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Ethics, Elitism, Eligibility: A Response

What happens if the Icelandic Arbitrator falls through the Ice?

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I. INTRODUCTION

Following his presentation on "The Co-arbitrator's Lodestar: Clientelism or Collegiality" at the Fourth Joint Conference of the American Society of International Law and the Nederlandse Vereniging voor International Recht at the Hague in July 1997, Mr Jan Paulsson put his views into print. They appeared in his article *Ethics, Elitism, Eligibility* in this Journal.[1] In writing his article, Paulsson knew that he was presenting controversial views. Indeed, he recalls that his address at the Hague in July 1997 was greeted by an audience response of unusual indignation ... certainly for a group of lawyers and arbitrators! Therefore, I will start this article, in response to Paulsson's article, by congratulating him for flushing this issue into public debate. As Paulsson always writes and speaks with great clarity, there is no hiding place for him!

Paulsson's central point is that, in the interests of international arbitration being conducted with the highest standards of legal ability, integrity and experience, there should be "an elite core of international arbitrators". In making out this argument, Paulsson rejects the suggestions of "a closed shop" and of "a self-perpetuating clique of international arbitrators who appoint and reappoint each other". Although I do not think anybody close to the scene of international arbitration would suggest there is "a self-perpetuating clique", most believe there is already "an elite core of international arbitrators". The statistics are not readily available, but the impression is that there are probably no more than two to three dozen international arbitrators, coming from Switzerland, its neighbouring countries in the European Union, the United States and Canada, who preside over the majority of international arbitrations. Therefore for me to table this issue, at any gathering of such arbitrators, may be perceived to have been pretty foolhardy!

Yet I did feel this subject, having now been raised by Paulsson, should be discussed and, therefore, somewhat dangerously I tabled for discussion at the London Court of

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[1] 14 J. Int. Arb. 4, at p. 13 (December 1997).

International Arbitration (LCIA) Symposium in Whistler in September of this year the following question:

> Is there "an elite core of international arbitrators" and, if there is, should this "elite corps" be perpetuated?

I did hope, however, that having tabled this topic, it would be taken late in the programme and, when it was called (like in that splendid finale of Noël Coward's play "Hay Fever"), Paulsson and I could furtively slip away as our fellow attendees at the LCIA Symposium argued the subject with increasing ferocity. There was no such luck!

On arriving at Whistler I found the President and the Registrar of the LCIA in conversation. I waited until they parted. I asked the Registrar, "Have you tabled my somewhat unwise topic?" The reply was plain and direct: "By golly I have. You are for the gallows. It should be fun!" Somewhat unnerved, I sought the advice of the Chairman of the Board of the LCIA. I have known and admired him for many years. Yes, he knew all about my topic. "The answers to your two questions are very simple," he said. "Yes and Yes and lets move on to the next topic." So it was that I was called to speak at the end of the first session. I live to tell the tale!

II. THE ELITE CORPS

My point of divergence with Paulsson is not whether there should be a specialist group of international arbitrators, but how it should be structured. "Closed shops" are not by any means the product of deliberate acts of exclusion. In my experience they are more often created out of the honourable intentions of preserving the integrity of the system in which they operate. When I joined the English Bar 35 years ago, the profession was full of closed shops. There was the closed shop, in the first place, of Members of the Bar who had exclusive rights of audience throughout the High Court, Assizes and Quarter Sessions. The ethics of the Bar then were such that a barrister was forbidden to use visiting cards or otherwise inform the public of his expertise and experience. Then there were the Circuit closed shops which meant that the lay client had to pay a steep premium (payable to the Circuit Treasurer and called a "Special Fee") in order to instruct a barrister (who was member of one Circuit) to appear on another Circuit. All of this was designed to keep the integrity of the Circuit system under which the Bar operated in England and Wales by dividing the territory into seven or eight geographical areas.

Thus, whenever there are groupings of professional people there is always a tendency for that group to be kept small and exclusive; and, whether the members of the group wish it or not (many do not), the work tends to remain within that group rather than go outside it. Indeed this happens, in honourable circumstances, for precisely

the reasons which Paulsson advances, namely the preserving of competence, honesty and experience upon which the users of the group's services can rely.

