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# SALIENT ISSUES OF INTERNATIONAL ARBITRATION

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## I. INTRODUCTION

At a recent breakfast with CLO's, one of which is the CLO of one of the biggest manufacturers of wind parks — a firm which exports all over the world, especially in Asia. He commented that most parties were proposing mediation clauses, and subsidiary submission to local courts, without an arbitration alternative.

Arbitration has been a success. It is the predominant dispute resolution procedure in international trade. It has conquered new territories in the area of investment protection. But we cannot rest on our historic laurels. The world is changing at terrifying speed, and international arbitration can only exist if it is the preferred solution chosen by companies and states.

You may be thinking that I will now refer to cost and time. Not at all. That is stale bread. My worry is not time and cost; my worry is the lack of trust — the lack of trust in the decisions issued by arbitrators. If companies and states lose that confidence, arbitration is doomed. Users are prepared to pay, and they are prepared to wait. But they are not prepared to pay and wait for an adjudication that

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they distrust.

This brings me to the two salient issues I want to address: the first is openness and the second is the participation of parties in the designation of arbitrators.

## II. OPENNESS

It is undisputed that we live in a more transparent world. Citizens everywhere insist on knowledge — transparency is the guardian of liberty. Freedom of arbitration acts have revolutionized citizens' knowledge of how their state is run. Technology has reinforced the trend: the cost of disseminating and acquiring information has dropped to close to nil.

The new openness has created a schizophrenic situation in arbitration. In investment arbitration the general rule now is total openness (cases, hearings, decisions are now public). In commercial arbitration the status quo is unmovable, and total secrecy the norm (the existence of the case, the people designated as arbitrators, and their decision: all is secret). There has been no change in commercial arbitration whatsoever in the last fifty years!

The situation is untenable. I submit that a fundamental change regarding transparency is required. Arbitral institutions should publish a list with the procedure they manage and which the arbitrators they designate — as ICSID does. I do not care about the name of the parties, but the names of the arbitrators should be public. Commercial awards should be published as a general rule, except if the parties have agreed otherwise or the institution so decides. The names of parties should be deleted, but name of arbitrators should be public.

Publicity is one of the basic pillars of justice. As Bentham said, "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."<sup>1</sup> It is essential that arbitrators know that their findings and arguments will be picked apart by lawyers, academics, futures clients — that what and how they decide will have an impact on their reputation. Publicity is a prime instrument of

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1. THE WORKS OF JEREMY BENTHAM 316 (John Bowring ed., 1843).

quality control.

The perceived and real lack of transparency is a shortcoming of international arbitration and it is a contributing factor in limiting its appeal — especially outside the First World. The *Financial Times* referred on April 15, 2010 to the “secretive world of international arbitration”<sup>2</sup> — this does not increase users’ confidence in the institution. And secrecy creates a false perception: arbitration is in general terms an impartial and fair system of adjudication. I have never come across any malfeasance. There is nothing to hide. But we act as if there indeed is something to hide, and in the process we undermine the legitimacy of the institution. More openness would also increase the possibilities of new entrants into the systems, as lawyers and arbitrators.

Let’s look at the disadvantages. There is the argument that users want secrecy, that confidentiality is the main advantage of arbitration. In a survey in 2003 the AAA found that only 10% of users thought confidentiality as relevant.<sup>3</sup> In shipping arbitration, all awards are published. Secrecy is not important for clients — and when it really is, there should be an opt out. In my opinion, confidentiality is a self-serving myth. I submit that confidentiality is a protection basically for arbitrators and possibly also for lawyers. It is a protection for arbitrators and lawyers trying to avoid public scrutiny of their work.

### III. PARTICIPATION OF PARTIES IN THE DESIGNATION OF ARBITRATORS

It is important that parties participate in the designation of arbitrators. Judges are civil servants, designated in accordance with an objective procedure established by law. Arbitrators should be chosen and designated by the parties. This is fundamental for the confidence in the final decision.

The lack of openness creates its own problems: while in investment arbitration parties can choose knowing all the previous decisions of an arbitrator, in commercial arbitration there is very

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2. Michael Peele & Jane Croft, *Arbitration: Case Closed*, FIN. TIMES, Apr. 15, 2010, <http://ft.com/cms/s/0/1858447c-48be-11df-8af4-00144feab49a.html>.

little guidance regarding the candidates' record. But there is a second, much more fundamental problem. In the traditional system, used by most institutions, each party has a total freedom in selecting an arbitrator. And the two co-arbitrators then elect the chairman, or, if they cannot agree, the designation is made by the institution or appointing authority.

