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FACT FINDING AND *IURA NOVIT CURIA* IN ARBITRATION: HOW FAR DO ARBITRATORS' POWERS REACH?

ITA IN REVIEW

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ETHICALLY CHALLENGED? A COMMENTARY

by Francis Ojok

I. INTRODUCTION

From January 20-21, 2022, the Institute for Transnational Arbitration in conjunction with the Institute for Energy Law of The Center for American and International Law and the International Chamber of Commerce ("ICC") hosted the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration. The conference reviewed the past year and looked to the year ahead in arbitration of international energy disputes. The event featured highly recognized international arbitration practitioners and covered a wide range of topics. The focus of this report is on a panel titled, "Ethically challenged? The increasing prevalence of challenges to arbitrators in both investor-state and contractual disputes."

This panel was moderated by Mr. William W. Russell, Counsel at Reed Smith LLP, Houston, and adjunct professor of international commercial arbitration at the University of Houston Law Center. The members of the panel were Ms. Claudia Salomon, the President of the ICC Court of Arbitration. She is the first woman to serve as President of the ICC in its almost 100 years. Mr. Gonzalo Flores, the Deputy Secretary General at the International Centre for the Settlement of Investment Disputes (ICSID). He has been with ICSID since 1998 and has participated in all the ICSID arbitration challenges except one. Mr. Doak Bishop, a partner at King & Spalding. He has served as arbitrator in over 70 arbitrations in all the major institutions both in commercial and investor-state arbitrations. Professor Loukas Mistelis, a distinguished professor of Transnational Commercial Law and Arbitration, and a Director of the Institute of Transnational Commercial Law, at Queen Mary University of London, School of Law.

The panel focused on the increasing prevalence of challenges to arbitrators in both investor-state arbitration and commercial arbitration.

II. DEFINING ARBITRATION

The moderator, Mr. Russell, commenced the discussion by defining what

arbitration is. In his view, arbitration at its core is the decision by parties to opt out of the national court system and to establish their own alternative process to resolve the dispute. He noted that the legitimacy of the process is the foundation of arbitration. A central component to maintaining arbitration's legitimacy is ensuring the impartiality and independence of the arbitrator(s).

According to him, there are two important tools to ensure impartiality and independence: (1) having informed parties, which is achievable through disclosures, and (2) having the tools to challenge arbitrators who do not meet impartiality and independence standards. Paradoxically, these same tools can also be used to undermine the process.

III. ICC'S ASSESSMENT OF AN ARBITRATOR'S DISCLOSURE OBLIGATIONS

Mr. Russell posed a question addressing the ICC's assessment of what an arbitrator needs to disclose and the consequences of their failure to do so.

Ms. Salomon noted that one of the key functions of arbitral institutions is to vet prospective arbitrators for independence and impartiality, and the ICC is no exception in this respect. Under the ICC Rules, every arbitrator must be independent and impartial of the parties involved in the arbitration.[1] Under Article 11(2) of the ICC Rules, arbitrators have a duty to disclose any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.[2] Article 14 of the ICC Rules provides that an arbitrator may be challenged for an alleged lack of impartiality or independence.[3]

To decide whether to accept the challenge, the ICC does a two-part analysis. They first look at whether the challenge is timely, *i.e.*, whether it is submitted within 30 days from the time of appointment, or from when parties making the challenge were informed of the facts and circumstances on which the challenge is based.

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[1] ICC Rules Arbitration (2021), *available at* https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

[2] *Id.* at Art. 11(2).

[3] *Id.* at Art. 14.

If the request is timely, the ICC will decide the merits of the challenge. In doing so, the ICC considers a range of factors and sources. Significant weight is accorded to decisions taken in previous cases that were based on similar facts and circumstances. It also considers international sources such as the IBA Guidelines on Conflicts of Interest.[4]

To maintain full transparency, ICC allows parties to request the reasoning for its decision on challenges. The ICC's most common grounds for challenges are: (i) relationships with other members of the tribunal or counsel; (ii) relationships with one of the parties, either directly or through the arbitrator's law firm; (iii) lack of impartiality, grounded on the argument of due process, manifest bias, improper conduct, and failure to conduct arbitral proceedings in accordance with the rules; (iv) repeat appointments of an arbitrator by the parties, counsel or law firm; and (v) non-disclosure of potential conflicts.