III. The Disadvantages

However there are disadvantages. Any grouping of professionals which becomes exclusive will tend to operate (intentionally and unintentionally) against the arrival of new persons into their ranks—in the case of arbitration against the arrival into the ranks of new arbitrators hopefully with new ideas and fresh approaches. Ultimately, this will limit the choice of the consumer in obtaining arbitral services. Why, for example, when women are so well represented at arbitration conferences, are there so few appointments of women international arbitrators? Why, when international arbitrations are increasingly coming out of projects in third world countries, are there hardly any international arbitrators appointed from those countries? How is the next generation of arbitrators going to be trained and get the relevant experience? It it right to argue that the international community is best served by only going to the best "Icelandic arbitrator" when there are other "Icelandic arbitrators" who may, for the present, lack the experience but, given the right opportunities, could perform just as well?[2] Apart from giving greater choice to the international community among "Icelandic arbitrators", what happens if the best arbitrator in Iceland slips and disappears through the ice? Who will be there to replace him?[3] Not only is it in the best interests of all parties and potential parties, whom international arbitrators serve, not to have barriers which limit choice but also, in the new environment[4] of international and domestic arbitration, it is positively for the good of the further development of arbitration to have new arbitrators arriving on the scene, who with new methods, are there to help the arbitration process to be more expeditious and less costly.

IV. The Bigger Arbitral Community

Casting one's memory back to 25 years ago, and further, one remembers much less international arbitration and a much smaller arbitral community. As I recall, England supplied to the international arbitral community a few highly distinguished former

[2] The "Icelandic arbitrator" does not appear in Mr Jan Paulsson's article *Ethics, Elitism, Eligibility*, but, with his usual fluency of speech and thought, Paulsson has subsequently introduced us to the "Icelandic arbitrator". His argument is that the commercial community which needs the services of an Icelandic arbitrator are entitled to go, and to continue to go, for *the best* Icelandic arbitrator, notwithstanding the availability of other Icelandic arbitrators.

[3] Particularly as I am arguing there should be more female arbitrators, I hope I will be forgiven in this article for using the male gender when referring to *both* male and female arbitrators. In defence, I would point that in England the Lord Privy Seal (Baroness Jay) takes the male title and the one and the only female Lord Mayor of London (Lady Donaldson) also took the male title. It is unfortunate, therefore, that the only female English Lord Justice of Appeal has recently dropped the male gender to call herself Lady Justice of Appeal.

[4] The new 1997 American Arbitration Association (AAA) International Arbitration Rules (see in particular Art. 16), the new 1998 ICC Rules (see in particular Art. 20) and the new 1998 LCIA Rules (see in particular Art. 14) are all directed at getting arbitrators to be more pro-active and to move the arbitration process forward with reasonable expedition.

judges (Lord Devlin comes to mind) and the countries of continental Europe supplied some equally distinguished academics and leaders of the legal profession. Although others of my generation may share these memories, there is much stronger evidence to be obtained in the arbitration statistics which are published by the ICC Court of Arbitration.

According to the statistics, which are helpfully published by the International Chamber of Commerce (ICC) Court of Arbitration,[5] the number of Requests for Arbitration received by the ICC Court in the following years were:

Year	Number of Requests
1930	93
1950	29
1970	152
1980	251
1985	339
1990	365
1995	427
1996	433
1997	452

The records of the ICC Court of Arbitration do not display a consistent rise every year in Requests for Arbitration. As shown above, they fell away in the post-war period and (although not shown in these statistics) there was a high blip in the mid 1980s which fell away leaving 1990 with just 26 more Requests for Arbitration than there had been in 1985. Yet, in its overall pattern, there has been a steady increase in the number of ICC arbitrations, by 1990 reaching the average of one new case a day. The number of pending ICC arbitration cases has also been on the increase. At the end of 1995, there were 855 pending cases and, at the end 1997, 935 pending cases. In that year, the ICC appointed as a sole arbitrators, or co-arbitrators or chairmen of arbitral tribunals a total of 746 arbitrators. Although the figures of the ICC Court of Arbitration only represent those arbitrations which come under their auspices, they are the best guide, worldwide, of the increase in arbitral activity that includes *ad hoc* arbitrations for which there are no statistics. Confirmation of this increase in international arbitral activity can also be obtained from the increases in international arbitrations taken by the LCIA and the American Arbitration Association (AAA).[6]

[5] The published Bulletins of the ICC International Court of Arbitration and information provided by Secretariat of the ICC.

[6] The AAA reports 226 new international arbitrations in 1996, 360 new international arbitrations in 1997 and an estimated 400 new international arbitrations in 1998, and the LCIA reports an average increase of new international arbitrators of 33 percent year-on-year for the last three years.

