TRANSCRIPT

PBA: Today, we share our exchange with Maître Christophe Seraglini ! Hello !

Christophe Seraglini : Hello!

PBA : Christophe Seraglini, you are an Associate Professor at the Faculty of Law of Paris - Sud, where you are also the co-director of the Master 2 in Domestic and International Contract Law. You are a partner at Freshfields and you are also an arbitrator. Therefore, you have considerable experience in handling international investment disputes, both as a lawyer and as an arbitrator.

We are pleased to have the opportunity to speak with a leading expert in arbitration law and more specifically in investment arbitration law.

We are delighted that you agreed to meet with us and we thank you again.

Christophe Seraglini : You are very welcome.

PBA : Together, we will discuss a topic in which you have a great deal of experience - the situation in which companies challenge States in Investment Arbitration.

Today, more than 3,000 international treaties contain Arbitration clauses, and at the request of the private sector's lobbies and governments, they are increasingly being incorporated into trade and investment agreements.

Arbitration tribunals allow multinational corporations to sue States, whether they are major powers or developing countries. Originally, Investment Arbitration was an ad hoc solution designed to protect investors and their activities in developing countries.

Has the paradigm shifted ? Are multinational companies now taking precedence over States? What reforms should be considered, from the point of view of the various stakeholders, in the interest of a system perceived as more legitimate ?

These are some of the questions that we will try to answer.

Professor, what do you think about the legitimacy of Investment Arbitration?

Christophe Seraglini : It's a broad topic. I think that we need to go back to what you said in your introduction. We have to look at the origin.

Investment Arbitration was created as a palliative to what existed for an investor in terms of its own protection. Indeed, the possibilities for the investor who wanted to complain about the State's behavior were limited.

The first possibility for the investor was the situation in which he is bound by a contract with the State in question. This contract needs to provide the possibility of Arbitration. This is usually the case for large investments for important projects.

The second possibility for the investor was to ask for diplomatic protection by his own State. But this possibility involves certain risks. We can never be sure that the State will in fact accept to act in defense of a private person.

The third possibility for the investor was to go in front of the courts of the State in question, but with all the risks that this may entail in terms of independence or impartiality of justice - whether they are proven or assumed by the investor.

So originally, Investment Arbitration was created based on a legitimate idea - to offer a way for any investor to be able to protect itself.

At first, it may have more benefited multinationals companies but today it's not the case anymore. It can be used for any kind of investment as long as it meets the definition of investor and investment of the treaty concerned. So much smaller investors can use investment Arbitration.

Therefore, today the evolution of the mechanism can be discussed. But its primary idea — which means the problem to which it responded — is still relevant.

PBA : In your opinion, do you think that this use of Investment Arbitration creates a situation in which multinationals abuse of this private justice?

Christophe Seraglini : As said before, Investment Arbitration is now used by all kinds of investors.

Like any kind of justice, it can always be abused. But to say that there would be a tendency of abuse in investment Arbitration seems to be excessive to me. Most of the claimants who are going to act are going to do so because they believe, rightly or wrongly, that they are within their rights and that they are not abusing the mechanism. One does not launch an action lightly, because an action has a cost.

There can be abuses of course - abuse of legal action exists in all kinds of matter, even before State courts, and even for internal disputes.

But one should not confuse this idea with another. One can sometimes see in the press that a company is going to act against a State to complain about measures that may seem legitimate, such as the exercise of legitimate power by the State. But it is important to distinguish the idea that an investor has taken an action against the State and the fact that the investor wins the case in the end.

In the end, if the company concerned loses, it is rather reassuring that the system is working well.

PBA : In your opinion, is the case law favorable to investors?

Christophe Seraglini : I don't think so, and I think the statistics can prove my point. I don't think that we can declare that there is a favor to investors.

It all depends on the issue that is being addressed. Is there a favor in the jurisprudence to retain jurisdiction? This is the first question. To answer his question, the arbitration tribunal must consider that it is faced with an investment and an investor under the conditions set out in the treaty concerned. But it is another question altogether to retain that the statistics show that the investors are granted damages when they complain in front of an arbitral tribunal. Do we see a real favoring of arbitral tribunals on this issue? I don't think so.

Sometimes it goes in one direction, sometimes in another. I don't think that we can consider that it is a system in which there is a favor for the investor and against the States.

PBA : Do you think that the freedom of choice of arbitrators can influence awards for States or investors? Are there typical profiles of arbitrators appointed by States and others by investors?

Christophe Seraglini : Actually, there are several questions to answer.

