

## **Counsel and arbitrator in investment arbitration: does the mixing of the roles nix neutrality?**

Juan Fernández-Armesto, IBA Arbitration Day 2012, Stockholm

- Let me start with a bull and a horse.
- In my native Galicia there is a saying that the peasant speaks about the fair, depending on how well he has sold the bull **[PowerPoint 1]**.
- Alexis has asked me to speak about the mixing of roles as counsel and arbitrator in investment arbitrations. I have to make a disclosure: I am not impartial. Because of my own professional experience, in this question I must acknowledge that I am biased.
- I said that there also would be a horse: this is the horse **[PowerPoint 2]**.
- It belongs to HH Sheikh Hazza Bin Sultan Bin Zayed al Nahyan, who won the 2005 Endurance World Championship. But then he was disqualified because his horse tested positive for drugs. He appealed to the CAS Sport Tribunal in Lausanne. He lost and then he appealed the award to the Swiss Federal Court. His argument was that one of the CAS arbitrators who heard his appeal was biased, because concurrently he was sitting as a co-arbitrator alongside opposing counsel in another CAS matter. The Swiss Federal Court **[PowerPoint 3]** rejected the appeal, arguing that the fact that an arbitrator is simultaneously sitting with a lawyer in another procedure by itself not a cause denoting bias.
- But interestingly the CAS saw some merits in the Sheikh's arguments. Immediately after the Federal Court it issued a recommendation which in 2009 was elevated to a prohibition: in CAS arbitration the "double hat arbitrator/counsel" is not any longer tolerated.
- What is interesting is the reasoning given by the CAS its decision: the aim is to enhance legitimacy **[PowerPoint 4]**

*"The number of parties and counsel expressing their discomfort at having a CAS member represent the opposing party has increased significantly"* Matthieu Reeb CAS Secretary General

- CAS has thus formally decided that in sport arbitration the arbitrator and the counsel roles cannot mix. Is this a precedent? Should we take a similar decision in investment arbitration?
- To answer let me start with the basics: the aim of any type of arbitration is to achieve
  - Efficiency and
  - Legitimacy.
- I dare to say that in commercial arbitration efficiency is trump. Enterprises care primarily about the efficiency of the mechanism. But in investment arbitration legitimacy is the key driver. This is related to the nature of the respondents: sovereign States.
- One of the issues which never cease to amaze me is that sovereign States have agreed to investment arbitration at all. Please make the effort of seeing investment arbitration from the point of view of a State.
- In a BIT or treaty the State is agreeing
  - That foreign investors can sue the State– at the investor’s choice! – before an ad hoc or an ICSID arbitral tribunal – and not before the State’s own Courts;
  - that three private persons are entrusted with the power to review, without any restriction, and without appeal on the merits,
    - + all actions of the government and its agencies
    - + all decisions of the Courts
    - + all regulations and laws, including those approved by parliament.
- No other institution
  - No national Court
  - No international Court

has ever been given by a sovereign State nearly as much power as these three private individuals. It is an unprecedented show of trust.
- States submit to arbitration because they feel that this surrender of sovereignty is compensated by other factors
  - More investment
  - Lower risk premium

- More rule of law
- Less arbitrariness; at the end
- More creation of wealth.
- But this surrendering of sovereignty must be explained and justified to the State's constituencies: and here is where the legitimacy of the arbitral procedure becomes key. Legitimacy requires
  - Not only that justice is done in investment arbitration: and I have never come across the slightest whiff of malfeasance in any investment arbitration procedure;
  - But that justice must be seen to be done: States, natural respondents in investment arbitration, must have the perception that justice is being done – because otherwise, they cannot justify the surrender of sovereignty to their citizens.
- This takes me back to the initial question: does the mixing of the roles of arbitrator and counsel nix neutrality?
- I will not answer myself, but I will refer to the opinion of Judge Buergenthal [PowerPoint 5]

“In my view, arbitrators and counsel should be required to be one or the other... That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel”

- Buergenthal consequently proposes the separation of arbitrators and counsel in investment arbitration. Please note the precise scope of the proposal:
  - the separation of course only refers to investment arbitration: investment arbitrators would be free to act as lawyers in commercial arbitration or before domestic and international Tribunals;
  - And the separation would also not apply if the State and the Claimant agree on the designation of a lawyer as chairman.
- I am aware that a lot of colleagues and friends do not share this position. They advance the argument that if lawyers are prohibited from acting as arbitrators, the pool of experience will be reduced. Frankly, I don't share the argument. It

has not happened at CAS, and it would not happen in investment arbitration. Lawyers would specialize: some would become arbitrators, others would remain as counsel. New entrants with experience in academia, in diplomacy, in the civil services would volunteer as arbitrators. The pool would not shrink. If anything, it would become more varied.