IV. ARBITRATOR CHALLENGES BASED ON REPEAT APPOINTMENTS

Regarding repeat appointments, there are two common scenarios that arise. First, where an arbitrator was appointed in another case involving one of the parties with overlapping issues. The ICC's position on this scenario is that multiple overlapping appointments with one or some common parties concerning the same or overlapping subject matter could potentially give rise to a reasonable doubt as to arbitrator's impartiality. The ICC's concern is information asymmetry for one of the arbitrators, *i.e.*, he or she could have access to information that is relevant to the case but not available to all parties.

The second component is repeat appointment of an arbitrator by a party involving different matters or repeat appointment of an arbitrator by counsel. Paragraph 27 of the ICC's note to parties enumerates what should be disclosed.[5] Specifically, if the arbitrator or prospective arbitrator has been appointed as an arbitrator by one of the

[4] IBA Guidelines on Conflicts of Interest in International Arbitration (Oct. 23, 2014), *available at* https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 [hereinafter "IBA Guidelines"].

[5] International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration ¶ 27 (Jan. 1, 2021).

parties (or its affiliates) or by counsel (or their law firm), such relationship must be disclosed. The ICC's note does not have a timeframe which differentiates it from the IBA Guidelines 3.1(3) and 3.3(8) on the orange list, which have a three-year window.[6]

V. CHALLENGE ON THE GROUND OF NON-DISCLOSURE

The issue here is the arbitrator's belated, partial, or even complete lack of disclosure as a ground of challenge. Is non-disclosure a separate ground? Or, is it raised to support the main ground?

Few disqualifications have resulted from failure to disclose, alone. But it is considered by the ICC as a factor in assessing whether a challenge is well founded. In exceptional circumstances, there have been instances where the ICC has accepted a challenge on nondisclosure grounds. In doing so, the ICC considered the behavior of the prospective arbitrator in not disclosing facts and circumstances.

In 2020, there were over 1500 arbitrators appointed in ICC cases. There were 92 challenges, of which only five were accepted. Statistically, that means challenges are accepted in about 4% of cases, with a success rate in about a half of a percent.

VI. ICSID ASSESSMENT OF AN ARBITRATOR'S DUTY TO DISCLOSE

According to Mr. Flores, things that are paramount to the legitimacy of the system are: (i) an arbitrator's independence and impartiality and (ii) allowing participants to have sufficient information about the arbitrators. Parties need to know who is being appointed.

Under the ICSID arbitration rules, arbitrators are obligated to disclose any circumstances that may cause their independence, impartiality, confidentiality, or availability to be questioned. The idea behind full disclosure is: (i) to prevent challenges by making sure the parties have all the information they need at the start of the arbitration proceedings, and (ii) for arbitrators to have all the information necessary to decide whether to accept an appointment in a completely transparent situation.

Recently, ICSID distributed to all its member states a package to vote on ICSID's

[6] IBA Guidelines, *supra* note 4, §§ 3.1(3), 3.3(8).

proposals to amend its rules. In recognition of the importance of arbitrator disclosures, ICSID's proposed new arbitration rules require disclosure of third-party funders, which is not included in the current rules and expand the arbitrator's obligation to disclose relationships with the parties, counsel, and members of the tribunal within a five-year period. Thus, ICSID is seeking to expand an arbitrator's disclosure obligations.

VII. CHALLENGES BASED ON REPEAT APPOINTMENTS

According to Mr. Flores, there is a rise in challenges based on repeat appointment of arbitrators. There is also an increasing number of repeated challenges of arbitrators over the course of proceedings. This is presumably due to ICSID's increased caseload and efforts to increase transparency. ICSID's position is that users should be free to take advantage of the different tools that are available to ensure the legitimacy of the proceedings. As such, the concern should not be the right of the parties to propose disqualification when it is founded. Rather, the focus should be on the procedural consequences of the motion, which can be used to tackle the possibility of frivolous challenges.

Under the ICSID arbitration rules, when parties propose to disqualify an arbitrator, the proceeding on the merits is automatically suspended.[7] This has attracted criticism from practitioners and scholars who argue that the rule entices the proposal for disqualification purposefully for a dilatory tactics, *i.e.*, to simply delay or derail the proceedings. ICSID proposed changing the current rule to suspend the merits proceeding, but most users prefer to keep the suspension rule. Parties can, however, agree not to suspend the proceedings during the disqualification process.

To tackle fear of delays resulting from challenges, ICSID has proposed a more expedited procedure for challenges. The idea is that it should be concluded within 60 days. ICSID will also remind the parties that they can derogate from the rule of suspension and proceed with the arbitration.

