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Qualified Investment Arbitrators?

A Comment on *Arbitrators in Investment Arbitrations*

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The editors of this Festschrift in honour of Hans van Houtte have asked me to comment on a particular arbitral award. As I found it difficult to choose one award, I would rather like to address an underlying problem in investment arbitrations that is not often discussed publicly because of the sensitivities involved.

In the Freshfields Lecture given on 30 November 2011, Toby Landau addressed the subject: 'Saving investment arbitration from itself.' Landau believes that the arbitration community must pay more attention to criticisms of investor-state arbitration as we see an explosion of cases pushing into ever-more sensitive areas of sovereign discretion. I agree with him.

I would like to contribute to the debate by addressing another question: Is there a sufficient number of qualified investment arbitrators?

The outside world has varying perceptions about investment arbitrators. Sometimes, I have the impression that investment arbitrators are considered almost mythical figures. They create a kind of international law in the most grandiose sense. They are virtually the Greek Gods. True, some behave like they are living on Mount Olympus. Equally true is that these arbitrators should be administered a reality check: I submit that they should simply do their job of deciding a dispute between two parties. Let me explain my more down-to-earth view.

For a proper understanding of this question, it may be useful to briefly describe investment arbitration as it is an area with which few are familiar.

In very general terms, it is arbitration between investors and Host States. The legal basis for investment arbitrations vary. Most are based on so-called bilateral investment treaties, in short BITs. A BIT is made up of two parts: a part with substantive provisions and a part with procedural provisions. The part with the substantive provisions contains provisions concerning the protection of investments and investors, such as fair and equitable treatment and no expropriation without adequate compensation. The procedural part gives the investor the right to arbitrate against the Host State if the investor believes that the Host State has violated one or more of the substantive protection provisions of the BIT. As a rule, the investor has the option of choosing amongst various types of arbitration. The most common ones are ICSID and UNCITRAL (sometimes via the Permanent Court of

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Arbitration). There are approximately 2,700 BITs. The first investment arbitration took place in the beginning of the 1980s. The number of cases started to increase in the two last decades. To be clear, investment arbitration under BITs is independent of any contract that the investor may have concluded, or not, with the Host State.

The method of constituting arbitral tribunals is in most cases that the investor and the Host State each appoint an arbitrator. The third arbitrator, also called the presiding arbitrator, is appointed either by the parties jointly, or by agreement of the two party-appointed arbitrators or by the arbitral institution involved.

Where can investment arbitrators be found? In most cases, parties appear to identify an arbitrator by asking around. There is no single list. One source is the arbitrator names on the some 350 published investment awards and decisions. Most of these are posted at the ICSID and ITA websites.

Another source is the ICSID Panels. Under the Washington Convention of 1965, there is a 'Panel of Arbitrators' which 'shall consist of qualified persons' (Article 12). The Convention then provides that: 'Each Contracting State may designate to [the] Panel four persons who may but need not be its nationals' (Article 12(1)). The Convention adds that: 'The Chairman may designate ten persons to [the] Panel. The persons designated to a Panel shall each have a different nationality' (Article 13(2)). I will not address the Chairman's list which has been revised in 2011. In my view, the Chairman did a good job by largely selecting qualified arbitrators. My concerns relate to the persons designated by the Contracting States to the Panel. Certain Contracting States seem to believe that it is an appointment in honour of a long-lasting official or academic career, an official decoration or worse a '*Cementario de elefantes*'. These States do not seem to be concerned with the desirability of having an investment arbitrator appear on the list.

The five pools from which investment arbitrators are generally recruited these days are as follows:

- (1) law professors in international public law, whether active or emeritus;
- (2) former judges, whether from State Courts or the International Court of Justice (ICJ);
- (3) retired diplomats and officials in foreign service or an international organisation;
- (4) practising lawyers who are, or were, partners in a law firm or barristers;
- (5) migrating commercial arbitrators.

I believe that the profile for the qualified investment arbitrator has the following elements:

- (a) has knowledge of substantive investment law and international public law;
- (b) has experience of arbitration proceedings;
- (c) is impartial and independent;
- (d) has sufficient time available to conduct the case;
- (e) is sensitive to economic, social and cultural differences;
- (f) is capable of dealing with facts;
- (g) is capable of dealing with numbers;
- (h) is in good health; and
- (i) understands that arbitration is a service industry.

