

**THE DEATH OF THE TWO-HEADED NIGHTINGALE:
WHY THE PAULSSON–VAN DEN BERG PRESUMPTION THAT
PARTY-APPOINTED ARBITRATORS ARE UNTRUSTWORTHY IS WRONGHEADED**

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I. Introduction

Less than a year ago, two of the most well-regarded and distinguished members of our profession – Professors Jan Paulsson and Albert Jan van den Berg – published articles criticizing party appointments and dissenting opinions. Both articles presume 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. Their articles are like Siamese twins, conjoined by a common presumption: lack of good faith on the part of party-appointed arbitrators. My co-author and I, however, believe that such a presumption is wrongheaded. It unjustifiably casts a shadow over party-appointed arbitrators.

In our view, 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. One important element of perceived legitimacy is the right of the parties to choose the arbitrators. Another is the ability of an arbitrator to express disagreeing views in a dissenting opinion. We believe that eliminating these elements, as proposed by Professors Paulsson and van den Berg, would impede the further development of the field.

To be clear, Paulsson’s and van den Berg’s critiques of party appointments and dissenting opinions appear to be addressed to all forms of international arbitration. The following comments therefore are directed to both commercial disputes and investment disputes.

II. Paulsson’s Article

Let’s begin with Professor Paulsson’s critique of party appointments. Paulsson proposes to enhance the legitimacy of international dispute resolution by removing what he sees as the “moral hazard” associated with party-appointed arbitrators. 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 recommends that “any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body.” Paulsson further

suggests that appointments be made from a pre-existing list of qualified arbitrators. We, however, disagree with Paulsson's suggested departure from the *status quo*.

Paulsson begins by stating that "there is no such right" for a party to name an arbitrator. But the right to name an arbitrator has existed for decades, even centuries. Indeed, States have historically insisted on the right to appoint an arbitrator. Let me give you a handful of examples – dating back more than 200 years – that have provided for this right:

- 1794: The Jay Treaty between the United States and Great Britain, one of the earliest examples in modern history of the use of an international tribunal to resolve an international dispute;
- 1871: The Treaty of Washington between the United States and Great Britain, which established a Tribunal of Arbitration to resolve the "Alabama Claims;"
- 1899: The Hague Convention of 1899, which established the Permanent Court of Arbitration in The Hague;
- 1907: The Hague Convention of 1907, which amended and expanded the 1899 Convention;
- 1920: The Statute of the Permanent Court of International Justice, which established the PCIJ and allowed for the appointment of *ad hoc* judges;
- 1945: The Statute of the International Court of Justice, which established the ICJ and preserved the right to appoint *ad hoc* judges;
- 1959: The Germany-Pakistan BIT, the very first BIT;
- 1963: the Netherlands-Tunisia BIT, one of the first BITs providing for investor-State arbitration; and
- 1985 and 2006: the UNCITRAL Model Law

Furthermore, the right to appoint an arbitrator is also included in all of today's major international arbitration rules. And many of the world's domestic arbitration laws, including those of Canada, England, and France. Accordingly, it would seem that:

- (1) there is a right for a party to appoint an arbitrator; and
- (2) such a right has become an established principle of law.

Paulsson's thesis is based on four assumed reasons why parties are attached to the practice of unilateral appointments. His primary reason is that a party may believe that "[m]y nominee will help me win the case." In other words, an "arbitrator-advocate."

However, all of today's major international arbitration rules provide that arbitrators, including party-appointed arbitrators, must be independent and impartial. And in practice, an arbitrator's reputation for apparent bias will undercut his or her credibility (hence influence) within a tribunal. No party will want to appoint such an individual. In other words, there is little advantage to having *one* guaranteed vote on a three-person tribunal.

We turn now to Paulsson's recommendation that appointments be made from a pre-existing list of qualified arbitrators. We disagree. For one thing, perceived legitimacy. Party involvement in the appointment of arbitrators ensures that the decision-making process is not perceived as something external to the parties. Rather it is perceived as a legitimate mode of resolving disputes. For another thing, the pre-existing list approach unnecessarily infuses politics into the system. Potential arbitrators must have close connections with States or the appointing institution to be included on the institution's list. Politics also create an artificial barrier to entry. This conflicts with, for example, a recent call by the ICSID Secretary-General for "additional qualified arbitrators on the ICSID Panels due to the increasing caseload."

Moreover, as Paulsson observes, parties may have "an inability to trust the arbitral institution to appoint good arbitrators." Naturally, no institution could properly evaluate how much trust a party would have in an arbitrator. This might negatively affect the perceived legitimacy of the proceedings.

Parties will generally have greater faith in the arbitral process if they themselves are the creators of the tribunal that will judge them. There thus seems to be a close nexus between the perceived legitimacy of international arbitration and the parties' appointment of the arbitrators. Legitimacy of the proceedings may translate into respect for the arbitral award, regardless of the outcome. As well as respect for the ultimate enforcement proceedings, if needed at all. In other words, a losing party may be less likely to challenge the legitimacy of the decision-making process if that party played an intimate role in constituting the tribunal.

