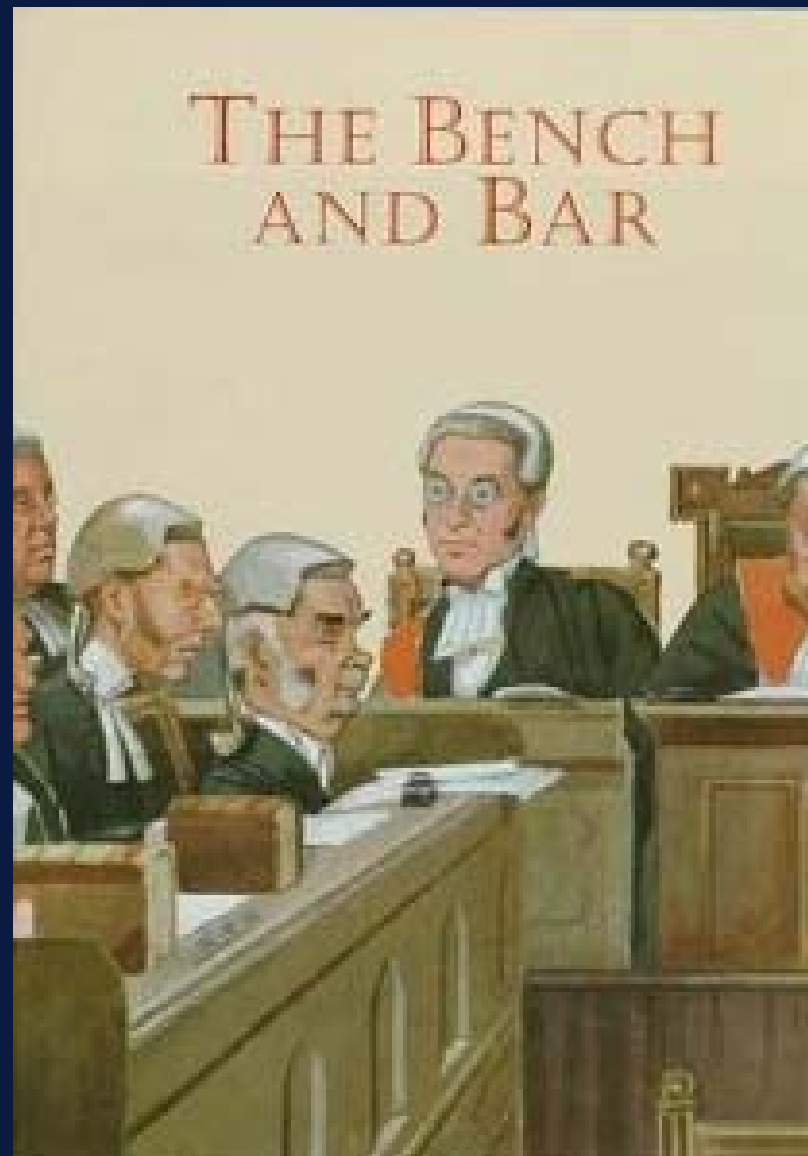


Kiev Arbitration Days 2012: Think Big!

“Arbitrator and Counsel:
Sitting on Two Chairs?”

Günther J. Horvath, 15-16 November 2012

Freshfields Bruckhaus Deringer LLP



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The Issues

- *Issue Conflict*

- *Is it perceived appropriate for the arbitral process when an arbitrator addresses, in the context of an arbitration, the very same issue presented to him or his law firm as advocate in another case, or to himself as scholar in academic writings?*
- *Is it appropriate for counsel to invoke an award in which he or one of his co-counsels or partners has sat as arbitrator and handed down an award directly dealing with a legal issue that arose in the case at stake?*

- *Role Confusion*

- *Is it appropriate for counsel appearing before an arbitral tribunal to rely on a case in which he sat as arbitrator?*
- *Can a lawyer, while acting as arbitrator, cut himself off entirely from his simultaneous role as counsel?*
- *Is it possible to do so without, in some way, potentially being seen to run the risk of allowing himself to be influenced, however subconsciously?*

Investment Treaty and Commercial Arbitration

- Investment Treaty Arbitration

- Transparent
- Subject of considerable personal interest
- Particular political sensitivity for the states involved
- The legal concepts reflect global standards built on public international law
- The cases will turn on the same issues over again: expropriation, fair and equitable treatment, full protection and security, MFN clauses, “umbrella clauses” etc.



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- Commercial Arbitration

- Confidential
- Rare political implications or issues of public legitimacy
- Different substantive applicable law
- The legal issues vary greatly



What Standard?

- ICSID Convention – Articles 14, 57 and 58: “*manifest lack of quality*”
- UNCITRAL Rules – Article 10(1): “*justifiable doubts*”
- ICC Rules (2012)– Article 11(2): “*such a nature as to call into question the arbitrator’s independence*”... “*reasonable doubts*”
- VIAC Rules – Article 7(5): “*circumstances likely to give rise to doubts*”
- IBA Guidelines – Articles 2(b) and 2(c): “*from a reasonable third person’s point of view*”... “*reasonable and informed third party*”



Case Law

- **Investment Treaty Arbitration**

- *Telekom Malaysia Berhad v. Republic of Ghan*
- *ICS Inspection and Control Services*
- *Rompetrol Group NV v. Romania*
- *Hrvatska Elektroprivreda v. Republic of Slovenia*

- **Investment Treaty Arbitration**

- *ICC Case No. 16553/GZ*
- *ICC Case No. 15860/VRO/MLK, S.P. 26.03.2009*
- *ICC Case* – not disclosed



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Arguments in favor

- “Libertarian argument”
- Benefit of people having experience in all aspects of the process
- Bias smoothed by the presence of two other arbitrators
- The position of an arbitrator who had argued a similar point in another case is no different to that of an arbitrator who has decided a similar point in another case
- You are a successful counsel and get your first arbitral appointment. Are you going to drop all your cases in the expectation that this is the first of many?
- Not all arbitrators can afford to make a living from being arbitrators alone
- Reduction of the overall size of the pool of expert arbitrators
- Dilatory tactics



Arguments against



- “Influx” of people from the realms of academia, diplomacy and the civil service
- In investment treaty arbitration, states lose confidence in the system
- Forms of “self-policing”
- It is necessary to preserve the integrity of the system
- More opportunities for up-and-coming practitioners to be retained

Going Forward - Institutions' Approach



a) International Court of Justice (**ICJ**)

In October 2001 it adopted one of its early Practice Directions which made clear the view of the Court that it is not considered to be appropriate for a person to wear the two hats at the same time.

b) Court of Arbitration for Sport (**CAS**)

In 2010 the Court became the first standing arbitration institution to prohibit individuals from wearing both hats (Catalyst: *Landis v. United States Anti-Doping Agency*)



Going Forward



- Investment Treaty Arbitration
 - Increasing the disclosure requirements for arbitrators is problematic where confidentiality requirements are in place
 - Interposing an institution into the appointment process so that arbitrators are not directly connected to one party.
 - Institutions to communicate the reasons when they refuse to confirm an arbitrator
- Commercial Arbitration
 - ICC's disclosure requirements work considerably well, limit the number of challenges brought and those accepted
 - Proceeding from the bar to the bench.

Thank you for your attention!

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