On Shifting Players and Roles in the Process of Challenging Arbitrators

A Comment on *Sundra Rajoo v Mohamed Abd Majed and Persuatan Penapis Minyak Swait Malaysia (Poram)*

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AN INTRODUCTORY REMARK

Participating in the discussion on the review and update of the UNCITRAL Model Law, Hans van Houtte presented forceful arguments (actually 10 arguments) against giving power to the arbitrators to issue interim measures on an ex parte basis.2 His sixth argument highlights the role of the arbitrator as a neutral decision maker. He points out that interim measures often aim at facilitating the effectiveness of a subsequent award, and hence such measures to some extent anticipate the outcome of the case. This might possibly impair the role and image of a neutral decision maker in the merits phase (since the arbitrator has in some way already taken a position). Hans van Houtte points out that in some countries, it has been argued that a judge who rendered an interim measure that already implied some evaluation of the merits should not decide the case on the merits. This observation does not lead to the argument that arbitrators should not issue interim measures. But it is pointed out that special caution is needed because of a risk of prejudice. Van Houtte reaches the conclusion that ‘the risk of prejudice created by *ex parte* proceedings [regarding interim measures] is disproportionate and thus incompatible with fair proceedings’.3

This argument puts into focus a system of coordinates within which assessments of impartiality have been made. The setting in which investigations are being made is the well-established juxtaposition of the party and the decision maker. Describing ‘elements of bias’, the International Bar Association (IBA) Rules of Ethics for International Arbitrators have taken note of an additional possible manifestation of prejudice. According to section 3.1: ‘Partiality arises when an arbitrator favors one of the parties, or where he is prejudiced *in relation to the subject-matter of the dispute*’ (emphasis added). Prejudice, or absence of

1 Professor of Law and Head of the Legal Studies Department (Central European University); Professor of Law, Emory University School of Law.
3 van Houtte (n 2) 92.
prejudice, is normally assessed before appointment (or possibly on the ground of biased behaviour after appointment). This simple and straightforward frame of reference is sometimes cast into question. Van Houtte raises the question whether a (presumably bona fide) position taken within the arbitration process itself (in connection with interim measures) may possibly be qualified as a relevant prejudice from the perspective of the merits phase.

The issue of impartiality and prejudice may be raised in the context of various remedies. The most direct procedural setting designed specifically to evaluate (and disqualify) bias and prejudice is the setting of challenges. This is also the setting in which new points of view and new controversies have emerged that test the viability and the limits of the established system of coordinates.

THE CONVENTIONAL ALLOCATION OF ROLES AND CONSIDERATIONS – AND ATTEMPTS TO DEFY CONVENTION

Challenges may be undesired episodes, but the rules on challenges represent a significant part of the normative setting of international commercial arbitration. The context and the coordinates are well established and well known. The rules on challenges are based on straightforward assumptions, and the division of roles is clear: the target of the challenge is an arbitrator (or a potential arbitrator) and the player submitting the challenge is one of the parties. Furthermore, the decision is in the hands of an arbitral institution or of a court – or of an appointing authority. The characteristic reasons for challenge are personal and business ties between one of the parties on one hand and one of the decision makers (one of the arbitrators) on the other.

This is the system of coordinates within which challenges normally take place. In a growing number of recent cases, however, some dividing lines have become volatile and the basic premises of the system have also been challenged. Van Houtte raised the question whether the issuance of a provisional measure that is relevant with regard to the merits may create a risk of prejudice (particularly if the provisional measure is issued in ex parte proceedings). Other new angles have also emerged. In a number of cases, the focus of the search for potential bias has shifted from the relationship between a specific party and a specific decision maker. For example, even in the absence of any personal or business connection between the party and the decision maker, the question has arisen whether the fact that both have the same group affiliation may justify the exclusion of an arbitrator. Common nationality (citizenship) has been recognised as a factor that may impede appointment in a number of arbitration rules (such as Article 13(5) International Chamber of Commerce (ICC) Arbitration Rules 2012). Other variants of group affiliation – like religion or ethnic identity – have also emerged as bases for challenges (although typically without success in formal challenge procedures). Another shift of focus has directed attention towards the relationship between the arbitrators themselves. A step in this direction was taken, for example, in the *Andros Maritima v Marc Rich* case. In this case, the basic coordin-

