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The 'Double Hat' Debate In International Arbitration

Should advocates and arbitrators be in separate bars?

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IT IS COMMONPLACE in international arbitration, as in most domestic arbitration in the United States, for experienced practitioners who actively represent parties before arbitral tribunals to serve as arbitrators in other cases.

Indeed, it is not unusual for an individual to represent a party in an arbitration administered by one of the larger international institutions, such as the International Chamber of Commerce (ICC) or the International Centre for Settlement of Investment Disputes (ICSID), for example, and at the same time serve as an arbitrator in another matter administered by the same institution.

In recent years, this practice has come under fire from practitioners and parties alike, resulting in calls for new rules prohibiting counsel who represent parties in arbitrations from serving as arbitrators in other cases. Although many of these proposed new rules would apply only to arbitrations administered by a particular institution, at least one proposal would apply to an entire category of arbitrations.

In response to such criticism, the governing body of the Court of Arbitration for Sport (CAS) amended that institution's regulations in late 2009 to prohibit the double hat arbitrator/counsel role.¹

More controversially, at the annual conference of the International Bar Association (IBA) held in Madrid in October 2009, Philippe Sands QC proposed that a similar rule be adopted for investment arbitrations, a special category of arbitrations brought by foreign investors against sovereign states and instrumentalities, arising out of alleged discriminatory or arbitrary treatment, or expropriation of the investor's investment by the sovereign, regardless of

who administers them. Coming as it did from a distinguished barrister, professor and author like Mr. Sands, the proposal received a great deal of attention, and has sparked a spirited debate in the international arbitration community.

The reasons cited for separating the pool of lawyers serving as arbitrators administered by a particular institution from the pool of counsel representing parties in such proceedings raise two general themes.

The first of these, and the principal justification cited for the new CAS rule, is that, in arbitration administered by institutions before which rotating roles are prevalent, the parties are likely to believe that arbitrators will favor lawyers before whom they are likely to appear in other cases. Similar concerns over the perception of "clubbiness" underlie Rule 3.10 of the ABA Model Code of Judicial Conduct, which prohibits judges from practicing law. As at least one opinion applying Rule 3.10 observes, allowing judges to appear as counsel before their fellow judges would "create...a perception... that the presiding judge would or could [not] be impartial if a fellow judge is acting as counsel for the opposing party."²

The second theme invoked by advocates of separate bars for arbitrators and counsel is based on concerns over so-called "issue conflicts." In the words of two commentators, "an 'issue conflict' in arbitration describes the existence of actual or apparent bias on the part of the arbitrator stemming from his or her previously expressed views on a question that goes to the very outcome of the case to be decided. It denotes the arbitrator's relationship to the subject matter of the dispute, and his or her perceived capacity to adjudicate with an open mind."³

Issue conflicts are cited as a particular concern in investment arbitration; indeed, Mr. Sands has characterized them as imperiling the entire system of investment arbitration. This is so because certain characteristics of investment arbitration distinguish it from most commercial arbitration.



For example, investment arbitrations usually involve the interpretation of bilateral investment treaties (BITs) containing similar if not identical provisions. The same or similar legal issues are thus raised over and over again in these cases. Moreover, there is still a relatively small pool of arbitrators with experience in investment arbitration, and most of these people also actively represent parties in such cases. It is thus not unusual in the investment arbitration world for an individual to be called upon to rule on an issue as an arbitrator on which he or she has taken or will later take a position as counsel to a party in another case.

Indeed, there have been cases in which an attorney, wearing his or her advocate's hat, has cited an award he or she wrote when sitting as arbitrator in another case. Fears that such scenarios (or others like them) could raise questions about the arbitrator's impartiality, or at least the appearance of impartiality in the eyes of an objective observer, are exacerbated by the fact that investment disputes commonly raise issues of public concern, and the fact that, in contrast to most commercial arbitration, the awards in investment arbitrations are available to the public.

Much like the rules governing the conduct of judges, the IBA Guidelines on Conflicts of Interest in International Arbitration preclude an arbitrator from serving in that capacity if facts or circumstances exist (or arise after the appointment) that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts about the arbitrator's impartiality or independence. The same guideline characterizes a doubt as "justifiable if a reasonable and informed third party would reach the conclusion that there

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was a likelihood that the arbitrator may be influenced by factors other than the merits of the case presented by the parties in reaching his or her decision."⁴

Arguments For and Against

Advocates of separating the pool of arbitrators from the pool of advocates argue that such a separation would go a long way toward alleviating problems created by both the "club" perception and issue conflicts, thereby restoring much of the confidence in international arbitration that these commentators believe has been lost.

Mr. Sands and others note that, in recent years, a number of foreign states have either withdrawn from the investment arbitration system, or have threatened to do so unless fundamental changes are made to it. If the concern over issue conflicts is a significant factor contributing to this trend, then cutting out a major source of issue conflicts could, to use Mr. Sands' metaphor, help save the goose that lays the golden eggs.

Furthermore, rules requiring lawyers to choose between roles would in all likelihood create more opportunities for up-and-coming practitioners to be retained to represent parties in international arbitrations, or to be appointed as arbitrators, if they are confident and bold enough to choose the arbitrator course early in their careers.

Critics of "separate bars" rules counter that they undermine the most fundamental precept of arbitration: its status as a consensus-based, "opt-in" system in which the parties should be free to choose who will arbitrate their disputes (or by what process such arbitrators will be chosen).