Another element that ICSID is incorporating in the proposed arbitration rule is a

[7] ICSID Rules of Procedure for Arbitration Proceedings, Rule 9(6) (Apr. 15, 2006) [hereinafter "ICSID Rules"].

notion that the tribunal must take into consideration the conduct of the parties when they are allocating costs. They also seek to remind tribunals of their power to issue an interim award of costs during the proceedings and before the final award. According to Mr. Flores, these procedural measures would likely minimize the negative consequences of unmeritorious challenges.

VIII. PARTIES ENGAGED IN REPEATED CHALLENGES

There are two ICSID arbitration cases involving Venezuela in which there where repeated challenges.[8]

In one of those cases, Venezuela lodged six challenges. The first challenge was after the arbitrator's firm merged with Norton Rose Fulbright LLP. The challenged arbitrator resigned from his law firm after the challenge was filed and it was rejected. The same arbitrator was later challenged for a second time along with the chairman of the tribunal for having a "general negative attitude" toward the case, allegedly relying too much on claimant's representations. That challenge was also rejected. The same arbitrator was later challenged for a third time along with the chairman for a second time. Their ground for challenge was a negative attitude because of an alleged ongoing relationship with Norton Rose Fulbright LLP. This challenge was also rejected. He was again challenged three more times over the next two years for different aspects of an alleged relationship with Norton Rose Fulbright LLP.[9]

In another case, *Fábrica de Vidrios v. Venezuela*,[10] Venezuela challenged the arbitrator, Stephen Drymer, four times. ICSID rejected all four challenges. One could certainly see those challenges as obstruction tactics, delay tactics, and abuses.

IX. CONSEQUENCES OF REPEAT CHALLENGES

There are several potential consequences of repeat challenges. These include: (i) a tribunal may award costs against the party who makes repeated challenges without justification, (ii) an injunction to stop repeat and future challenge, and (iii) adverse

[8] Liberty Seguros, Compañía de Seguros y Reaseguros v. Venezuela, ICSID Case No. ARB(AF)/20/3 (2020); Fábrica de Vidrios Los Andes, C.A. v. Venezuela, ICSID Case No. ARB/12/21, Award (Oct. 17, 2017).

[9] Liberty Seguros, ICSID Case No. ARB(AF)/20/3.

[10] Fábrica de Vidrios Los Andes, ICSID Case No. ARB/12/21.

inferences. According to Mr. Bishop, there is a fourth option, namely, changing or removing the automatic suspension rule under the ICSID Arbitration Rules.[11]

X. CHALLENGING THE ENTIRE TRIBUNAL

The panel then discussed instances of parties challenging the entire tribunal and making challenges based on the ruling or procedural issue that they do not like. According to Mr. Bishop, instances of parties challenging the entire tribunal are on the rise.

Mr. Bishop then went on to address questions such as why do parties ever challenge the entire tribunal? Are they ever effective?

According to him, the case *Chevron v. Ecuador* is instructive.[12] Ecuador challenged the entire tribunal on several grounds, one of which had to do with the merits of certain interim measures decisions. The secretary general of the PCA issued a 45-page decision rejecting all the challenges. The secretary general said the law did not allow him to pass judgment on the correctness of the tribunal decision and substitute his own views in place of theirs. Instead, the secretary general assesses whether the decisions were so unreasonable that bias is the most likely explanation for them. He rejected the challenge finding that there was no justifiable doubt of impartiality and no appearance of bias.[13]

There was also an LCIA Arbitration where a party challenged all three arbitrators for improperly delegating their decision-making authority to the tribunal secretary.[14] The challenge occurred after the chairman mistakenly sent an email to the plaintiff which was intended for the secretary to the tribunal. The email asked the secretary a question "your reaction to this latest from the claimant"? The LCIA decided that this email alone did not prove improper delegation of authority by the tribunal, and they rejected the challenge. The case went to the English commercial court. It also

[11] ICSID Rules, *supra* note 7, Rule 9(6).

[12] Chevron Corp. v. Ecuador, PCA, Award (Aug. 31, 2011).

[13] *Id.*

[14] P v. QRS & U, LCIA, Award (2015).

agreed with the LCIA's decision.[15] Conversely, in Italy a party challenged an award because a tribunal which was composed entirely of construction specialists hired a lawyer to draft the award for them. The Italian Supreme court held that the tribunal effectively delegated its decision-making authority and annulled the award.

