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# Litigation

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# Chutzpah

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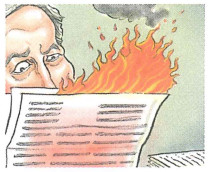



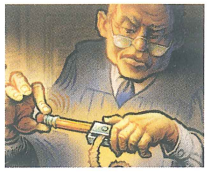









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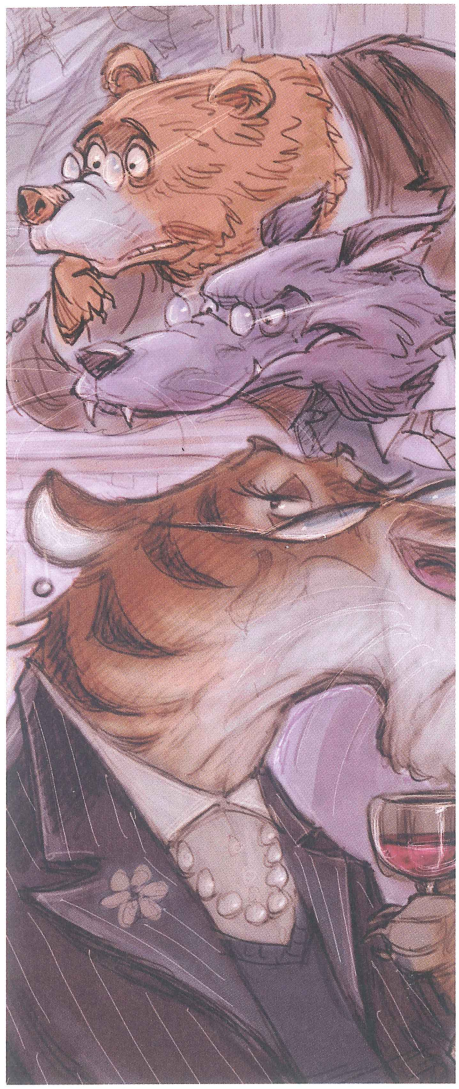

Cover illustration by Brian Ajhar

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# DOUBLE-HATTING IN INTERNATIONAL ARBITRATION

FREDERICK A. ACOMB AND NICHOLAS J. JONES

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You are defending the respondent in an international arbitration administered by an institution headquartered overseas. The arbitrator is a lawyer at a prominent law firm there. Midway through the proceedings, the claimant gives notice that it has retained a new lawyer on its counsel team.

The new lawyer is from the same country as the arbitrator and the administering institution. You review her résumé and are shocked to discover that she is the vice-chair of the very institution where the case is pending. You read the institution's rules and learn that she sometimes has the unilateral power to select arbitrators for proceedings administered by the institution.

Before you call your client, you consider the likely reactions:

*What?! The arbitration institution is acting* against *me? The vice-chair of the institution is sitting at counsel table* for my opponent? *I didn't agree to that! Who would ever agree to that?*

*Your firm drafted the arbitration agreement. Why didn't you warn me that the arbitration institution permits this? Had I been warned, do you think I would have agreed to naming that institution?*

*The claimant's lawyer must have advised his client to retain the vice-chair. Why didn't you give me that advice? Let's retain the chair of the arbitration institution as our co-counsel! Can we do that?*

You scour the institution's rules for anything that might have put you on notice that the vice-chair could serve as counsel for a claimant. Finding nothing, you call your client.

The lack of notice provided by the rules offers him no solace. As you expected, he's concerned that the claimant's engagement of the vice-chair means that the arbitration institution itself is sitting at counsel table against him. He's certain that the claimant retained her to influence the arbitrator and that the arbitrator's independence is destroyed by the prospect that he or others at his firm will receive—or not receive—future arbitration appointments. He believes that this presents a conflict of interest between the vice-chair and the arbitrator, and at least the appearance of impropriety.

You explain that challenging the appointment of the arbitrator won't accomplish anything, as this is an institutional conflict that would affect any arbitrator appointed by the institution. Your client is frustrated and concerned. He sees three options: (1) waive the conflict and take his chances; (2) challenge the vice-chair's capacity to serve as the claimant's co-counsel; or (3) try to even the playing field by retaining some other high-ranking institutional insider to serve as his co-counsel.

