Kluwer Arbitration Blog

Counsel Ethics in International Arbitration: The Glass Slipper Still Does Not Fit

Fahira Brodlija (Association ARBITRI) · Friday, July 2nd, 2021

The story of counsel ethics in international arbitration is very much like Cinderella's fairytale. Once the clock struck midnight, all that remained was her glass slipper. This left the prince to search the kingdom for a maiden with the perfect fit for a "happily ever after". Counsel ethics in international arbitration similarly involve an ongoing pursuit, with no end in sight. It is necessary to apply the proper law, find the appropriate forum to raise any concerns, and then determine a suitable remedy. This post seeks to tell the story of the various difficulties and challenges when navigating this tricky landscape, as illustrated in a recent case before the Canadian Federal Court (the "Court") – *Geophysical Service Incorporated v. Canada*.

In this case, the Court refused to review the decision of the Trade Law Bureau of Global Affairs Canada ("TLB"), which had declined to remove a member of its counsel team representing Canada in a NAFTA arbitration. The Applicants (Claimants in the NAFTA arbitration) alleged that one of TLB's counsel was conflicted because of prior employment at the Claimant's third-party funder. The Applicants asserted that said counsel had access to privileged information that could prejudice their position in the NAFTA arbitration since the negotiation of their funding terms took place immediately prior to that counsel joining the TLB. Because the application was one for judicial review, and not a direct challenge of the counsel in question, the Court was able to avoid addressing the alleged conflict of interest by refusing to intervene on jurisdictional grounds. This post highlights the key considerations of the Court and maps out the likely journey of this application before the arbitral tribunal.

Judgment of the Federal Court – The Court Dismisses the Application

Issue 1 – The Court has No Jurisdiction to Review the Contested Decision

The Court conducted a narrow assessment under the Federal Courts Act ("FCA") and found that the contested decision of the TLB was private in nature, and thus outside of the Court's jurisdiction for review. Under Article 17(3)(b) of the FCA, the Court may set aside, prohibit or restrain a contested decision of a federal body. The Supreme Court of Canada has recognized the "sweeping" nature of this definition, that includes everything *"from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between."* Yet, the Court found that this definition did not encompass "any other body that is loosely connected to the

Crown", such as the TLB.

The Court reasoned that the TLB, as a representative of the federal government, acted as any other arbitration counsel. Thus, its decisions regarding the constitution of Canada's defense team are inherently private and outside of the Federal Court's purview. In conclusion on this issue, the Court also added that the NAFTA arbitration does not have any public implications, as the Applicants were "claiming damages for the misappropriation of their property". The court held that the Applicants had other remedies available to ensure the public interest of "conflict-free lawsuits" without identifying any remedy in particular.

The Court analyzed the nature of the contested decision through a very narrow lens that did not encompass the context of the underlying NAFTA arbitration, which could have impacted the final decision. Firstly, the Court characterized the TLB as "loosely connected to the Crown", despite the fact that it represents the government before international tribunals (in this case, in a NAFTA arbitration). Secondly, the Court denied any public interest in the underlying NAFTA arbitration, focusing on the specific claim of the investor, rather than the broader framework of the case. While investors generally pursue their private interests against host States in investment arbitration, as is widely recognized within the arbitration community (and also by critics of the investor-State dispute settlement system), this does not diminish the public dimension of the proceedings, not least because any adverse award of damages will be paid out of the public budget. Further, should the refusal of the TLB to remove the challenged counsel from Canada's defense team result in adverse costs in the arbitration, such costs would be borne by the government. Therefore, although this narrow reading of the nature of the underlying issues provided the interpretive framework for the Court's decision on jurisdiction, it is difficult to square with the full picture of the case.

Issue 2 – The Court Cannot Intervene in Proceedings Under Chapter 11 of NAFTA

On the second issue, the Court relied on Article 5 of the UNCITRAL Model Law to find that the review of the decision in question was outside of the Court's jurisdiction. The Court went on to state that the Applicant's request was not a proper interim measure in its nature, and even if it were, the tribunal had the express power to order such measures under Article 17 of the Model Law. However, there may have been avenues which would have allowed the court to consider the request, both under NAFTA and the Model Law itself.