XI. CONSEQUENCES OF RAISING TACTICAL CHALLENGES

The most obvious repercussion for such challenges is cost awards. However, tactical challenges can also result in questions or concerns about the counsel's credibility, as well as the client's. Constant challenges may also create a hostile attitude towards the case. According to Professor Mistelis, if ever one is being challenged, the arbitrator could consider resigning. However, assessing whether a particular challenge is tactical or legitimate is difficult for the tribunal to make. Finding the right balance is not always very clear.

XII. DIFFERING APPROACHES AMONG INSTITUTIONS AND NATIONAL COURTS

Faced with the issue of arbitrator's challenge, national courts and arbitral institutions operate based on their practice and on the law. In the law, there have been significant approximations, but it is rather bare. Reasonable doubt as to the impartiality and independence would justify the challenge, but it is not known beyond that, *e.g.*, whether non-disclosure should result in disqualification. That is where there is a lot of divergence.

In Professor Mistelis's observation, national courts have become much more relaxed about challenges. However, the institutions have become a bit stricter. The reason for this is that institutions need to serve the role as gatekeepers of arbitration. National courts also have that role to some extent, but they seem hesitant to remove an arbitrator. Indeed, some courts would almost never remove an arbitrator. For example, in the case of *Tecnimont v. Avax* in France, there was a different decision in the ICC and in *Cour de Cassation* as to whether to remove the arbitrators.[16]

Professor Mistelis further explained that the better-known the arbitrator is, the

[15] P v Q and others, [2017] EWHC (Comm) 194.

[16] Cour de Cassation [Cass.] [Supreme Court] Paris, 1e ch., Société Tecnimont S.p.A. v. J.&P. Avax (Case No. 11-26529), June 25, 2014; Cour d'Appel [CA] [Court of Appeals] Paris, Société J.&P. Avax v. Société Tecnimont S.p.A. (Case No. 14/14884), April 12 2016.

less likely that he or she is going to be removed. That is the point the English court of appeal made in *AT&T Corporation & Anor v Saudi Cable Company*.[17] The challenged arbitrator was the then president of the LCIA. He filed a statement to the court saying that he made a genuine mistake. The court did not uphold the challenge. If the arbitrator were lesser known, the result might have been different.

Ms. Salomon concluded the session, explaining that the reason for the diverging approaches between the arbitral institutions and national courts is due to the stage of the arbitration proceeding. Institutions assess the challenge during the arbitration. Institutions are not involved in upending the outcome of the arbitration as the national court is asked to do in the enforcement stage.

Additionally, arbitral institutions do not typically decide to accept a challenge on the ground of non-disclosure alone. Rather, it is one of many factors, which is ultimately, a requirement with "no teeth." So, how can we insist on disclosure but then there would not be any consequences for the lack of disclosure? Ms. Salomon does not believe this is satisfactory to the global business community, and ultimately, it threatens the legitimacy of arbitration. The issue must be examined more closely.

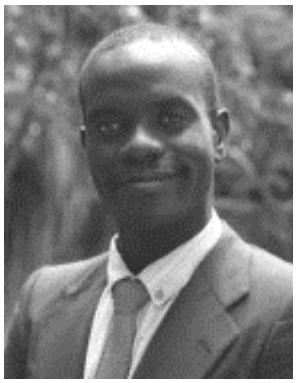
XIII. CONCLUSION

With the growth in global commerce, the use of arbitration as a neutral alternative forum for a just and fair determination of disputes is increasing. It is therefore imperative that the various users of arbitration have confidence in the system. This is achievable by arbitral institutions setting acceptable standards regarding disclosure of potential conflicts and imposing consequences for failure to meet those standards. Other stakeholders, *i.e.*, arbitrators, parties, and the tribunal support staff, must also exercise their self-policing duty to maintain transparency, by disclosing all facts that might create doubt about an arbitrator's independence and impartiality.

Depending on the facts disclosed, a challenge to one or more of the arbitrators may be appropriate. Many challenges are brought in good faith. However, some parties bring a challenge to gain a perceived tactical advantage, for example, to delay the proceedings and, potentially, to gain leniency from an arbitrator. Tactical

[17] *AT&T Corp. & Anor v Saudi Cable Co.*, [2000] EWCA (Civ) 154 (May 15, 2000).

challenges often increase costs and decrease efficiency. In turn, such challenges can decrease confidence in the system among the users. To reduce the number of tactical challenges, it is important that parties have clear guidance on when a challenge is appropriate and on the potential consequences for bringing an unmeritorious challenge.



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