Double Hatting in International Arbitration: Time to close the Revolving Door?

Amanda Nerea and Ronald Mutasa

This topic could not be more befitting, or intimidating, in the context of being a topical theme of this inaugural class of the Africa Arbitration Academy and the debate within the arbitration community on diversity and equal opportunity in the International Arbitration sphere.

Definition

Double Hatting has been simply defined as the act of an individual performing two roles.[1] Most commonly, the roles involve being either counsel or Arbitrator and may also include acting as expert-witnesses or tribunal secretaries.

In critiquing this issue, it is imperative that the obvious, but often overlooked question be addressed: is double hatting actually that common or systematic? The answer to this is interestingly vague and it is this: not really.

Practitioners are generally in consensus that there is no empirical evidence to suggest that "double hatting" is widespread. In fact, an attempt to gather this empirical data has been made principally by Langford, Behn and Lie[2]. Their conclusion is that double hatting is not a common or widespread practice across the entire network of cases that they studied *(i.e., breadth)*, but that it is practiced so consistently by a highly visible and powerful core of some of the most influential actors in the system (*i.e., depth*).[3]

Having established its existence, the following warrants examination: is double hatting, however limited its practice, desirable? There are three different approaches that can be taken in criticizing this concept.

First, the diversity issue. It is argued that not only does double hatting encourage repeat appointments of the same individuals, it also thwarts diversity, i.e. the choice of Arbitrator and counsel is never diversified from the stereotypical pool of "pale, male and stale".

Secondly, the enforcement issue. It is trite law that enforcement of an award can be denied in circumstances where it is alleged and later proven that there was breach of due process; i.e. lack of independence and impartiality of the Arbitrators. The effects of double hatting, it is argued, are subtle, but equally destructive, particularly when one acts as arbitrator in one case, and counsel in another. Acting as counsels, arbitrators can argue for a certain interpretation of the treaty or arbitration clauses, which argument they then advance as

[1] EUABC- Internet dictionary accessed on 12th June 2019.
[2] Langford, Behn & Lie, "The Revolving Door in International Investment Arbitration", *Journal of International Economic Law*, 2017 p. 20, 301–331.
[3] p 21 supra.

arbitrators when making awards, thereby creating a body of precedents which they use in either role.[4]

Lastly, the issue of ethics and conflict of interest. Whilst neither the various arbitration rules (i.e., ICSID, SCC, ICC, and UNCITRAL) nor the IBA Guidelines on Conflicts of Interest in International Arbitration explicitly prohibit this practice, it is argued that double hatting should be considered as a significant threat to transparency and independence of an arbitrator. Thus, while the disputes may not create a personal or professional connection for the arbitrator, they may be connected in the "substance" of the dispute at issue. Undeniably, one of the reasons for the existence of double hatting is the tendency for the same few arbitrators to be appointed repeatedly by the users of the system. It is logical that parties desire arbitrators have issued awards in favour of their legal position. This means that an arbitrator's chances of being appointed again increase with each appointment, hence perpetuating this revolving door.

On the other hand, those who see no wrong with the practice argue that there is a relatively small pool of arbitrators that can sit in complex, multi-million dollar type of arbitrations and thus limiting qualified individuals from sitting as arbitrator due to work as legal counsel would undermine the quality and respect for the arbitral system. Further, it is contended that there is an "economic argument" for not limiting the practice of double hatting: many legal counsel seeking to become full time arbitrators cannot justify giving up their counsel practice when there is no guarantee that arbitral appointments will come in the future.[5]

So, why close the revolving door? Is it necessary? Is it time?

We advance the argument that it is necessary, and an opportune time to close the door. It is undeniable that concerns about double hatting go to the root of the arbitral system: independence and impartiality of arbitrators. Sands in his speech at the 2015 European Society of International Law conference referred to the practice of double hatting as 'deplorable'[6]. It also goes without saying that repeat and double appointments of arbitrators do nothing to solve the salient problem of diversity in International Arbitration.

Diversity has been, and continues to be, a seminal topic. There is an increased call for gender and ethnic diversity in international arbitration, that is to say, inclusion of individuals of varied racial, ethnic, gender and social backgrounds. A survey by BCLP, a global law firm[7], establishes that 50% of respondents thought that it was desirable to have gender balance on arbitral tribunals whilst 54% believe that ethnicity and national background should be a factor in considering the choice of an arbitrator.

[4] Arbitrator and Counsel: the Double Hat Syndrome', Global Arbitration Review (15 March 2012).

[5] Langford, Behn & Lie, p23 supra.

[6] ESIL Reflection -The Ethics and Empirics of Double Hatting, Vol.6 issue 7 -Malcolm Langford , Daniel Behn

[7] https://www.bclplaw.com/en-US/thought-leadership/diversity-on-arbitral-tribunals-are-we-getting-there.html accessed on 14 June 2019.

The question of whether it is necessary, and timely, to close the revolving door is, to us, a rhetoric one. We posit that the diversity of views that can be brought to the fore in arbitral awards handed down by "gender and ethnic neutral" tribunals, will only make the process fairer, and the outcome, more widely acceptable. Empirical studies would certainly need to be undertaken to validate our viewpoint.

What is, however, undeniable is that whilst the stakes in arbitration cases are always high, it goes without saying that double hatting does not in any way guarantee efficiency of the arbitral proceedings simply because the parties involved either as counsel or arbitrators are familiar with the process. On the contrary, it may raise ethical concerns, which cause undue delay in the proceedings and the ever-growing criticisms that there is a tight knit, special group of arbitrators who take on dual roles, only continue to bear more weight. In any event today, there is a highly competitive arbitration market with a large pool of experienced arbitrators and legal counsel, young and old.

Some form of remedy lies, we strongly believe, in proposals such as Arbitrator Intelligence, the brain-child of the distinguished Professor Catherine Rogers. The platform is a global information aggregator that collects and analyses critical information about international arbitrator decision making with a view to making the selection of arbitrators in international arbitration more transparent, and diverse. We believe this is a brilliant step towards remedying the diversity issue not only in nationality but in gender as it provides stakeholders in the Arbitration world, from potential clients to counsel and even to arbitrators, with a key ingredient: information about other counsel and arbitrators with experience to handle arbitral disputes.

1111 words less references, names and title.

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