The presiding arbitrator needs, in my view, a number of additional qualifications:

- (j) has diplomatic skills; and
- (k) has case management skills.

It is my experience that there is not a sufficient number of individuals who meet these qualifications. I am not alone here. I see parties and arbitral institutions having problems finding competent investment arbitrators. These problems can be traced to the context in which the above-mentioned elements are situated.

(a) Has Knowledge of Substantive Investment Law and International Public Law

I will be cautious here by stating that not all persons in the five categories have such knowledge.

(b) Has Experience of Arbitration Proceedings

Not all persons belonging to the five categories have a proven track record in arbitration. They have been professors, ambassadors, judges at a Supreme Court, senior officials in government service, but the word 'arbitration' does not appear on their CV, or at least not prominently.

(c) Is Impartial and Independent

Certain States tend to appoint former Supreme Court judges, government officials or diplomats. It is difficult to explain to these States that by doing so, there may be a problem concerning impartiality and independence.

Private practitioners have their identity crises too: in one case they are arbitrator, while in another they are counsel, deliberating and arguing the same issue, respectively. This is what is called an 'issue conflict'. I have made a deliberate choice to avoid it by not acting as counsel in investment cases.

Even if private practitioners are free from issue conflicts, their availability is still uncertain. Certain large law firms do not look favourably (and some even forbid) upon their partners acting as arbitrators. This is due to two reasons: first, the hourly rate for partners is usually higher than the hourly rate for arbitrators; second, if the partner takes a case involving a large company, the entire law firm is conflicted out to act for the company and its affiliates for the duration of the arbitration.

A further problem is party-appointed arbitrators who believe that they should defend the position of the party that has appointed them. Some do so openly, while others act in a more subtle way. In any event, the undesirable practice has developed in investment arbitration of the 'mandatory dissent'. As soon as a majority is against the party that appointed him or her, he or she has to write a dissenting opinion. It is remarkable that the number of dissenting opinions in investment arbitration is increasing (in contrast to commercial arbitration). Worse, almost all dissenting opinions are issued by the arbitrator appointed by the party that has lost the case.² Here, there are serious concerns about how arbitrators perceive their mission and their neutrality.

² See my contribution to the Festschrift in honour of Michael Reisman: 'Dissenting Opinions by Party-appointed Arbitrators in Investment Arbitration' in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden, Martinus Nijhoff, 2010) 821–43.

In this connection, there is a related phenomenon. Certain arbitrators are always appointed by investors, whilst certain other arbitrators are invariably appointed by Host States. Does this imply a certain predisposition towards investors or States, respectively? I am not sure. But it is noteworthy that some of these arbitrators belong to the category of 'serial dissenters' in investment arbitration.

(d) Has Sufficient Time Available to Conduct the Case

I find it unacceptable that an arbitrator is not available for even a three-day hearing during the next three months. Unfortunately, some arbitrators claim such unavailability.

Take as an example certain law professors.³ They claim that they cannot participate in a hearing for a long period of time because they must teach and they consider teaching more important than acting as arbitrator.

Take as another example certain arbitrators who also act as counsel: they claim that they cannot participate in a hearing for a long period of time because they have a case to conduct that takes several months, sometimes even half a year.

I submit that neither excuse is valid and that they should continue with their main profession but exit the road of investment arbitration.

(e) Is Sensitive to Economic, Social and Cultural Differences

This is a requirement I could write about at length, but the limitations of this contribution do not allow me to elaborate.

(f) Is Capable of Dealing with Facts

I was in a deliberation with a famous international public law professor. As usual, I first wanted to ascertain the facts. When making that point, I was stunned to hear him say: 'Facts are irrelevant.'

Yet, most cases, including investment arbitrations, are fact-driven and, as a rule, 80 per cent concern facts and 20 per cent law. So, the arbitrator should be capable of collecting and analysing facts. In other words, he or she should have minimal forensic skills. This is not what happens in a number of cases. The result is what is aptly described by legal sociologists as the 'legal reduction of reality.'

A proven method is first to read the relief claimed only, then the exhibits in chronological order, the witness statements and finally the submissions by the parties. A good practice is also to draft the fact section prior to the hearing so that the arbitrator will be able to ask questions about the facts. After all, law is written for facts, and not vice versa.

