Editorial

Jacques WERNER

The Independence of Party-Appointed Arbitrators: For a Rule of Reason

The situation of party-appointed arbitrators is much under discussion. This stems from the many challenges which are raised, either at the stage of the constitution of the arbitral tribunal or of the enforcement of the award, based on an alleged lack of independence of one arbitrator. Whereas these challenges reflect the increasingly litigious nature of the international arbitration process, they reflect as well the clashes between two diverging conceptions of the party-appointed arbitrator: the civilian approach, where the standard of independence is the same for all three arbitrators; and the common-law approach, where it is admitted that a party-appointed arbitrator may act to some extent within the arbitral tribunal as an advocate of the party who appointed him.

The rising numbers of cases with parties and arbitrators stemming from these two diverging traditions render a harmonization necessary: the worst situation is to have one party-appointed arbitrator who behaves one way and the other party-appointed arbitrator who behaves another way, as this conveys the impression that one party is being put at a disadvantage within the arbitral tribunal. The trend, under the influence of the International Chamber of Commerce, seems towards the traditional civilian approach which is gaining ground even in common-law countries, as evidenced by the adoption last February by the American Bar Association of a resolution calling for party-appointed arbitrators to serve as neutral arbitrators in international cases.

To be universally accepted as the standard of behaviour, the independence requirement will have to be defined by arbitral institutions and courts alike in a way which does not negate the *raison d'être* of the party-appointed arbitrators. Their purpose is to allow each party in the dispute to have someone on the arbitral tribunal whom it knows and trusts. Or, in other words, to have a friend, who must be independent enough to award against the party who appointed him should the merits of the case warrant it, but who will ensure that all the arguments of his party get a thorough and fair hearing. This distinctive feature of international arbitration, by comparison to State jurisdiction, is of great importance to ensure voluntary compliance with the awards, as the losing party will more readily accept the arbitral tribunal's decision if it knows that its contentions, if not finally followed, have at least been fully heard.

This trust which a party puts in the arbitrator it appoints pre-supposes, however, prior contact between the party, or more generally its counsel, and the arbitrator, as otherwise they would lack the necessary elements on which to base their appointment decision. If the institution of party-appointed arbitrators in its most useful sense is to be preserved, it is consequently important that arbitral institutions and courts understand well that it is not the mere existence of these prior contacts but their nature which should be decisive for determining if a party-appointed arbitrator has the required independence. Or, to use the distinction familiar to antitrust lawyers, a *rule of reason* approach rather than a *per se* approach.