Dangerous Liaisons in International Investment Arbitration: The Annulment of the Eiser V Spain ICSID Award

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In a recent decision, in *Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v Kingdom of Spain* (ICSID Case No. ARB/13/36), an International Centre for Settlement of Investment Disputes (ICSID) ad-hoc committee decided to annul an award in its entirety. The reason being a conflict of interest. For the first time in ICSID's history, an award is annulled on the grounds of improper constitution of the tribunal and a serious departure from a fundamental rule of procedure.

Background of the Dispute

The claim was brought by Eiser Infrastructure Limited and Energia Solar (collectively the "**Eiser Parties**") under the Energy Charter Treaty. The Eiser Parties alleged that regulatory reforms relating to the energy sector implemented by Spain caused them to suffer €256 million in damages. The ICSID Tribunal (the "**Tribunal**") unanimously determined that Spain had violated its international obligations and awarded the Eiser Parties €128 million inclusive of interest.

In the annulment proceedings, the ad hoc committee (the "**Committee**") concluded that Spain had sufficiently demonstrated that the undisclosed business relationship between the arbitrator appointed by the Eiser Parties, Mr Stanimir A. Alexandrov, and the Eiser Parties' experts, the Brattle Group, had been improper. As a result, the Committee annulled the award on the following grounds: (i) an improper constitution of the Tribunal, and (ii) a serious departure from a fundamental rule of procedure.

Improper constitution of the tribunal

First, the Committee considered whether the Tribunal had been properly constituted. In doing so, the Committee examined the parties' respective interpretations of Article 52(1)(a) of the ICSID Convention, before turning to the issue of the applicable standard when determining if an award should be annulled under Article 52(1)(a).

The interpretation guideline of Article 52(1)(a) of the ICSID Convention

The Committee interpreted Article 52(1)(a) of the ICSID Convention by considering the following parameters:

- The text

The Eiser Parties' assertion that the provision only applies to procedural deficiencies regarding the constitution of the Tribunal at the outset of the arbitration was rejected. Instead, the Committee reasoned that "the Tribunal must have not only been correctly formed, initially but must also continued to remain so for the duration of its existence".[fn]para. 158.[/fn]

- The context

The Committee explained that Article 14(1) of the ICSID Convention sets out the qualifications of arbitrators designated to sit on arbitral tribunals. The Committee then rejected the Eiser Parties' reasoning that a failure to exercise "independent judgement" cannot provide a ground for annulment. The Committee instead reasoned that "a tribunal cannot be held to be 'properly constituted' under Article

52(1)(a) where an arbitrator, whose ability to exercise independent judgment is in doubt, is either appointed to or continues to be a member of, a tribunal".[fn]para. 167.[/fn] In the same manner, the Committee also dismissed Eiser Parties' argument that the award should be revised rather than annulled.

- Object and Purpose

The Committee stated that the object and purpose of the provision is centred around the notions of procedural legitimacy and procedural integrity. The Committee went on to emphasise that there is no greater threat to the legitimacy and integrity of the proceedings than the lack of impartiality of independence of one or more of the arbitrators.[fn]para. 175.[/fn]

- Interpretation in accordance with relevant rules of international law

The Committee highlighted that its interpretation of Article 52(1)(a) is consistent with Article 31(3)(c) of the Vienna Convention, which provides that relevant rules of international law applicable to the relations between the parties shall be taken into account. The Committee went on the state that the right to an independent and impartial tribunal has been recognised as a general principle of international law and that, therefore, this rule must be considered when interpreting the meaning of "improper constitution" under Article 52(1)(a). The Committee concluded that: "for purposes of determining whether the Tribunal was properly constituted, it has the authority to examine whether the members of the Tribunal were and remained (and were seen to be/remain) impartial and independent throughout the proceedings".[fn]para. 178.[/fn]

What is the applicable standard then?

