

The 13th Investment Treaty Forum Public Meeting—Friday 11th September 2009.

The topic ***Ethics, Issue Conflicts and Arbitrator Challenges*** was chosen to consider the growing number of challenges instituted against arbitrators based on repeat appointments, issue conflicts, duty of disclosure, financial interest, and same-chamber barrister participation. The principle concern is that the integrity of the international arbitral process would be called into question if the parties lost trust in the tribunal members. The difficulty is to strike a pragmatic balance between the parties' concern and desire for an impartial tribunal and the proper constitution of an experienced and profession tribunal.

In her introductory speech, **Norah Gallagher** announced that a novel format was used due to the important but sensitive nature of the topic; some speakers had been designated positions to advocate which did not necessarily reflect their personal or professional views. The format proved very successful, and meant that speakers could discuss important issues on a non-attributable basis, enabling all perspectives and issues to be included to generate a well-rounded debate.

One of the main issues, discussed from several perspectives, was whether there was systemic bias in investment arbitration in favour of the investor. An important point was that the community of arbitrators was relatively small, (described by one speaker as orbiting Geneva, Paris and London) meaning that many sat on several panels for similar cases, making it hard to remain entirely impartial or independent.

It was suggested that it might be useful to have a set of guidelines for investment arbitrators. The IBA Guidelines on Conflicts of Interest in International Arbitration are helpful and have been referred to in the ICSID challenge cases but it was proposed that perhaps additional guidelines were required. Arbitrators were encouraged to disclose early and to remain vigilant throughout the arbitral process to the need to make any additional disclosures.

In his keynote address, **Professor William Park** of Boston University brought up some salient ethical problems in international investment arbitration, such as mechanisms of appointing arbitrators. He dismissed as unrealistic the creation of a global arbitral body to make all appointments. The aim was to achieve a balance between an overly rigid position and a system where all pernicious arbitrators can render awards unchallenged. Every case should be investigated individually, if there is no special relationship between the arbitrator and the party which may affect arbitrator impartiality.

Panel 1

Questions relating to Arbitrator challenges

Chair: Nassib Ziade **Speakers:** Audley Sheppard, Micheal Waibel.

Nassib Ziade gave some introductory comments on the practice at ICSID relating to challenges to arbitrators. There has been an increase in the numbers with 33 cases in total since the ICSID Convention entered into force in 1966, 13 of these have been filed since 2007. ICSID has also seen an increase in challenges to counsel in cases in the past year. **Audley Sheppard** discussed arbitrator challenges under the ICSID

Convention, outlining issues arising from notable challenges, the procedures for challenging an ICSID arbitrator, issues arising from time limits, and the ICSID test for arbitrator conflicts of interest. He touched upon reforms suggested in 2006, namely the proposed amendment of (6) (2) Disclosure requirement, whether to drop 'manifest' from the disclosure. 'Manifest' imposes a very heavy burden on the party seeking to challenge. There were three main grounds for challenge: (1) a relationship between an arbitrator and a party; (2) a relationship between an arbitrator and counsel and (3) issue or subject matter conflict. Also, he outlined the ECHR test for independence (whether a 'fair minded and informed observer would decide arbitrator is not independent) suggesting that it was a good model for testing independence.

To address untested assertions that arbitration is systematically biased, **Michael Waibel** explored the question of whether arbitrators are political with an interesting approach. Using statistical tests to determine patterns or correlations in arbitration outcomes, he used personal characteristics from a set of over 200 arbitrators as variables (for example whether they come from a common or civil law jurisdiction, are in full-time practice, whether they are academics, etc) and attempted to find a statistical relationship between these characteristics and the outcome of an arbitration. During the course of the discussion, this brought some interesting facts in their own right about arbitrators in general (for example, in his sample around 72 per cent come from developed countries, and 80 per cent are politically conservative). The main finding of the exercise was that while policy views do play an outcome in arbitration, this does not mean that there is an inherent bias in the system. What is certain is that more empirical work is needed to explore this matter.

Panel 2

Two debates:

1. **Relationship between Arbitrator and Counsel**
2. **Issue Conflict and Limits on Financial Disclosure**

Chair: Professor Julian DM Lew QC

Speakers: Rodman Bundy, Eversheds LLP, Paris, Zachary Douglas, Matrix Chambers, London and Cambridge University, Emmanuelle Cabrol, Herbert Smith, Paris, Professor Loukas Mistelis, School of International Arbitration, Queen Mary University of London.

Professor Julian DM Lew QC introduced the panel and noted that the two topics have become an area of increased concern to practitioners and parties in international arbitrations. Rod Bundy and Zac Douglas debated the relationship between an arbitrator and counsel, and whether this should impact barristers acting as a counsel from the same chambers as a member of the tribunal. It was pointed out that there are other cases where barristers and arbitrators from the same chambers have been involved without any challenge being made (*Impregelio v Pakistan* and *Bayindir v Pakistan*). On the one hand, it was argued that Chambers are marketed as a brand together and do share an interest in income generation. The counter-argument was that Chambers are not law firms: barristers are independent have no shared financial interest and are instructed for their expertise in a particular area. It was suggested that the test applied in *Hrvatska Elektroprivreda v Slovenia* was wrong (even if most agreed with the outcome); they applied a subjective test to the question of impartiality.

Professor Mistelis and **Emmanuelle Cabrol** then debated the extent of an arbitrator's obligation to disclose a financial interest and issue conflicts. There may be direct or indirect financial benefits to the arbitrator. There are problems with proving this kind of interest where the legal test may be manipulated, and to what extent the information can be disclosed if protected by data protection law. How rigorous is the duty to investigate at regular intervals throughout the arbitration? The safest option is to make the disclosure even if *de minimus*.

Emmanuelle Cabrol focused in more detail on issue conflict where an arbitrator has already taken a position in earlier cases. She also mentioned the personal or intellectual interest in taking certain decisions by an arbitrator—can an arbitrator legitimately be challenged because of his personal opinions expressed in his writing, as in *Saipem v Bangladesh*. She also stated that personal interests are universal and financial interest is an individual case.

Panel 3

Chair: Professor Catherine Rodgers, Pennsylvania State University

Speakers: Mark Appel, George Burn, Loretta Malintoppi, Ana Stanic

The format of the third panel was a roundtable discussion on best practices. **Catherine Rodgers** managed and coordinated the discussion and kept it running smoothly. She introduced the topic by stressing the importance of best practices for the legitimacy of the arbitration process—emphasising that because people do not follow laws because they necessarily agree with them, but rather because they perceive the law to be legitimate, it is in the best interests of arbitrators and others involved in the system that they follow certain codes of conduct. **George Burn, Loretta Malintoppi** and **Ana Stanic** all made observations on the obligations for arbitrators to disclose conflict of interests. The test in *Pinochet* for non-executive directors was mooted as a proper guide for arbitrators. The *ad hoc* committee decision in *Azurix v Argentina* (See <http://ita.law.uvic.ca/documents/Azurix-Annulment.pdf>) was also discussed with a suggestion that perhaps the challenge process under ICSID should be carefully reviewed.

It was emphasised that when it came to disclosure, 'early is good' and to 'err on the side of disclosure'. This approach was endorsed from the institutional perspective by **Mark Appel** of the AAA ICDR. The test they use is that the relationship must be 'direct, continuing, recent and substantial.' This is not only because disclosure is necessary but because non-disclosure itself raises concerns about impartiality, and seems all the more sinister if a possible conflict of interest is discovered at a later date. It was important that the bond of trust between arbitrator and the parties remained in tact or the system would be unworkable.