It is well established that parties who agree to arbitrate thereby waive their right to resort to national courts, subject to exceptions stipulated by contract, or provided by law. This is also the case under Articles 1121(1)(b) and 1121(2)(b) of NAFTA that provide exceptions to the exclusive jurisdiction of the arbitral tribunal for "…any proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages". The Application in this case could arguably fall under the express exception provided in these articles, as it did not relate to the merits of the case, nor did it involve the payment of damages.

The UNCITRAL Model Law and the UNCITRAL Rules recognize the competence of courts to issue interim measures in relation to arbitral proceedings, without derogating from the agreement to arbitrate. Therefore, the Court's power to review the contested decision is not incompatible with the NAFTA tribunal's jurisdiction.

What Would the Arbitral Tribunal Do?

The decision is not likely to be any easier once this issue is raised before the arbitral tribunal. The main difficulties will relate to the determination of the applicable rules and standards governing such a challenge. The fact that the challenged counsel is a member of the State defense team additionally complicates the already layered issues. Prior investment awards do not provide much guidance in this sense. The few known cases where the tribunal did take up the issue related to allegations of conflicts between the counsel and a member of the arbitral tribunal.

In *Hrvatska Elektroprivreda d.d. v. Slovenia* and *Rompetrol v. Romania* the parties requested the removal of counsel due to alleged conflicts of interest with tribunal members. Both tribunals recognized that the ICSID Rules were silent on such matters, and emphasized party autonomy in the context of selecting their representatives. In *Hrvatska Elektroprivreda* the tribunal deduced the powers to decide on the challenge and removal of counsel from the principle of the "immutability of properly-constituted tribunals". The tribunal in *Rompetrol* noted that, when such powers are found to exist, they should be exercised in exceptional cases.

However, such analytical gymnastics would be of little help in the case at hand, as the alleged conflict of interest did not relate to the arbitral tribunal, or the merits of the case, rather the professional relationships of a member of the State defense team.

Finally, and most consequentially, even if the tribunal were to find a conflict of interest on the side of Canada's counsel, the existing arsenal of remedies does not guarantee the protection of the integrity of the proceedings. The IBA Guidelines on Party Representation provide some examples of possible remedies that tribunals can order in cases of misconduct by party representatives, which include: admonishing the representative, drawing adverse inferences in the evidence or the legal arguments, considering the misconduct when apportioning costs and taking any other appropriate measure in order to preserve the fairness and integrity of the proceedings. None of the suggested measures can resolve alleged conflicts of interest, unless the tribunals find that the alleged conflict would endanger the "integrity of the arbitral proceedings".

What About the Conflicts of Interest?

The analysis above illustrates the journey of challenges related to alleged conflicts of interest of counsel in international arbitration. With proper standards and rules still out of sight, both national courts and arbitral tribunals will be reluctant to resolve these issues, and where they do, they will find themselves in an ethical "no man's land". In the analyzed case, the Applicants sought to resolve the issue through judicial review, as interim relief, only to learn that it was not a good fit under the applicable law. The arbitral tribunal, under the current framework, is not in a much better position, as it lacks investigatory resources and disciplinary authority.

Numerous instruments have been proposed over the years, ranging from universal international rules of ethics to choice-of-law rules and specialized checklists, as discussed in previous contributions to this blog.

Since the "happily ever after" is not yet in sight, and considering the harmful effects of the persistent uncertainty, it may be time to put the idea of specialized rules aside for a more pragmatic agreement on the proper forum and choice of law rules to apply to issues of counsel conduct in

international arbitration. Perhaps it is time to trade in the glass slipper for a more sensible choice that is more likely to fit.

To further deepen your knowledge on attorney-client privilege in international arbitration, including a summary introduction, important considerations, practical guidance, suggested reading and more, please consult the Wolters Kluwer Practical Insights page, available here.

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