V. The Temptation

It is tempting just to seek to expand the existing group of specialist international arbitrators, but otherwise keep the status quo. The international community is fortunate to have, as it undoubtedly has, a group of international arbitrators of such high quality. Almost without exception, they all have high competence, considerable experience and complete integrity. If some international arbitrators have too much work which causes delays in the arbitration process—delays in finding free dates for future hearings and delays in the issue of the awards—then why not resolve this by taking in a few more international arbitrators into the club? Yet, in the history of human affairs, it does not work like that. The amount of work increases more than is expected. The arbitral delays become much more serious. Many new (and in some cases unknown) "arbitrators" arrive on the scene—some experienced, some very much not so! The system no longer works. The small community of international arbitrators, who know and trust one another, is gone. Peer-group control will no longer be here to preserve the "ethics" of international arbitration. What benefits "elitism" may have given to the international arbitration community will be lost. The tests of "eligibility" can no longer be applied.

VI. The Exposure

Arbitrators[7] have particular responsibilities both professionally and ethically. Unless it can be shown that they have seriously misconducted the arbitration, their awards are not challengeable in the courts. When not conducting an arbitration under one of the international arbitral institutions, an arbitrator is directly responsible for the collecting of fees and disbursements from the parties and for the holding and distribution of those monies. When appointed by one of the parties in the arbitration, there is no "policing" (however much institutional rules may forbid it) which will stop that arbitrator entering into regular contact with that party and seeking to shape the course of the arbitration to the wishes of that party. Whatever they suspect, he can do this without the knowledge of his fellow arbitrators. We cannot overlook the enormous damage which would be perpetrated upon the process of arbitration, if one or more international arbitrators are to be found acting corruptly.

VII. The Un-qualified Status of Arbitrators

Nearly all arbitrators come into arbitration holding professional status in one discipline or another and having a reputation and experience in that discipline. Most, in the experience of conducting arbitrations, become very good at it. Yet, for the status itself of being an arbitrator, the arbitrator is unqualified and (when operating outside an

[7] See note 3, above.

arbitral institute) he acts unsupervised . When the system is working well, this does not matter. However, when the system is not working well, it could matter a lot.

VIII. What Can Be Done?

As a starter, the arbitral institutions, those who nominate arbitrators and the existing community of international arbitrators should be more pro-active in bringing new talent into the ranks of international arbitrators. The new arrivals should not be limited to those who have grown up through the system, such as lawyers and judges, but should include engineers, accountants, administrators, civil servants, diplomats, industrialists and others. There should also be much more information about those who offer their services to international arbitration. All arbitration institutions (but most particularly the ICC) should publish lists (with photographs!) of arbitrators giving details of the expertise of each person listed and grouping them in categories which the user of the lists would find useful in the selection process.

The objective should also be to preserve, and to enhance, the quality of arbitrators. There could be an obligation (as most international arbitrators now do voluntarily) for regular training and attendance at arbitration conferences and symposiums. Should we go further and introduce a vetting system in which only competent, honest and experienced persons can hold themselves out for arbitral appointments? This is certainly what the principal arbitration institutions seek to achieve, but what about those arbitrators who are not being appointed by the principal arbitration institutions and what about the newcomers? Should there not be an actual professional status for international arbitrators? Should the principal institutions concerned in international arbitral appointments (*viz.* in North America and Europe the AAA, the ICC and the LCIA) form a college which certificates and disciplines those who hold themselves out for international arbitral appointments? Should such certification and discipline be placed in the public domain? Domestically, in the UK, the Chartered Institute of Arbitrators (CIA) has set up a scheme for the certification of arbitrators which has a lot of merit. Any aspiring UK arbitrator, who is not already on one of the arbitral panels of the CIA, cannot now be placed on any CIA panel unless that arbitrator has been accorded the status of Chartered Arbitrator. To achieve that status the aspiring arbitrator has to sit on a least one arbitration hearing, of three days or more in length, and write a draft award at the end of it. He also has to attend two preliminary meetings and prepare draft Orders for Directions. He has to undergo a certain amount of training and conference attending and also to write draft awards in two "documents only" arbitrations. He also has to spend some time in the Commercial Court and write a note of the proceedings which he has witnessed. Finally, an aspiring candidate has to appear before a Committee of the CIA and, if thought to have the necessary character and ability, he is then recommended for appointment as a Chartered Arbitrator.

Some senior international arbitrators may reasonably conclude that they do not

want to go back to school where there is nothing (or insufficient) to learn. That will not matter if such senior international arbitrators can show they do have the requisite experience and ability which would justify them being "grand-fathered" into the status (whatever it may be) of a "chartered international arbitrator". All other arbitrators and other persons aspiring to undertake international arbitrations could go through this process and with it have the benefit of a status which is internationally respected.

No solution is a perfect solution. Enlargement of the ranks of those presiding over international arbitrations is going to happen. It is better, therefore, that it happens in a way that is beneficial for the international community which the arbitration process serves. The preservation of high standards of ability, integrity and experience is essential, but this can only be achieved if we work for a pro-active solution. Paulsson has started the debate, do us not let him down by allowing it to fade away!