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ates were still kept, but the relationship at issue was the relationship between a party (Mr Nelson, the president of the broker of a party) and an arbitrator (Mr Arnold). Yet the relationship between the broker of a party and the chairman of the arbitral tribunal was scrutinised in the light of the fact that Mr Arnold and Mr Nelson sat together as arbitrators in a number of cases. In the Marc Rich case, the relationship between the arbitrators was indirectly relevant. It serves as an indicator of an allegedly close relationship between two persons, and the question arises as to whether persons who have served together as arbitrators may later assume the roles of a party and of an arbitrator in the same case. This leads us to the next issue: whether the relationship between the arbitrators themselves may become relevant. Does it matter if the chairman of the tribunal and one of the party-nominated arbitrators are close friends? Is this a circumstance that needs to be disclosed (even if there is no personal and business links between any of the arbitrators and any of the parties)?

In addition to the emergence of unconventional focuses in assessing bias or lack of bias, traditional borders have also shifted with regard to one of the most elementary premises of the process: the target of the challenge. In a rather unusual International Centre for Settlement of Investment Disputes (ICSID) case, the target of the challenge was not one of the arbitrators, but an attorney representing one of the parties. In Hrvatska Elektroprivreda v The Republic of Slovenia,6 the circumstance on which the challenge was based was the fact that one of the counsels for one of the parties (Mr Mildon, counsel for Slovenia) and the president of the tribunal were affiliated with the same barrister’s chambers. What was unusual was the fact that the challenge was directed against the counsel, rather than against the decision maker (this may have been prompted by the fact that the information appeared at a rather late stage in the proceedings, and the party submitting the challenge – the claimant – did not want to waste too much time by re-starting the proceedings). The ICSID arbitrators opted to ban Mr Mildon from further participation in the proceedings. They showed awareness of the fact that they were facing a quite unconventional request. They explained their entitlement to remove the attorney with several arguments. Most importantly, they relied on the principle of immutability (see sections 26 and 27 of the tribunal’s ruling), asserting that the respondent was not entitled to amend the composition of its legal team in such a fashion as to imperil the tribunal’s status or legitimacy. Furthermore, it was argued that the tribunal had ‘inherent powers to take measures to preserve the integrity of the proceedings’.7 The respondent asserted and repeated that the parties should be free to choose counsels as they deemed appropriate. This argument was rejected and the challenge against the counsel was upheld. The tribunal concluded that ‘Mr. David Mildon QC may not participate further as counsel in this case’.8

**CHALLENGE SUBMITTED BY THE ARBITRATOR?**

We have seen that the coordinates are not carved in stone. In the ICSID case, the traditional division of roles was reversed: counsel for the party was not the person submitting the

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6 Hrvatska Elektroprivreda dd v The Republic of Slovenia, ICSID Case No ARB/05/24, tribunal’s ruling of 6 May 2008. See a comment on this case by D Branson, ‘An ICSID Tribunal Applies Supranational Legal Norms to Banish a Counsel from the Proceedings’ (2009) 25 Arb Intl 615.

7 Tribunal’s ruling in the ICSID Case No ARB/05/24, ss 33 and 34.

8 Ruling of the ICSID Tribunal, s 1.
challenge, but the person targeted by the challenge. Considering possible swaps of roles, another turnaround would take place if the usual target of the challenge (the arbitrator) would become the player initiating the challenge. And this is exactly what happened in the case decided by the High Court of Kuala Lumpur.\(^9\)

The Judgment of the Kuala Lumpur Court Allowing an Arbitrator to Challenge Another Arbitrator

