ISSN: 2582 - 2942

LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- VI

AUGUST 2020

ISSN: 2582 - 2942

DISCLAIMER

ISSN: 2582 - 2942

EDITORIAL BOARD

ISSN: 2582 - 2942

EDITORIAL BOARD

ISSN: 2582 - 2942

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BIAS IN INVESTMENT TREATY ARBITRATION

KARTIK SHARMA

INTRODUCTION

There have been concerns by many scholars and organizations over the impartiality and independence in the procedure of dispute settle of Investment treaty arbitration. Most of these concerns relate to the independence of arbitrators and their bias towards one of the parties. This has led to proposal of reforms that gear the system towards a court like process. This bias is usually blamed towards the *ad hoc* nature of the appointment of arbitrators, who render decisions with a view to get reappointed by the parties. It has been observed that multiple appointment of an arbitrator by a party in various disputes, often leads to compromise of his independence and impartiality.

Bias can be pre-existing, possessed by arbitrators before their appointment in the first arbitration proceedings, or it can be prospective where arbitrators act in a bias manner to increase their chances of reappointment by the party in future arbitrations. Another form of bias that has been observed in many proceedings is retrospective bias. In such cases, arbitrators favour the parties that are responsible for more appointments in the past. Another way to differentiate bias in arbitration proceedings is- systematic bias and individual bias. Systematic bias refers to a situation when the procedure of arbitration proceeding is drafted to favour one of the parties. Individual bias is when prominent individuals who generally have an effect on arbitration proceeding favour a party than the other.

Most scholars who have raised this issue of bias and the partiality of arbitrators suggest that the decision in such arbitration proceedings favour investors and multinational corporation and are against States and parties that are weak in the economic structure like the consumers or even employees of corporations. The issue is not only highlighted by scholars, some countries have cited it at various instances and even withdrawn from the 1965 ICSID Convention for this reason. The *2013 UNCTAD Report on Recent Developments in Investor-State Dispute Settlement*, has covered this issue as well. It mentions that problems such as the trend of investors challenging public policies, contradictory decisions by tribunals, increased dissenting opinions and arbitrators' conflict of interest are all inherent in the system of investment treaty arbitration.[1]

[1] UNCTAD Report on Recent Developments in Investor-State Dispute Settlement, (2013)

APPARENT & IMPLICIT BIAS

Bias does not necessarily be apparent that occurs with enough evidence to show personal gain of certain arbitrators in a dispute. It becomes important to look at the bias that is a result of the values of arbitrators or the culture in international arbitration. This is referred to as implicit bias. Legal concept of bias in investment treaty arbitration should be understood in a broader manner, to include both apparent as well as implicit bias.

It is very difficult to prove implicit bias by the parties in most cases. Therefore, most arbitration laws and regulations focus on apparent bias instead on implicit bias. In *Locobail vs Bayfield Properties*[2], the English Court of Appeal, on implicit bias, held that the law does not provide for raising a question on value that influences a judge's mind. In *Morelite Construction Company vs N.Y.C. District Council Carpenters' Benefit Funds*[3], a US court held that, to decide whether there is bias in an arbitration proceeding, a reasonable third person will have to conclude that the bias arbitrator was partial and favour one of the parties. Similar view was given by an English court in *Porter vs Magill*[4]. Thus national courts have, in their rulings, laid down a standard to observe bias in arbitration proceedings which excludes bias arising from the subconscious of the arbitrator. Even the International Bar Association Guidelines on Conflict of Interest in International Arbitration excludes implicit bias in their regulations and provide that a reasonable third party must assess an arbitrator's impartiality in case any doubts are raised on it.

Subconscious or cognitive bias can affect the decision making capacity of arbitrators to a large extent. This makes the values of those individuals appointed as arbitrators very important. These values eventually have an influence on the legal outcomes in cases. A homogeneous group of arbitrators will not resemble the same ideals as a neutral third person whose decision will not be tainted by any kind of bias. Thus the concept of bias has to be understood to include both apparent bias as well as implicit bias. The scope of laws govern arbitration proceedings should not extend only to the bias that is apparent and associated with personal gains of individual arbitrator, but must also cover cultural bias as a result of the values of arbitrators.

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[2] (2000) QB 451
[3] 748 F.2d 79
[4] (2002) 1 All ER 465

INDIVIDUAL BIAS

Bias in Investment arbitration can primarily be linked to the individuals acting as arbitrators in the process and their ethics. Regulatory bodies that overlook the process of international arbitration of disputes have, at various instances, tried to strengthen the framework that lays the duties of arbitrators, primarily to disclose the information that might result in bias on their part. As a result, there are many arbitration laws and ethic codes that govern the conduct of arbitrators. Even national courts of almost all States have made efforts to try and refine the standard of bias that is apparent in the conduct of arbitrators, be it a reasonable appearance of bias or a reasonable suspicion of bias.

