

Selecting Party-Appointed Arbitrators Through a Screened Selection Process: The Best of Both Worlds

By Charles B. Rosenberg & Olivier P. André

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Introduction

Every law student learns in the first few weeks of an alternative dispute resolution (“ADR”) seminar that one advantage of arbitration over litigation is the ability of the parties to select the decision-makers. A common practice in arbitration is for each party to appoint an arbitrator, and then for the two party-appointed arbitrators to agree on the chairperson of the tribunal.

In recent years, however, a debate has raged in the arbitration community regarding the practice of party-appointed arbitrators. Luminaries in the field, including Jan Paulsson, Albert Jan van den Berg, and Charles Brower, have publicly clashed over whether the parties should be the ones to appoint the arbitrators to enhance the parties’ perceived legitimacy of the arbitration proceeding or whether a third party (such as an arbitral institution) should appoint the entire tribunal to eliminate the “moral hazard” that party-appointed

arbitrators may be inclined to rule in favor of the party that appointed them.¹

This article summarizes the debate and the numerous challenges regarding the appropriateness of party appointments, as well as one unique alternative for addressing some of those concerns.

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¹ Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339 (2010); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (2011); Charles N.

Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson—Van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 6 WORLD ARB. & MED. REV. (2012).

The Party-Appointed Arbitrator Debate

The debate regarding party-appointed arbitrators was reignited in 2010 when Professor Paulsson delivered his Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair at the University of Miami School of Law. In that lecture and ensuing written remarks, Paulsson proposed to enhance the legitimacy of international dispute resolution by removing what he perceived as the “moral hazard” associated with party-appointed arbitrators, i.e., that a party-appointed arbitrator may be inclined to act as an “arbitrator-advocate” on behalf of its appointing party. According to Paulsson, the best way to avoid incidents of arbitrators acting unethically is to forbid, or at least police, the practice of unilateral appointments. Paulsson therefore recommended that “any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body.”

The following year, Professor van den Berg published an article in which he questioned the neutrality of party-appointed arbitrators based on his finding that nearly all of the publicly available dissenting opinions in investment arbitrations were issued by the arbitrator appointed by the party that lost the case. Van den Berg examined the 150 publicly reported investment arbitration decisions and identified a dissenting opinion in 34 such cases (a 22% dissent rate), noting that “all of those 34 dissenting opinions were issued by the arbitrator appointed by the party that lost the case in whole or in part.” Van den Berg reasoned that “[a] nearly 100 percent score of dissenting opinions in favour of the party that appointed the dissenting arbitrator is statistically significant” and “raises concerns about neutrality.”

In 2012, Judge Brower and Charles B. Rosenberg (a co-author of this article)

questioned Professors Paulsson and van den Berg’s presumption that party-appointed arbitrators are untrustworthy in that they may be too prone to violate their mandate to be and to remain independent and impartial. Brower and Rosenberg argued that their colleagues’ concerns were overstated and unjustifiably casted a shadow over party-appointed arbitrators. Their article emphasized that “the continued viability of international arbitration, in particular investment arbitration, hinges on users of the system viewing it as a legitimate form of international dispute resolution.” Two important elements of perceived legitimacy are the right of the parties to choose the arbitrators and the ability of an arbitrator to express disagreeing views in a dissenting opinion. Brower and Rosenberg maintained that eliminating these elements, as proposed by Professors Paulsson and van den Berg, would impede the further development of the field.

The Screened Selection Process

Notably absent from the foregoing debate has been any mention of the screened selection process for party-appointed arbitrators, a procedure that is unique to the arbitration rules of the International Institute for Conflict Resolution & Prevention (“CPR”) and that addresses many of the concerns identified above. CPR includes in various sets of its arbitration rules the option of a screened selection process for appointing arbitrators. For example, Rule 5.4(d) of the new CPR Rules for Administered Arbitration of International Disputes provides that if the parties have agreed to a three-person tribunal and that two of the arbitrators are to be selected by the parties “without knowing which party designated each of them,” CPR will conduct the screened selection process as follows.

First, CPR convenes a conference call with the parties to discuss the profile and qualifications the parties are looking for in

their arbitrator candidates. The candidates are drawn from the CPR Panels of Distinguished Neutrals,² but the parties also may designate their own candidates. CPR then compiles and circulates to the parties the list of candidates, together with confirmation of the individuals' availability to serve as arbitrators, their rates, and disclosure of any circumstances that may give rise to justifiable doubts regarding their independence or impartiality. Within ten days of receipt of the list of candidates, each party ranks its top three candidates from the list to serve as its party-appointed arbitrator. At the same time, each party may object to the appointment of any candidate on the list on the grounds of lack of independence and impartiality. CPR appoints the arbitrators based on the order of preference indicated by the parties, excluding the candidates who have been successfully objected to by the parties.

CPR's screened selection process is a unique and innovative procedure that strives to enhance the objectivity and hence legitimacy of the arbitration proceeding while preserving the ability of the parties to select their decision-makers.

Unique among arbitration rules, the CPR Rules provide that "[n]either CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or appointed arbitrator as to which party selected either of the party-designated arbitrators." In other words, CPR acts a

² CPR's Panel of Distinguished Neutrals comprises around 600 neutrals worldwide, specifically vetted for their expertise in resolving commercial disputes. In addition, CPR maintains

"screen," enabling the parties to appoint the arbitrators without the arbitrators knowing which party appointed which arbitrator. The screen thus aims to ensure objectivity and eliminate the risk of arbitrator bias in favor of the appointing party, while preserving the parties' ability to select the decision-makers.

In practice, parties regularly agree to CPR's screened selection process either in advance of a dispute in their contracts or even at the time the dispute arises. In CPR's experience, the screened selection process has been particularly prevalent with financial sector and high value commercial contract disputes.

The screened selection process is included in CPR's *Rules for Administered Arbitration of International Disputes* (2014), *Administered Arbitration Rules* (2013), and *Non-Administered Arbitration Rules* (2007).

III. Conclusion

CPR's screened selection process is a unique and innovative procedure that strives to enhance the objectivity and hence legitimacy of the arbitration proceeding while preserving the ability of the parties to select their decision-makers. It is a simple compromise between the positions of those who believe the existing system of party appointments should remain unchanged and those who would overhaul the system. Screened selection can be implemented with no obvious downside: at best it can reduce bias, and at worst the level of bias will be unchanged. The screened selection process therefore offers an easy and helpful tool in the ongoing quest to enhance the effectiveness and legitimacy of alternative dispute resolution.

panels of neutrals in over 20 industry practice areas (such as Construction, Energy, and Insurance).

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Charles B. Rosenberg



Olivier P. André

[Charles B. Rosenberg](#) is an Associate at White & Case LLP and a member of the inaugural Y-ADR Steering Committee of the International Institute for Conflict Prevention & Resolution (“CPR”). T +1 202 729 2324
Email: crosenberg@whitecase.com

[Olivier P. André](#) is Vice President, International and Dispute Resolution Services at CPR. T. +1 646 753 8241
Email: oandre@cpradr.org

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CPR is the only independent nonprofit organization whose mission is to help global business and their lawyers resolve commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

CPR

575 Lexington Avenue, 21st Floor
New York, New York 10022
Phone: +1.212.949.6490
Fax: +1.212.949.8859
www.cpradr.org