In this Malaysian judgment, the request for challenge was submitted by one of the co-arbitrators, targeting two respondents: the other co-arbitrator and the arbitral institution. The specific relief requested by arbitrator Sundra Rajoo was actually twofold. The applicant (arbitrator Sundra Rajoo) asked the court to oblige the first respondent (arbitrator Mohamed Abd Majed) and, alternatively, the second respondent (PORAM, the arbitral institution) to disclose all past and presents appointments of Mr Majed by Virgoz Oil and Fats Pte Ltd. The second relief requested was to remove arbitrator Majed after disclosure was ordered. The context of these requests was as follows: Mr Rajoo and Mr Majed were co-arbitrators in a number of cases. All of these cases involved Virgoz as one of the litigants, and Mr Majed was in each case nominated by Virgoz. Mr Rajoo was nominated by various parties opposing Virgoz. In three cases, Virgoz was the respondent, and the claimants in the arbitration proceedings challenged the appointment of Mr Majed on the ground that he had earlier been nominated by Virgoz or the Virgoz group in more than 20 PORAM\(^{10}\) arbitrations. In these three cases, Mr Majed voluntarily resigned. In two cases, however, Virgoz was the claimant, and the respondents opted not to participate.\(^{11}\) In this situation, as stated by the court, Mr. Rajoo ‘[h]as taken upon himself the task to preserve the sacrosanct status of arbitration tribunal to make his application.’\(^{12}\) Thus, since the player whose role it is to submit a possible challenge chose to be absent, the arbitrator took over his role. This leads us to the question that the Malaysian court (with good reasons) qualified as ‘the central issue’, namely ‘[w]hether a co-arbitrator has locus standi to seek the above reliefs notwithstanding the fact that such reliefs can be sought by the litigants to the arbitration proceedings.’\(^{13}\)

Before addressing the issue of locus standi, I would like to make a few observations regarding the ground for challenge at issue. What was perceived as a problem by the co-arbitrator (and earlier by other parties facing Virgoz in arbitration cases) was the fact that arbitrator Majed had been appointed by Virgoz in a quite considerable number of cases. In itself, this does not necessarily indicate bias, but it may be conceived as evidence of a special trust. (The question remains, of course, whether this is trust in a fair and competent arbitrator or trust in an arbitrator who has a history of showing sympathy towards the arguments of Virgoz.) One may submit that in assessing the relevance of repeated appointments, it would be helpful to have some extra information in addition to the number of appointments by the same party.

\(^{9}\) Sundra Rajoo v Mohamed Abd Majed and PORAM, High Court at Kuala Lumpur (Commercial Division – Saman Premula No D-24 NCC (ARB) – 13 of 2010), judgment of 23 March 2011.

\(^{10}\) PORAM is an abbreviation for Palm Oil Refineries Association of Malaysia – or Persuatan Penapis Minyak Sawit Malaysia in the original language. (PORAM was the second respondent in the challenge proceedings initiated by arbitrator Rajoo.)

\(^{11}\) According to the wording of the Kuala Lumpur judgment, ‘have chosen not to submit to the arbitration proceedings’.

\(^{12}\) Judgment of the Kuala Lumpur court, para 3.

\(^{13}\) Last sentence of the introductory part of the judgment of the Kuala Lumpur court.
It might help in learning what the voting pattern was, and how many awards rendered with the participation of arbitrator Majed were unanimous. As far as the frequency itself is concerned, it would be helpful to know whether the ‘over twenty’ PORAM arbitration cases in which arbitrator Majed was nominated by Virgoz included ‘string arbitration’ cases or ‘disputes arising out of contracts in a string’ defined in section 1, Article III.3 PORAM Rules (in which case, ‘over twenty’ might be less significant). One may very well agree with the Malaysian court, which eventually held that disclosure of earlier appointments ‘has merits’. At the same time, it should be noted that the absence of such a (desirable) disclosure need not be a sufficient ground for challenge. In a decision of 9 June 2010, the Supreme Court of Sweden contemplated a challenge on the ground that an arbitrator failed to disclose earlier appointments by the same law firm. (It may be noted that here the indication of conceivable bias is somewhat more indirect, since the contemplated connection is not between the arbitrator and a specific party to the dispute, but between the arbitrator and a law firm representing various parties.) The Supreme Court of Sweden established that the arbitrator was appointed 12 times by the same law firm between 1995 and 2005, but also noted that this amounted to about 10 per cent of the arbitrator’s total appointments in the contemplated period. The motion to set aside was rejected.

The Kuala Lumpur court decided to recognise the locus standi of arbitrator Rajoo and it ordered arbitrator Majid to make the requested disclosure within seven days. Furthermore, the court stated that if disclosure was not made within seven days, the arbitrator would be removed and disqualified.

