithstanding the different problems that arbitration presents, it is still rated in the highest positions and it is considered as effective and reliable method for the parties to ventilate its divergences. It cannot be ignored that the psychological factor behind the unilateral appointments contributes in the success of the institution, and the market is not showing signals of changing this practice.

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87 On this context, Section 39 of The Swedish Arbitration Act stipulates that: An agreement regarding compensation to the arbitrators that is not entered into with the parties jointly is void. Interesting point of the SAA is that it blocks the possibility of parties to have individual agreements with the arbitrators. See also: Gans, K.S. 'Don't Bite the Hand that Feeds You: Arbitrator Bias Based on Payment Information' (2008), 5 Transnational Dispute Journal, Part of the conclusion of this work is to: “avoid informing the arbitrators about the non-payment, and work with the arbitration institute to shield the arbitrators from this knowledge. The greater the separation between fee payment and the arbitrators’ decision, the more likely that a motion to stay an arbitration will not be granted, and an arbitration award will be enforced.

88 See Redfern, supra note 7 at pag. 233 where the author questions the grade of independency of party appointed arbitrators since its getting its fees paid by the same appointing party. See also: Mosk and Ginsburg, supra note 48 49 on page 275 considers that the availability of dissenting opinions for arbitrators might put some pressure on arbitrators on supporting the appointing party.

89 Smit, supra note 3748.
The elevated costs that undertaking the task of changing the practice of unilateral appointments is a factor that cannot be ignored. Hundreds of statutes and rules would be needed to be reformed; this, in addition to the modifications of international conventions with all the complications that taking such task would require.\footnote{In order to close the option of having Tribunals conformed of arbitrators that have been unilaterally appointed by the parties, the regime for enforcement the awards would be needed to be reformed. This situation rises up another number of concerns and doubts that escape from the scope of this paper, some of this can be mentioned: could this reform be concluded exclusively from a national level? Or this will incur into violations of International Conventions such as the NY Convention? Would be required to amend International Conventions? If so, what type of amendments? Would the signatory countries of International Instruments be committed with such reform?}

Moreover, there is no certainty of the results of taking the change, and just the mere attempt to reform the system could bring more problems than benefits, since it is possible that parties could stop relying in arbitration for being deprived of selecting the judges of their dispute.

Having in consideration that the problems of biased arbitrators (and the implications within) ultimately impact on how users of ADR methods perceives the Institution of Arbitration as a reliable method of justice, it is important to see in which ways the same results can be achieved without going through a solution as dramatic and controversial such as banning the unilateral appointments.

In first instance, parties have the possibility of agreeing a different method of appointment, since it rests within their autonomy the faculty of designing the procedures that they consider satisfactory.

In this context, it has been proposed that parties conclude agreements to either have: sole arbitrators; appointments made by third neutral parties, such as a prestigious arbitration institute; or anonymous appointments, where the arbitrator does not find out who was the party who appointed him or her.
An equal important factor in this task of reducing perverse incentives is the role that relevant arbitration actors need to take. That is, actions that keeps investing efforts in the promotion of the real culture of arbitration, with a special focus in explaining the importance of having impartial and objective arbitrators. This, in order to alginate the market to exclude those arbitrators who have a ‘perverse’ historical set of cases.

Moreover, National Courts judgment are of extreme importance in this point since every ruling sends a message to society\textsuperscript{91}, and, being the ones who are in charge of reviewing and enforcing the awards, it is crucial that the ethical guidelines are applied in their rulings\textsuperscript{92}. This will transmit the message, that if parties want to have an enforceable award, they will be required to stay under the practice of appointing non biased arbitrators.

In any case, there are many reasons that justify any reflection of the way arbitral tribunals are being constituted, especially when there is an animus of proposing possible solutions that will contribute in developing the Institution of Arbitration. This debate is far away from being closed, and something tells me, that the idea of non-neutral arbitrators for International Arbitration, might be not so crazy after all.

**Biography**

\textsuperscript{91} See Bullard, Alfredo ‘Derecho y Economía, el análisis económico de las instituciones legales’(2006), Palestra Editores, 2nd edición at page 51-67. The author uses a law and economics approach to analyze the messages that a ruling sends to the society, and how the society responds to it.

\textsuperscript{92} An example of the application of Ethical Guidelines in their reasoning is the case Applied Indus. Materials Corp V Ovalar Makine Ticaret Ve Sanayi, A.Sm 492 F.3d 132(2nd Cir. Jul 09, 2007) (Reasoning that ” It is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowlege that will adhere to these standards.’ As annotated in Rogers, supre note 2829 at fn 20, Pag. 628. On this same line of ideas: Gunter, P-Y. Hurni, C ‘Impartiality and Independence of Arbitrators in Recent Swiss Case Law - from Constitutional Law Principles to Transnational Procedural Law’(2008), 5 Transnational Dispute Manager; where the authors comment about a recent case by the Swiss Supreme Court in which there is a direct application of the IBA Guidelines of conflict of Interest.
“International Arbitration Do`s and Don’ts” Publication by Swiss Arbitration Association, ASA, Special Series No.31 June 2009


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