Despite all the efforts to curb a biased arbitration regime, studies on the behavior of arbitrators and their decision-making conclude different views and fail to provide a satisfactory explanation for the issue. This is because it is very difficult to capture the act of arbitrators that suggest bias as bias is basically unobservable.

PROSPECTIVE BIAS

Under a presumed Bias by arbitrators, they can try to shape their reputation in three different manner. They can either take a pro-investor direction or a pro-State direction or even a neutral approach. These directions attract appointment in their own manner to the advantage of the arbitrator. A neutral direction is taken with a view to shape the reputation for an increased appointment by the presiding arbitrators in *ad hoc* proceedings. However, most data available does not describe a situation where arbitrators decide cases, purposely, not on its merit, just to maintain a neutral reputation. It has been observed that the reputation of arbitrators affect their decision in the sense that, arbitrators that are pro-investors or pro-State, decide claims in more likely or less likely (as the case may be) in favour of the investors or States, respectively.

RETROSPECTIVE BIAS

Often, arbitrators reflect a bias to fulfill the needs of investors or States, that have created more chances of appointment. This may include a factor of reciprocity or loyalty. Various reports suggest that ICSID arbitration reflect that arbitrators in ICSID proceedings act in a manner that lacks

independence and impartiality. There main reason for this has been found in the appointment of the same arbitrators by the same parties over and over again.

Arbitrators are often appointed by both, investors and States, on a predisposition achieved from their previous decision and their inclinations. However ICSID selects arbitrators that are neutral and known for impartiality to maintain its reputation in the international community and compete with other dispute settlement institutions. The ICSID Convention lays down the rule for appointment of arbitrators who can be counted for their independence.[5]

The *ad hoc* appointment of arbitration witnesses pre-existing bias, instead of prospective or retrospective biases for various reasons such as:

- There is an influence of pre-existing bias, instead of the overtime development of arbitrator's reputation in case of their appointment because it is not necessary that arbitrator develop a particular reputation which will be rewarded.
- Arbitrators decision can be challenged and disqualified by parties on evidence of "manifest lack of qualities".
- Evidence of prospective or retrospective biases might affect arbitrators' career in the long run.

SYSTEMATIC BIAS

Integrity of arbitral tribunal has mostly been challenged on the acts and ethics of individuals, appointed as arbitrators to settle disputes. Over a number of years, international arbitration practice has been assisted by various regulations that lay down rules and guidelines for the conduct of arbitrators, as they have been criticised increasingly, especially on the ground that they favour a specific class of parties. For example, *the IBA Guidelines on Conflict of Interest in International Arbitration* suggests that "when close personal friendship exists between an arbitrator and counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social

[5] Article 14 of the ICSID Convention

organizations the arbitrator should disclose the relationship."[6] Similar regulation can be found in various other codes formed by institutions. All these codes have the same objective i.e. to lay down guidelines for a standard of conduct of arbitrators to maintain a confidence in the process of arbitration for the parties. National courts too, have worked towards achieving this goal by trying to cleanse the standard of bias present in international arbitration. For example, courts in England have worked towards adopting a standard of bias based on reasonable appearance or suspicion.

Even though, there has been enough work done to address the issue of bias in international arbitration, it can be noticed that the main focus of the work is towards the bias of individuals acting as arbitrators. Most regulations fail to include in them rules associated with the bias of system of arbitration. Thus it becomes important to differentiate systematic bias from individual bias.[7]

While looking at what constitutes systematic bias, it is not important to focus on if the arbitrator who decides the claim gained financially or decided based of a personal interest. Rather, what is important is to focus on if the system of adjudication has been designed to favour a certain group of individuals or certain legal interpretations. In a systematically biased system of adjudicating claims, most of the individuals that are appointed as arbitrators will have the same views and same position on legal, social or political matters. For example, a system wherein, individual that are appointed as arbitrator belong to the same religion or are graduates of the same university, can be said to have a systematic bias.

There can be a situation where individual bias and systematic bias overlaps. In such cases, individuals who are appointed as arbitrators might share the same legal views, irrespective of how they were appointed to the panel of arbitrators. For example, there can be a panel of arbitrators wherein all arbitrators individually give importance to commerce and economic activities than environment protection. Their decision will most probably be biased due to this common view; however it will be the result of a coincidence.