Locus Standi Supported by an Extensive Interpretation of the Term ‘Party’

Returning to the motion of arbitrator Rajoo, it has to be said that the acceptance of a locus standi encountered serious difficulties under Malaysian law – just as it would have under practically any law. The right to submit a challenge against an arbitrator is normally a right of the parties to arbitration. (To cite just a few norms that may have had a role in the shaping of the regulation of arbitration in Malaysia, see for example Article 13 UNCITRAL Model Law, Articles 12 and 13 UNCITRAL Model Rules 2010 or section 24 English Arbitration Act 1996.) Following the same logic, it is stated in Article 15(1) 2005 Malaysian Arbitration Act that: ‘Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days’ (emphasis added). The PORAM Arbitration Rules do not contain specific provisions on challenge.

Endeavouring to find a solution, the Malaysian court undertook a serious and respectable scrutiny, including a comparative analysis of case law. It accepted the locus standi of arbitrator Rajoo, relying first on an extended interpretation of the meaning of the term ‘party’. At this point, a serious hurdle was presented by Article 2 Malaysian Arbitration Act, which gives a definition of the notion of the ‘party’ and states that ‘party’ means a party to an arbitration agreement. In order to overcome this hurdle, the Malaysian court relied on two English cases in support of the assumption that the arbitrators are becoming parties to the arbitration agreement. The first citation is not quite unequivocal. According to Hobhouse J: ‘It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject

14 Case T-156-09.
to the various statutory provisions) bound by the terms of the arbitration contract.\(^\text{15}\) The term ‘arbitration contract’ in this context may also be understood as the contract between the parties and the arbitrators rather than the arbitration agreement between the parties to arbitration. In the other case, however, one may, indeed, find backing for the position of the Kuala Lumpur court. In Norjarl v Hyunday, Sir Browne-Wilkinson stated: ‘On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral agreement.’\(^\text{16}\) It has to be added that this was not a perception determining the judgment (formulated by Leggatt J), but rather a view stated in the second concurring opinion. However, the approach of Sir Browne-Wilkinson does not have much support in either practice or theory. Most authors – including, for example, Fouchard\(^\text{17}\) – perceive the contract between the parties and the arbitrators as a distinct contract (receptum arbitri) rather than an extension of the arbitration agreement, even if this distinct contract is rarely formalised.

It is difficult to justify locus standi on the ground of an extended interpretation of the notion of the ‘party to the arbitration agreement’.

**Locus Standi Supported by Natural Justice, by a Vested Interest of the Arbitrator in the Integrity of the Arbitration Process and/or Ethical Standards**

The second justification adopted by the Kuala Lumpur court was shaped following an alternative line of reasoning. The court stated that it may deal with the requests submitted, notwithstanding whether the term ‘party’ may or may not encompass an arbitrator. Judge YA Datuk Dr Haji Hamid Sultan Bin Abu Backer explained the entitlement of the court in the following terms: ‘In my view the requirement of impartiality is a principle of natural justice, and in consequence the court has an inherent jurisdiction to check its breach or purported breach at limine when the complaint comes from any interested party involved and it may include co-arbitrator or witnesses etc; and is not one limited to the litigants to the arbitration proceedings per se.’\(^\text{18}\)

Furthermore, it was added that arbitrator Rajoo had a legitimate interest in intervening. According to this added justification for the standing of arbitrator Rajoo: ‘The applicant has a legitimate ground to seek the assistance of the court at common law to arrest a mischief in limine as he is a co-arbitrator and after having received remuneration for work he may become personally liable in contract and/or negligence and/or breach of his fiduciary duty for having participated in an award which has a real likelihood of being set-aside.’\(^\text{19}\)

Reliance on ‘inherent jurisdiction’ (the ICSID Tribunal relied on ‘inherent powers’) in the pursuit of ‘natural justice’ is a rather bold proposition, which was apparently inspired by the special circumstances of the case where the respondent opted not to participate – and hence failed to take the initiative to verify the impartiality of a decision maker. The proposition of endowing all participants or ‘interested parties involved’ (even witnesses!)

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\(^{15}\) Companie Européenne de Céréales SA v Tradax Export SA (1986) QB (Comm Ct) 301.

\(^{16}\) K/S Norjarl A/S v Hyunday Heavy Industries Co Ltd [1991] 1 Lloyd’s Rep 524. The citation is in para 8, sub-s ‘f’ of the Kuala Lumpur judgment.


\(^{18}\) Judgment of the Kuala Lumpur court, para 8, sub-s ‘d’.