- There is a second argument, which in my opinion is the relevant one: it is a strictly libertarian argument. I see it as a fundamental principle that parties should have the freedom to choose as arbitrators (and as counsel) the persons they prefer. And this freedom of choice should only be limited if there are compelling reasons to do so.
- Do such reasons exist? My feeling is yes. And the reason is that the “dual hat syndrome” undermines the legitimacy of investment arbitration: States lose confidence in the system if they see that the person
  - who is being entrusted to review State’s actions, decisions, regulations, and who is expected to act without any bias,
  - is simultaneously challenging another States actions, decisions, regulations with the partiality which lawyers must apply to their reasoning,
  - and all that in an area of the law where the issues under discussion are few and routinely come up for decision.
- This takes me to my last question: should there be a specific prohibition? Should ICSID and the PCA include a prohibition in their rules? Should there be at least a recommendation, like there was at CAS for some time?
- I am not sure. Especially because there may be a self policing factors at work.
- Parties, and especially investors, may become wary of appointing arbitrators who are acting as lawyers in other procedures, because this opens the possibility to challenges. We all know that, when there is at least an iota of justification, a challenge is a win-win situation:
  - If successful, the arbitrator is dismissed;
  - If unsuccessful, his or her standing within the arbitral tribunal is undermined – a situation which may be even more satisfactory to the challenger.
- Samuel Ross Luttrell has recently analyzed in his doctoral thesis the case law regarding challenges of arbitrators in investment arbitration [**PowerPoint 6**], and his conclusion is that panels are moving away from the high bar of the manifest apparent bias, enshrined in art. 57 of the ICSID Treaty, to the so called *Sussex Justices* model [**PowerPoint 7**]:

“A fair minded and informed observer would have reasonable apprehension that the [arbitrators] are biased” Lord Hewart CJ

- This means that challenges are becoming easier. And there at least two cases where the double hat syndrome has led to arbitrators or counsel stepping down in one of their roles **PowerPoint 8**:
  - The first is a decision of the District Court of The Hague, which held that the arbitrator’s duty to advance his client’s position was incompatible with his duties as counsel in another investment arbitration; the arbitrator eventually withdrew as counsel;
  - The second is a decision of Nassib Ziadé, then Deputy Secretary-General of ICSID, in a NAFTA arbitration, where one of the arbitrators was simultaneously acting as counsel to another NAFTA State; the arbitrator was given the choice between both roles, and eventually he withdrew as arbitrator.
- I would submit that parties may become more and more reluctant to appoint as arbitrators persons who are actively acting as arbitrators. But if this self policing does not work, in my opinion eventually there will have to be recommendations and eventually even outright prohibitions, following the precedent of CAS.
- I have said “there will have to be”. And I use these words conscientiously. Two weeks ago I was speaking with Prof. Schreuer in Vienna. We spoke about the future of investment arbitration. And we shared the doubt whether in 20 or 30 years time investment arbitration will still flourish.
- Hopefully it will. Because I am deeply convinced that investment arbitration is a factor of good:
  - It suppresses arbitrariness,
  - It strengthens the rule of law
  - It supports development
  - In one word: It creates wealth.
- But States can gauge the situation differently:
  - They may shy away from a system which grants private individuals the unfettered right to review their actions;
  - They may feel that the loss of sovereignty, the difficulties in explaining the system to their constituencies, the cost of defending the cases, outweighs its advantages.

- The answer is, our answer must be
  - To strengthen the perception that there is no bias,
  - To reinforce the conviction that justice is being done,
  - To avoid any conflict of interest which can be viewed as undermining the integrity of investment arbitration,
  - the answer, in one word, is strengthening the legitimacy of the system,
  - and if this requires that the roles of arbitrators and lawyers be separated, then let's assume it as a necessary cost for the survival of investment arbitration.