³ Hans van Houtte obviously not being one of them.

(g) Is Capable of Dealing with Numbers

A number of investment arbitrators seem to adhere to the maxim *judex non calculat*. This may have been true in Roman times, but nowadays it is all about numbers. Certain arbitrators make an extraordinary effort on matters of jurisdiction and liability, but when it comes to quantification of damages, the reasoning is rather thin. They are afraid of financial data, damages theories, economic assumptions, formulae, models and calculations. Even Excel is something that they believe only their accountant could use. The same applies to decisions on costs.

This is no longer the approach that parties can expect from an arbitrator. The arbitrator should be capable of understanding the financial positions of the parties. In the end, most arbitrations concern the ordering of the payment of a sum of money. Arbitrators should be capable of assessing and explaining these amounts.

(h) Is in Good Health

I have witnessed a number of human dramas in arbitration. The mind is still sharp as a knife, but the body no longer follows suit. I quite understand that individuals do not want to give up what they like so much to do. Yet, it is reality, in particular in our times where arbitration is also a physically demanding job (long flights, long hearing days and evening preparation for the next day). Moreover – and this applies to international arbitration in general – it has become a 24/7 job. Most parties expect an arbitrator to be available for a reaction within 24 hours.

(i) Understands that Arbitration is a Service Industry

In the literature, there is currently a debate about whether investment arbitrators should serve ‘the system’. It is argued that investment arbitrators have a duty to create investment law and develop principles. Certain arbitrators seem to be impressed by this concept.

Yet, ask parties what they expect. The answer is predictable: a fair decision in *their* dispute. They pay for it, not for developing the system. And I think they are right. Law schools should pay a professor for developing ideas, possibly contributing to the system, but parties should pay for a solution to their dispute.

The presiding arbitrator needs, in my view, a number of additional qualifications.

(j) Has Diplomatic Skills

I note that in most cases (there are a few exceptions), chair persons do have diplomatic skills.

(k) Has Case Management Skills

Here, we have one of the significant issues for investment arbitrators. Some parties still believe that a great academic reputation is a guarantee for proper justice. They think that if law professor X is the presiding arbitrator, the arbitration will be a success. This is a serious source for disappointment. Law professor X may be brilliant in his or her writings and speeches about international law issues, but hopeless and helpless when it comes to conducting an arbitration. Does he or she know how to conduct a preparatory conference, how to draft a first procedural order, how to deal with production of document requests, how to address interim measures requests, how to cope with confidentiality orders (also called protective orders), how to guide the cross-examination of witnesses, to name just a few procedural matters?

A number of potential arbitrators underestimate this management aspect of investment arbitration. In the last five to ten years, it has become a procedurally cut-throat business. Certain parties are battling on every conceivable (and inconceivable) procedural point. They also set traps for annulment or setting aside afterwards. The unwary may right walk into these traps.

In short, this is no longer business for good willing volunteers. It is business for those who know and have the experience to deal with it.

CONCLUSION

Investment arbitration in many institutions and in ad hoc arbitration (UNCITRAL) experiences a shortage of people who can do the job professionally, efficiently, cost-effectively and according to due process. If investment arbitrators do not carry out a highly proficient job, the reputation of arbitration generally suffers and its credibility is challenged.

What can we do in the short term? I suggest training investment arbitrators. Here we encounter another problem: some Olympic Gods are untrainable. Luckily, many investment arbitrators nowadays have become aware that it is no longer a gentlemen's game of 40 years ago and are open to some form of *éducation permanente*. Appropriate guidance by experienced arbitral institutions, such as ICSID and PCA, may also bring relief. Further, it should be recognised that investment arbitrators should run cases with qualified administrative secretaries.

It is an economic law: where is scarcity, others will attempt to fill the void. This is happening in investment arbitration as well. Many young lawyers are getting ready to be investment arbitrators. They have the skills and most of the qualifications, but not yet the experience. The problem for them is that parties still think that going for the 'Grand Old Names' is safe. I see that the thinking of parties is changing and that they too realise that they may be better off with the new generation. So, notwithstanding my gloomy picture of the current lack of qualified investment arbitrators, I am hopeful for the future.