In sum and with all due respect, Professor Paulsson overstates whatever moral hazard may be thought to exist with party-appointed arbitrators. To the contrary, the legitimacy of

international arbitration rests, to a large extent, on the intimate involvement of the parties in the appointment of the arbitrators.

III. Van den Berg's Article

We turn now to Professor van den Berg's article. Van den Berg likewise questions 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; in other words, a 22% dissent rate. Notwithstanding the 22% dissent rate, van den Berg questions dissenting opinions by party-appointed arbitrators.

In our view, however, dissenting opinions play a critical role in fostering the legitimacy of international arbitration. Indeed dissenting opinions are a significant feature of international dispute settlement, as demonstrated by the fact that a large number of international courts, tribunals, and institutions permit dissents. These include:

- ICSID;
- the Iran-United States Claims Tribunal;
- the ICJ (and its predecessor, the PCIJ);
- the International Tribunal for the Law of the Sea;
- the ICC;
- the ICTY;
- the ICTR;
- the Special Court for Sierra Leone;
- the Special Tribunal for Lebanon;
- the Inter-American Court of Human Rights; and
- the European Court of Human Rights.

Now turning to the 22% dissent rate in investment arbitration, three comments.

First, the 22% dissent rate is actually decreasing. Using van den Berg's methodology, the 2010 dissent rate in investment arbitration was a mere 12%.

Second, the inverse of the 22% dissent rate is that 78% of the 150 cases reviewed by van den Berg produced no dissenting opinions. (Likewise 88% of the decisions issued in 2010 produced no dissents). In other words, 3 member tribunals that included 2 party-appointed arbitrators have been able to reach a unanimous award in the overwhelming majority of cases – 88% in 2010 and 78% overall. This alone serves to minimize van den Berg’s concerns regarding dissents in investment arbitration.

Third, van den Berg has failed to compare the dissent rate in investment arbitration with rates in national judicial systems. On the one hand, take the 12% or even 22% dissent rate in investment arbitration. Now compare this rate with the dissent rate of the United States Supreme Court: 62%. Or the High Court of Australia: 36%. Or the Supreme Court of Canada: 25% (and 37% the year before).

In light of this, it would seem that dissents by party-appointed arbitrators should more properly be viewed as the reflection of the arbitrators’ shared outlook with the party that appointed them. In other words, good due diligence by counsel. Not bad faith on the part of party-appointed arbitrators.

Van den Berg also contends that his survey contradicts the argument that dissenting opinions contribute to the development of the law. Van den Berg maintains that “[w]ith one curious exception [*Helnan International v. Egypt*], in none of the investment cases did the arbitrators refer to a dissent in a previous investment case.” Van den Berg thus concludes that dissents by party-appointed arbitrators have become suspicious.

Two observations here.

First, Van den Berg overlooks 2 decisions in which tribunals favorably referred to a dissent in a previous case: *Tza Yap Shum v. Peru* and *Aguas del Tunari v. Bolivia*. That within the short history of investment arbitration even those three awards – *Helnan International*, *Tza Yap Shum*, and *Aguas del Tunari* – have embraced dissenting views is, in our view, a validation of the potential contributions that can be made.

Second, it is doubtful that a dissent not cited in a subsequent case has no influence on the development of international investment law. What actually happens is that investment arbitration awards are discussed and scrutinized at conferences and in scholarly articles. To take

one example, the late Professor Walde's ("VELDE") 2005 Separate Opinion in *International Thunderbird v. Mexico* has been favorably commented on by scholars and practitioners in:

- Kluwer Arbitration Blog;
- Global Arbitration Review;
- Transnational Dispute Management;
- Arbitration International;
- Journal of International Arbitration;
- Journal of World Investment and Trade;
- and several U.S. law reviews.

By this means, a dissent can give rise to intellectual debate within the community. This in turn may contribute to the evolution of the law.

And there are other advantages of dissenting opinions. Briefly before I conclude, let me list 4 such advantages:

- (1) The prospect of a dissent may stimulate deliberations by encouraging dialogue.
- (2) A dissent, circulated within the tribunal prior to issuance of the award, may produce a better arbitral award. A dissent may ensure that the award is well reasoned by raising the most difficult problems with the majority's reasoning.
- (3) A losing party may be more likely to accept the legitimacy of the arbitral process if it feels that its arguments were considered by the tribunal, even if ultimately rejected by the majority.
- (4) The absence of a dissent may actually weaken the authority of an award and delay enforcement (the so-called "mandatory dissent")

IV. Conclusion

In conclusion and with respect, Professor Paulsson's and van den Berg's critiques of the *status quo*, based on their shared presumption that party-appointed arbitrators are untrustworthy, are unsupported. A party's right to appoint an arbitrator and the ability of an arbitrator to dissent are significant elements of perceived legitimacy. And eliminating them would impede the further development of the field. To put it simply, "If it ain't broke, don't fix it."