\(^{19}\) Judgment of the Kuala Lumpur court, para 8, sub-s ‘g’.
with standing to initiate challenges might bring in an added opportunity to check impartiality under atypical circumstances, but at the same time might also create opportunities for obstruction, and some consequential dividing lines might get blurred. One may certainly agree that the ‘requirement of impartiality is a principle of natural justice’, but this does not necessarily mean that one of the decision makers can take over the procedural entitlements of the party who may be the prospective victim of a lack of impartiality.

The idiosyncratic situation faced by the Kuala Lumpur court is interesting from an ethical point of view as well. It is stated in General Standard 7, section (c) IBA Guidelines on Conflicts of Interest in International Arbitration that an arbitrator is under a duty to make reasonable inquiries to investigate any potential conflict of interest, as well as any facts and circumstances that may cause his impartiality or independence to be questioned. The question is do we have the same duty (or right) when the impartiality of another arbitrator is at issue? A more closely matching point of reliance in ethical rules might be Canon I 2004 American Arbitration Association (AAA)/American Bar Association (ABA) Code of Ethics, which states that: ‘An arbitrator should uphold the integrity and fairness of the arbitration process.’ The specific provisions of Canon I do not, however, contemplate the situation we are dealing with.

It may be argued that the duty (or entitlement) to preserve the integrity of the tribunal cuts both ways. A dispute between the arbitrators regarding the range of disclosure will not contribute to a positive image of the arbitral tribunal. If the question at issue is that of multiple appointments of one of the arbitrators, a challenge by the other arbitrator may be perceived as a matter a jealousy as well. One also needs to consider the fact that in the given case, it was due to the inaction of the respondent that a built-in safeguard of the arbitration process failed to function.

It is true that arbitrators (or potential arbitrators) may be eliminated without party initiative. The arbitral institution may opt not to confirm an appointment. An arbitrator may opt to step down without a formal challenge in order to avoid doubts regarding his impartiality. But the right to submit a formal challenge is vested with the parties, the actors whose material interests may be tainted by prejudice, and the actors who are at the same time entitled to waive the objection and to accept a decision maker who has personal or business links with the other party. This simple logic is confirmed in statutes and it is questionable at best whether it is justified to give a locus standi to actors other than those who are directly affected, and other than those who only have the option of accepting an arbitrator in spite of circumstances that might justify a challenge.

CONCLUDING REMARKS

If one accepts the proposition that the locus standi of a co-arbitrator does not have sufficient justification, the question that remains is what an arbitrator should do if he is aware of circumstances that might impair the integrity of the process, that might jeopardise the award and that might represent a possible ground for challenge, but the party concerned is not aware of such circumstances. The Kuala Lumpur court explained with persuasive arguments that the arbitrator has a vested interest in the integrity of the arbitration process, and this might prompt an entitlement – or even a need – to take some action. A possible course of action – other than submitting a formal challenge – would be to share the information
with the party concerned or, even better, in order to avoid unilateral communication, to share the information with both parties and all co-arbitrators. This would create a situation in which the actor entitled to submit or not to submit a challenge might make a responsible choice. If the respondent believes that there is no jurisdiction (which may have been the reason that prompted the respondent in the Malaysian case not to participate), it may still challenge an arbitrator, just as it may contest jurisdiction.

In the increasingly transnational environment of arbitration, problem patterns emerging in one country are likely to appear elsewhere as well, and questions raised in one country are likely to become relevant and to prompt questions and answers worldwide. The challenge considered in the Kuala Lumpur case is also a challenge to the basic allocation of roles in commercial arbitration and to the limitations of such roles. Such challenges make us better acquainted with the environment of commercial arbitration and its limits, because borders become perceptible only when they are tested.

In the specific setting of the Malaysian case, another sensitive point might arguably emerge. This is the issue of confidentiality, since arbitrator Rajoo learned about the multiple appointments of arbitrator Majed in the course of other arbitration cases. The Malaysian court did not contemplate the issue of confidentiality. A juxtaposition of confidentiality with the duty to observe the integrity of the process would take us beyond the limits of this chapter. It may be noted that it is certainly easier to give priority to the considerations of the integrity of the process over a possible duty of confidentiality than to displace the roles defined in the legal framework of arbitration (plus to disclose what was learned in the course of another arbitration case).