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[6] IBA Guidelines on Conflict of Interest in International Arbitration (May, 2004)

[7] Stavros Brekoulakis, "*Systemic Bias and the Institution of International Arbitration",* Vol. 4 Journal of Int. Dis. Settlement, pg. 553-585 (2013)

A systematic bias system of adjudicating claims usually doesn't consist of individual with different views and it designed to procedurally favour the appointment of like-minded arbitrator who share a common ideology and will thus naturally make decisions that favour a certain type of litigants. For an adjudicating system to ensure there is no systematic bias and the fairness of arbitration proceedings can be maintained, it becomes essential that an assortment of individuals with different views be available to be appointed as arbitrators.[8]

INSTITUTIONAL INFLUENCE ON ARBITRATORS

Studies on the behavior aspect of arbitral decision making give a diverging and conflicting view. They have failed to give a reasonable explanation on how the behavior of arbitrators affect their decision. Two reasons for this failure are, first, the studies mainly focus on the attitudinal theory on decision making and second is that they mostly rely on scientific method to observe bias. These behavior studies analyse the outcomes of award given by the arbitrators and their voting pattern. The relation between the two is straightforward and fails to include many other complex factors to the decisions of arbitrators. Many determinants that are important to the decision making process are left out of analysis. Thus these studies often give a conflicting view. One of the most important determinants they fail to take into consideration in the institutional influence on the arbitrators, within which they practice and make decisions.

Institution refers to the political and legal regime, which the decision-makers are a part of. These decision-makers can be both, judges of national or international courts as well as individuals acting as arbitrators in international disputes. Institutions have played an important role in the decision making process since a very long time. They affect the behavior and values of the decision-makers by various process such as their selection or appointment process, their professional training, their tenure status, their professional dependence on the institution as well as their obligations towards it. Theories that analyse the effect of institution on the decision-makers recognise that values and cultures of individuals play an essential role to guide them towards the legal outcomes the give, however these theories provide that it is the wider institutions in the first place that shape these values and provide

[8] Catherine Yannaca, "*International Investment Law: Understanding Concepts and Tracking Innovations*", ISBN 978-92-64-04202-5-OECD 2008

constraints in their decision. These individuals are embedded in the institution and are bound by legal precedents and texts. Their decisions are based on the most authentic interpretation of law in light of the dominant values of the institution of which they are a part of.

To understand the institutional effect on arbitration, it becomes important to look into the procedural design of international arbitration and examine its the institutional process and structure. Various legal values have a major role in shaping international arbitration over the years. Also these values implicitly guide the attitude of those individuals acting as arbitrator. The effect of institution of national and international judiciaries and the effect of institution of international arbitration has to be separated from one another.[9]

INSTITUTION OF NATIONAL AND INTERNATIONAL JUDICIARIES

National and international judges are appointed by a central authority and are given a fixed tenure. They are professionally and financially dependent on the State or an authority that is responsible for management of international courts and tribunals. Various studies show that there is a bias in the judicial system associated with the structure and process of the institution the judges are a part of. For example, the process of appointment and promotion of judges in a State or in an international organisation is often affected by various political considerations and interference. This can be witnessed in the appointment of judicial bodies in many international courts. Evidence suggest that governments shape the judicial bodies through the process of selection and appointment of judicial person in World Trade Organisation Appellate body, the European Court of Human Rights and other international courts. Although the judges that are appointed in these international courts may not be like minded with similar values, or appointed by a single government, as is the case in national judiciary, the appointment process is molded by politics in the organisation in a different way.

In the case of national judiciaries, the institutional effect on the judiciary and its procedure or the values and behavior of judges can be said to begin much before the appointment of the first person in the office. Various factors that contribute to the structure of a State influence the homogeneity of the judicial system such as education of the individual's appointment as judges, their social background

[9] Stavros Brekoulakis, *"Systemic Bias and the Institution of International Arbitration",* Vol. 4 Journal of Int. Dis. Settlement, pg. 553-585 (2013)

and early professional life. This can be viewed in the case of judges in United Kingdom. They mostly come from middleclass professional families and have studies in independent schools such as Oxford or Cambridge and initially spend about twenty years practicing at the bar. This problem of lack of diversity in the judiciary of the UK has been acknowledged to be a major factor resulting in systematic bias in the national judiciary. As is the case in the US Supreme Court, where most of the current judges are graduates of the Harvard Law School or the Yale Law School and are either Catholics or Jews.

Other institutional factors like tenure status of judges or their role in the profession have also shown to shape judges' values and behavior. Judges in all States enjoy immunity and are appointed to head over tribunals, committees and commissions. These factors compel them to act in a manner, keeping in mind the States interest and order. Another important institutional factor of judicial decision making is the role of precedents in law. Precedent ensure that judges conclude on the same position in cases involving the same legal question. Even if they are not bound by precedent, they follow decisions made by the judiciary in earlier situations because it can be seen at various instances that a decision that fails to respect judicial conformity will not be accepted and followed by other judges. The result of these factors on a national judiciary is that it leads to cohesive group of decision makers who have a similar mental attitude and political stance which in turn protects a certain specific value[10].

