

KYIV ARBITRATION DAYS 2016: THINK BIG!

The Confidence Complex

Closed Lists or Freedom of Choice?



The Confidence Complex



Confidence in whom?

- the arbitrator?
- the tribunal?
- the institution?
- the arbitration process?

Closed Lists -vs- Freedom of Choice

The best way to avoid incidents of moral hazard is “... *to forbid, or at least rigorously police, the practice of unilateral appointments...*”



“The only decent solution ... is thus that any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body.”

“... an institutional requirement that appointments be made from a pre-existing list of qualified arbitrators.

...such a restricted list may have undeniable advantages...”

The call for closed lists

Unilateral appointment

Appointing a nominee

No evidence that three

Irrational for parties to

‘Cultural’ appointments

Unanimity in awards is less likely to be achieved



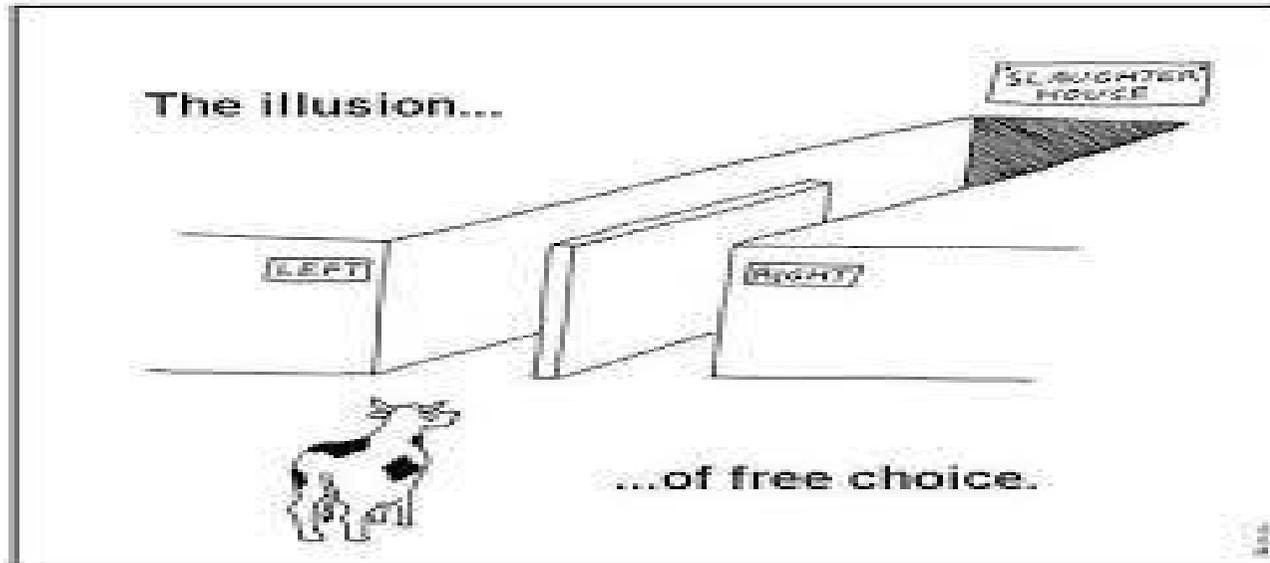
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The institutions



Freedom of choice



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- To choose the/its arbitrator

Against closed lists' arguments

- Perpetuates the very moral hazard argued against
- Limits breadth of experienced arbitrators rather than broadening it
- Wrongly assumes all participants appointments are 'hired-guns'
- Ignores party autonomy – bedrock of arbitration's credibility
- Wrongly assumes closed list arbitrators will not be biased or poor judges
- Wrongly assumes institutions' knowledge is greater than their sum
- Increases likelihood of repeat appointments due to limited pool
- Disparaging of less-established institutions
- Asserts that unilateral appointments increase dissenting judgements – but are dissenting judgements such a bad thing?



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