Formally, all three arbitrators must have the same level of impartiality and independence. But this is a farce. As Martin Hunter famously said in a classic quote: "What I am really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client but with the minimum appearance of bias."<sup>4</sup>

Parties have no interest to appoint truly impartial and independent arbitrators. They are subject to the well-known *prisoner's dilemma*: a classic game developed in 1950's by American mathematician Albert Tucker. Two prisoners are interrogated separately. If both keep quiet, they will be freed. If one confesses, the other will be jailed and he will be free. But if both confess, both will be jailed. This is a situation where the outcome depends not only from your own behavior, but also from that of the counterparty. There is an amazing result: rational behavior leads both prisoners to confess — while by both simply shutting up, they would have avoided jail!

The situation is analogous in arbitration.

- Both parties could choose impartial arbitrators: the result would be that fair justice is done
- But if claimant does, and the respondent chooses a partial arbitrator, respondent will be privileged (he has an unashamed defender on the tribunal, while claimant does not)
- The prisoners' dilemma will push the claimant to be cautious and to select someone who, appearing to be impartial, in fact is as close as possible to the claimant's case. And the respondent will do the same.<sup>5</sup>

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4. Martin Hunter, *Ethics of the International Arbitrator*, 53 ARBITRATION 222-23 (1987).

5. See, e.g., Peter Rees Shell's General Counsel (speaking at the Institute of

Party appointed arbitrators lead to situations which can only be described as miscarriages of justice and which undermine the legitimacy of arbitration. Here are some examples:

- The party appointed arbitrator who *impromptu* stands up and interrupts the opposing party lawyer to make a passionate *plaidoyer*
- The party appointed arbitrator who writes a 140 page dissenting opinion, stating why the award is null and void, procrastinates delivery for months and runs a huge bill
- The party appointed arbitrator who then drafts the request for annulment of the award before the courts
- The party appointed arbitrator, who initially accepts the decision against the state which appointed him, and then changes his opinion and candidly admits that he wants to be able to return to his country
- The party appointed arbitrator who is caught sending emails to the party who appointed him, describing the *minutiae* of the deliberations

Paulsson tells the story of the U.S. appointee to the *Loewen* tribunal, who afterwards acknowledged in public that he had been put under severe pressure by officials from the U.S. Department of Justice.<sup>6</sup>

How can parties trust an adjudication system which permits this type of behavior by the very persons who are designated to decide the dispute? And whose decision as to the merits is final and binding?

But the present system has a further — and in my opinion fatal — disadvantage: parties have a 100% capacity to influence the party appointed arbitrators and 0% capacity to influence the designation of the chairman by the institution. If there is no agreement, the institution will designate the person of its choosing, without taking

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Energy Law's European Conference): "Picking your own arbitrator is a massively overrated advantage of arbitration – because the corollary of being able to pick your own arbitrator is that so can the guy on the other side."

6. David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*.

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into account the parties' preferences. So that parties can end up with the following: (1) with a party appointed arbitrator, whom they really like, because he or she is formally impartial, but in his heart he is a known defender of the party's thesis; (2) with a party who is set-off by an arbitrator designated by the other party, who meets exactly the same conditions; and (3) and with a chairman, who in the end is the one who will decide, who has been chosen by the institution, without any participation of the party, and who may for some objective reason be actively disliked by the party. The net result is that the present system does not really guarantee party involvement in the designation of the deciding arbitrator.

#### IV. CONCLUSION

What is the solution? We must move away from party appointed arbitrators. Respect for party autonomy must be the first rule: parties should be free to agree party appointed arbitrators — but they should do so expressly. The default rule should be different: all appointments should be made by the institutions.

Paulsson has proposed that arbitral institutions should have closed lists of candidates. I have misgivings. It could lead to a closed, elitist coterie.

The basic guideline is parties should be heard and should have a say because we are providing service and the voice of the client is basic. In other words, substitute the right of arbitrary appointment of one arbitrator with the right to veto all three candidates. There are various *formulae*. Each institution can develop its model.