This is no mere hypothetical. When these essential facts happened to one of us, the respondent challenged the propriety of the institutional insider serving as counsel for the claimant. The insider declined to withdraw voluntarily, and the arbitrator declined to direct him to do so. For the rest of the arbitration, as far as the respondent was concerned, the arbitration institution was sitting at counsel table for his adversary. That the respondent ultimately won most of the case did nothing to neutralize his daily concern that the entire process was tainted.

## Three Areas of Scrutiny

This sort of double-hatting damages the reputation of international arbitration and opens the door to judicial scrutiny in annulment and enforcement proceedings. There are three primary areas for potential scrutiny—due process, public policy, and contract.

**Due process.** Article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (June 7, 1959) (the New York Convention) establishes a ground

to refuse enforcement when the tribunal has not given the resisting party the opportunity to present its case. This allows courts at the place of enforcement to apply their own standards of due process.

One requirement of due process is that the decision maker be unbiased and free from undue influence. In other words, an arbitrator must provide a fair and impartial hearing. One minimal requirement of fairness is that each party's argument be heard in a meaningful way on an equal and level playing field.

Thus, the fundamental element of due process is the *meaningful* opportunity to be heard. Double-hatting deprives the opposing party of a meaningful opportunity to present its case because the arbitration institution's senior leadership is sitting at the opposition's counsel table.

In addition, having to present one's case to a sole arbitrator who depends on the opposing party's counsel for future appointments creates at least the appearance of bias. The arbitrator's inherent economic interest in gaining favor from the double-hatting official arguably denies the right to an impartial decision under Article V(1)(b) of the New York Convention. Parties, and courts in enforcement proceedings, have a legitimate expectation of impartiality and fairness in arbitration. Having to present one's case to a tribunal whose impartiality and fairness are in justifiable doubt is not a meaningful presentation of one's case and thus could be subject to judicial nonenforcement.

**Public policy.** Article V(2)(b) of the New York Convention permits refusal to enforce foreign arbitral awards if "recognition or enforcement . . . would be contrary to the public policy of that country" and explicitly permits states to apply their own definitions of public policy. Whether enforcing an award that was subject to double-hatting would merit nonenforcement thus depends on the definition of public policy prevailing in the enforcement forum.

In the United States, courts may refuse to enforce a foreign arbitral award if enforcing that award would violate the forum state's most basic notions of morality and justice. In that context, courts could find that enforcing awards when the institution seemed aligned with or unduly influenced by one party might jeopardize public confidence in the arbitral system, contrary to public policy.

A number of the world's leading arbitration centers grant unilateral arbitrator appointment power to institutional insiders.

**Contract.** The enforceability of an award may be threatened if the parties were not given advance notice that this type of double-hatting might be permitted. Article V(1)(d) of the New York Convention provides that courts may decline to enforce awards if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." Arbitration is a matter of contract, and parties cannot be forced to act beyond the limits of their contracts.

Hence, the following inquiries seem appropriate in the context of Article V(1)(d): Did the parties knowingly agree to an arbitration procedure that permits high-ranking insiders to serve as counsel against them in matters administered by such officials' own institution? Did they agree to an arbitral authority whose consideration for future arbitrator appointments might depend on the insider? If the institution's rules gave no notice that the institution might tolerate such a practice, can it fairly be said that the parties agreed to either eventuality? If not, can it still be said that the arbitration was in accordance with the agreement of the parties?

The more "no" answers to those questions, the greater the risk that a court might decline to enforce an award under Article (V)(1)(d).

A number of the world's leading arbitration centers—including the China International Economic and Trade Arbitration Commission, the London Court of International Arbitration, and the Singapore International Arbitration Centre—grant unilateral arbitrator appointment power to institutional insiders with no published rules precluding them from serving as party counsel. Parties to arbitrations in those institutions seem poorly protected from the potential negative effects of double-hatting officials.

In contrast, the International Chamber of Commerce addresses the perils of double-hatting by limiting unilateral appointment powers and, where necessary, prohibiting those with unilateral power from serving as party counsel.

The diffusion of appointment authority away from a single individual permits high-ranking officials to serve as party counsel while maintaining the integrity of the arbitral process. If the necessity for expedited procedures requires a single individual to make appointments, regulations should prevent that person from serving as counsel in arbitrations administered by that particular institution.

These precautions strike the optimal balance among a party's right to select counsel, institutional officials' interest in counsel work, and the universal interest of justice. ■