One of the principal perceived advantages of arbitration is that it allows parties to have their cases decided by persons with expertise in the subject matter of the dispute. In this sense, arbitration is fundamentally different from litigation in the United States, which is an "opt-out" system that derives legitimacy from democratic institutions and where efforts by the parties to choose what judge will decide their disputes are frowned upon.

Barring counsel who represent parties in arbitration from serving as arbitrators would also reduce the overall size of the pool of potential arbitrators and deprive the parties of the ability to choose as arbitrator those lawyers with deep expertise in the subject matter of the dispute who, for whatever reason, have decided to forego the arbitrator role in favor of that of advocate. These problems would be exacerbated if a large number of experienced practitioners opt for the often more lucrative advocate's role.

Perhaps just as importantly, many would argue that such rules will not significantly affect the problems they are intended to address. For example, although practitioners must now confine themselves to one hat or the other in arbitrations administered by the CAS, an experienced lawyer who has opted for the arbitrator role at CAS may nonetheless play the advocate's role in arbitrations administered by other institutions.

Because the pools of many arbitral institutions overlap, our hypothetical CAS arbitrator will still have opportunities to appear as counsel for a party before other

members of the CAS arbitrator "club." And in the investment arbitration sphere, it is far from clear that issue conflicts, as opposed to other factors, contributed significantly to the decisions of a handful of countries to withdraw from or seek to change the system.

Comment in Published Decisions

Although published decisions on challenges to arbitrators are rare, the few that exist suggest that existing rules and institutions are managing the issue conflicts "problem."

The first published investment arbitration-related decision in which the issue conflict question was raised was *Telecom Malaysia v. Ghana*.⁵ Ghana challenged Professor Emmanuel Gaillard's role as arbitrator in the ad hoc *Telecom Malaysia* arbitration while he was acting as counsel in another investment arbitration called *Consortium RFCC v. Morocco (RFCC)*.

It is commonplace in international arbitration, as in most domestic arbitration, for experienced practitioners who actively represent parties before arbitral tribunals to serve as arbitrators in other cases.

As counsel to the investor in *RFCC*, Professor Gaillard sought the annulment of an award favoring Morocco on which Ghana was relying in the *Telecom Malaysia* case. The District Court of The Hague, the court before which the challenge was brought, disapproved of Professor Gaillard's dual roles under the circumstances, and required him to resign either as counsel in *RFCC* or as arbitrator in *Telecom Malaysia*.⁶ Professor Gaillard gave up his counsel role in *RFCC*.

Ghana then brought another challenge in the same court to Professor Gaillard's continuing role as arbitrator in *Telecom Malaysia*. However, this time the court rejected the challenge, noting that it is to be expected that, from time to time "an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide a question less open-minded than if he had not defended such a point of view before."⁷

In *Vivendi v. Argentina*, another investment arbitration, Argentina objected to Vivendi's reliance on an award issued in another case called *Eureko v. Poland* on the ground that the *Eureko* award was co-written by Judge Stephen Schwebel, one of Vivendi's lawyers, while the *Vivendi* arbitration was underway. Argentina requested that all references to the *Eureko* award be stricken from the record in *Vivendi*, questioning the ability of Judge Schwebel, or indeed, of any arbitrator, to draft an award in one proceeding without being affected by the impact that award might have in another

proceeding in which similar issues are raised and in which he was acting as an advocate.

The tribunal in the *Vivendi* case nonetheless cited the *Eureko* award, among others, in its own award, thereby at least implicitly rejecting Argentina's argument.

In sum, although the problems proponents of separate bars in international arbitration identify are real and warrant attention, there is, as of yet at least, little evidence that existing rules and institutions are incapable of addressing them. Without such evidence, it is difficult to justify such a radical departure from time-honored practice.

Moreover, forcing practitioners to choose between the role of arbitrator and that of advocate could give rise to a whole new set of problems without the benefit of effectively remedying the problems this forced choice is intended to address.

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1. Code of Sports-related Arbitration (Court of Arbitration for Sport (CAS) Regulations) §S18 (2010).

2. Georgia Judicial Qualifications Commission, Opinion No. 200 (April 26, 1995).

3. Anthony Sinclair and Matthew Gearing, "Partiality and Issue Conflicts," *Transnational Dispute Management*, Vol. 5, Issue 4 (July 2008).

4. IBA Guidelines on Conflicts of Interest in International Arbitration, Part I, §2 (Council of the Int'l Bar Ass'n 2004).

5. For a more thorough discussion of the *Telecom Malaysia*, *RFCC* and *Vivendi* cases (discussed below), see Caline Mouawad, "Issue Conflicts in Investment Treaty Arbitration," *Transnational Dispute Management*, Vol. 5, Issue 4 (July 2008); Judith Levine, "Dealing With Arbitrator 'Issue Conflicts' in International Arbitration," *Transnational Dispute Management*, Vol. 5, Issue 4 (July 2008).

6. District Court of The Hague, civil law section, provisional measures judge, challenge number 13/2004, petition no. HA/RK 2004.667, Decision of Oct. 18, 2004, reprinted in *ASA BULLETIN* (Kluwer Law Int'l 2005 Vol. 23 Issue 1) 186, 192.

7. District Court of The Hague, civil law section, provisional measures judge, challenge number 17/2004, petition no. HA/RK 2004, Decision of Nov. 5, 2004, reprinted in *ASA BULLETIN* (Kluwer Law Int'l 2005 Vol. 23 Issue 1) 193, 196 at ¶11.