It cannot be said that there is no difference at all among national and international judges on legal and political matter. For example, US Supreme Court judges often take a different approach while giving their interpretation of law, based on their political position as conservatives and liberals. Individually, they may either support the Republicans or the Democrats. However, all these differences between them are embedder within the culture of a broad institutional framework. Scholars like Powe suggest that these judges have been influence by the views of the elite society in America at the time. Powe further suggests that judges in America have been subject to the same social, economic and intellectual conditions as the upper-middle class elites and thus the courts often serves the ruling political coalitions. In case of the State Judiciaries in the US, judges are allowed to have their own views and preferences on different policies however these views should not be a threat to the institution and

[10] Anton Strezhnev, "*Detecting Bias in International Investment Arbitration"*, Paper presented at the 57th Annual Convention of the International Studies Association, Georgia (2016).

undermine its status quo. Thus it can be said that collectively, they work towards the reinforcement of the values and ideals of the prevailing institution.

INSTITUTION OF INTERNATIONAL ARBITRATION

The International arbitration regime has to be differentiated from the highly controlled system of national and international courts. In most international arbitration, each party is required to appoint an arbitrator and the two party-appointed arbitrators then appoints the presiding arbitrator, rarely with the consent of the parties. Unlike the national courts, there is no authority that been given the task of appointing the decision makers in international arbitral tribunals. There are some organizations that appoint arbitrators in some cases, on a request made by the parties but in majority of cases, it is the parties that appoint them and determine the composition of the tribunal. According to the International Chamber of Commerce, out of 1300 arbitrators appointed in ICC arbitrations by 2013, 930 of them were appoint by the parties. This right of the parties to determine the composition of the tribunal is considered to be the very essence of arbitration.

This method of appointing arbitrators empowers the parties to the proceeding with an opportunity to mold the values of the tribunal. Thus the tribunal is expected to represent the biases of both the parties and come to a balanced decision. This right of the parties to be involved in the constitution of the tribunal has improved the procedural legitimacy of the process of international arbitration. The procedure of international arbitration welcomes a wide range of ideological, legal and cultural diversity in the tribunals. For example, it is possible that an English barrister, a French lawyer and a Swedish officer are all part of the same arbitral tribunal. Further, an arbitral tribunal can decide a case holding a legal position which is not in par with the prevalent views of international investment law because the international tribunals are free from the constraints of stare decisis.

However, it is important to look beyond the rules laid down to govern international arbitrations and see if their proceedings are actually diverse and democratic. There are certain values that have developed in international arbitration over the years. These values have an implicit effect on the attitude of arbitrator and have developed concepts of the individuals involved in the teaching and practice of arbitration. It has been observed that when arbitrators are appointed, they tend to share a similar attitude and values, enough though they belong to different classes and legal backgrounds. This

makes it important to see whether there are any mechanisms in place to check if these individuals support those value that are necessary to maintain the status quo of international arbitration.

To understand the decision making in arbitration, one should not only analyze the individuals behind the decision and their attitude, but also the institution that surrounds them. This has been omitted by many studies on arbitral decision making. Some studies suggest that there is a limited availability of arbitrators in international disputes which has resulted in a cultural limitation, thus raising an accusation of "arbitration mafia". Comprehensive study of the institutional aspect of international arbitration is extremely complex exercise because unlike national courts, international arbitration is dynamic and transnational. The need to study this institutional structure that molds the values of arbitrators and the law requires the study of various players involved in it such as organization administering arbitration proceedings like the ICSID, the law firms which are actively involved in the appointment of arbitrators, commissions that lay down model law and regulations like the UNCITRAL and academic institutes involved in the teaching of arbitration. This will not only help in understanding the decision making of arbitrators but also explain the policies and decisions behind the structure of international arbitration.

Arbitration practitioners have suggested that the process of appointing arbitrators by parties should be abolished and instead arbitral institutions be responsible for the appointment of all members of an arbitral tribunal. They believe that this process would make the appointing of arbitrators transparent and improve the quality of appointed individuals. Some practitioners have also suggested that investment treaty tribunals should be replaced by international investment courts with judges who have a fixed tenure and are subject to either the national courts or an appellate body. These suggestions pose a threat on institutional bias in the process of international arbitration similar to that in national courts, where there is a lack of diversity and democratic process in the appointment of judges. This would in turn, evolve individual bias into systematic bias in international arbitration.

The best way to tackle bias in the institute of international arbitration, is by increasing the cultural diversity of arbitrators. This can be achieved by providing for a larger pool of lawyers from different countries who are familiar with the required expertise and knowledge of arbitration, which is possible in today's time as an increasing number of arbitrations programmed are now available in universities around the world. But first a better understanding of the institution of international arbitration and

the process that molds the values of arbitrators is required. As international arbitration keeps expanding its scope, the traditional concept of public justice is further challenged. This would inevitably make arbitral decision making come under a closer scrutiny.