First, I will give considerations that are not specific to investment Arbitration but concern Arbitration in general. Indeed, these discussions are also going on in commercial Arbitration. Should we leave the choice of arbitrators to the parties? One of the arguments raised to go against this possibility is that it is a way to authorize the parties to name arbitrators that suit them. It is an argument that is attached to a very caricatured vision of a totally partisan arbitrator lacking independence and impartiality. But even if put this caricatured vision on the side, is there a legitimate doubt that an arbitrator appointed by a party will be inclined - even if he is independent and impartial - to be favorable to the thesis of this party ? As said before, it is a question that concerns commercial Arbitration as well as Investment Arbitration.

But there is a particularity to Investment Arbitration. This distinction could be exacerbated because we will be able to label arbitrators as pro-investor and pro-state arbitrators. Some allow themselves to be lumped into those labels to generate more appointments.

I couldn't tell you that this distinction doesn't exist, but I don't think it's the majority. Above all, the world of arbitrators is a world that has evolved a lot in recent years. Before, we tended to think that there was a very limited number of arbitrators. But it has become a much more democratic world. More globally, the world of arbitration is taken by a wave of modernization. The users of arbitration are more and more numerous. It is not only a prerogative of large companies anymore. And also on the side of the different institutions, there is a certain kind of democratization. For example, Arbitration institutions are making great efforts to renew their panel of arbitrators. With this movement of modernization, these caricatured positions tend to fade away.

Secondly, even if one were to consider that the caricatured vision is true, there would be some kind of balance. The investor appoints an arbitrator who suits him, so does the State ; therefore it is neutralized somehow. Everything will then be played out at the level of the President of the Arbitration tribunal. But in this caricatured vision, the President can then find himself a bit alone.

But from experience, the so-called partisan arbitrator is not the majority today. And compared to the advantages that come with choosing an arbitrator, I find that these disadvantages are outweighed. Indeed, there are a certain number of benefits to it, when we can choose our judges we can choose someone who is an expert on the issues of the case. For example, if the case needs an arbitrator with a solid mathematical mind and knows about finance, the parties won’t want to end up with someone who doesn't have these qualities and will evaluate the prejudice randomly. When we give the option to the parties to choose the arbitrators, they will be able to select a profile, expertise, a reputation that corresponds to the field of the litigation.

But one can and must be demanding to reinforce the requirements of independence and impartiality of the arbitrators.

PBA : In practice, what is the solution for a developing State being attacked by a multinational company whose turnover is higher than its GDP?

Christophe Seraglini : There are many States that decide to represent themselves and not call on lawyers. They will be represented by the Minister of Justice for example.

Being in a situation where there is an unbalanced financial relation, with a strong party and a weaker one, can be seen in all kinds of matters. It is a situation that can exist in front of domestic courts too. For example, when you are a small producer of some raw material and you are attacked by a huge group, how can you defend yourself?

But when the State is a defendant, there are a certain number of mechanisms in a certain number of Arbitrations that allow the State not to advance its share of the Arbitration costs and let the claimant advance it for him. It will still be necessary to pay the counsels but there are ways to limit the costs.

I could not say that a huge multinational could not take advantage to put excessive pressure on a developing State for example. But It is necessary to know that the multinational company exposes itself too by taking action. *In fine*, if the arbitral tribunal considers that this procedure is abusive or unfounded, it will be able to put at the charge of the multinational company, the expenses of the arbitration which can be raised.

But there are indeed companies that have almost unlimited means and that can attack smaller contractual partners. Unfortunately, this kind of power relations can be seen everywhere.

PBA : Therefore, how would you describe in 3 words the ideal future of investment arbitrage?

Christophe Seraglini : There have been challenges, and there are still challenges ; we must be aware of them and listen to the arguments that are brought up in the discussions.

The balance of power in these Arbitrations need to be rebalanced. There probably needs to be more transparency. But all this is being worked on at the international level, we are on the way to progress.

It would also be necessary to have a system of requirements - even more than in commercial Arbitration - regarding the position of the arbitrators, their independence and their impartiality. There are plans to replace these arbitrations with permanent courts for the settlement of these disputes. But for those projects, there are still pending questions left unanswered. Who will appoint the judges ? What will be their profiles ? We will have to wait and see the exact modalities. Europe is very favorable to this approach.

But if we were to stay with investment Arbitration as it exists today, I think we are in the process of tending to a reform. The world of Arbitration has listened to many critics, and it can probably continue to improve.

Ideally, for investment Arbitration, we need to arrive at the same kind of balance that there is commercial Arbitration. In commercial Arbitration, the balance of power is generally relatively balanced. For example, when a State is part of a commercial Arbitration — that is to say, when it has in front of it its co-contractor within the framework of a contract — it generally defends itself very well. It can make counterclaims against this private party, it knows how to handle that very well.

PBA : Thank you very much! We thank you for answering all our questions, and we are sure that this exchange will be valuable for the students and professionals who listen to us.