The Committee applied a similar test as the three-step test set out in *EDF v Argentina*; namely:

1. was the right to raise this matter waived because the party concerned had not raised it sufficiently promptly?
2. if not, has the party seeking annulment established that a third party would find a visible or obvious appearance of lack of impartiality or independence on the part of an arbitrator on a reasonable evaluation of

the facts of the case (the Blue Bank standard)? and
3. if so, could the manifestly apparent lack of impartiality or independence on the part of that arbitrator have had a material effect on the award?[fn]para. 180.[/fn]

In relation to the first limb of the test, the Committee rejected the Eiser Parties' argument that Spain knew or should have known about the relationship between the arbitrator and the Brattle Group. It was instead opined that the Eiser Parties had failed to demonstrate that Spain was aware of the relevant information and *inter alia* that "the existence of the information in the public domain does not discharge the burden of the Eiser Parties to prove that Spain was aware of the relevant facts".[fn]para. 190.[/fn]

In analysing whether the second and third limbs of the test had been satisfied, the Committee looked at whether the standard for disqualification had been met. Consequently, the Committee stated that the appropriate standard is the one adopted in *Blue Bank v Venezuela,* where the Chairman of the Administrative Council of the ICSID disqualified the claimant's appointed arbitrator on the grounds that his law firm was acting against Venezuela in a different arbitration.

In this sense, the applicable legal standard to the Committee is an "objective standard based on a reasonable evaluation of the evidence by a third party."[fn]*Blue Bank v Venezuela*, para. 60.[/fn] Therefore, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the ICSID Convention.

Considering this standard, the Committee decided against the Eiser Parties, holding that:

1. on an assessment of the facts, an objective third party would conclude that the existence of the relationship between the arbitrator and the Brattle Group created a manifest appearance of bias; and
2. given the extent of the "past and present professional connections and interactions" between the arbitrator and The Brattle Group, the arbitrator was under a clear obligation to disclose this relationship.

A serious departure from a fundamental rule of procedure

Both parties agreed that, for an award to be annulled, a fundamental rule of procedure must be severely affected and that the right to an independent and impartial tribunal is a fundamental rule of procedure. However, the parties disagreed on the question of when there has been a departure from a cardinal rule of procedure. The Eiser Parties submitted that it was necessary to prove, firstly, that the deviation from the fundamental rule of procedure influenced the outcome of the case, and then, in a second step, that without the deviation, the result would not have been the same. Conversely, Spain argued that it only requires demonstrating a "potential effect" of the departure on the award.

According to the Committee's analysis, this fundamental rule of procedure had been violated because the arbitrator did not reveal his relationship with one of the parties, depriving Spain of having a fair trial. At the same time, the Committee also considered that if the other arbitrators had been informed of the existing relationship with one of the parties, they could have taken it into account at the stage of deliberation. As such, the Committee did not render a "blanket rule", but rather highlighted the importance of disclosure at the outset of the arbitration.

Finally, the Committee analysed whether this deviation can be considered serious according to Article 52 (1)(a) and (d) and thus have a material effect on the result. The Committee reasoned that if the other arbitrators had been aware of the relationship between Mr Stanimir A. Alexandrov and the Brattle Group, they would have given another value to the arbitrator's contributions and therefore it cannot be considered unlikely that the non-disclosure of the relationship with the expert influenced the final result.

Considering the above, the Committee annulled the award on the grounds that:

1. a conflict of interest may have existed; and
2. a failure to disclose it may have affected the outcome of the award, annulling the award, therefore.

Conclusion

At a point where stakeholders in ICSID arbitration are in desperate need for a solution to the ever-increasing bias challenge, the reasoning of the Committee is enlightening and marks the first time that a challenge on the basis that a tribunal

was improperly constituted has succeeded in an ICSID annulment proceeding. The decision of the Committee demands that tribunals meet a high degree of transparency in order to be considered “properly constituted” under Article 52 (1)(a). Going forward, there will be less and less room for members of the tribunal to have professional relationships with parties or experts involved in the arbitration.

The high bar set by the Committee will, in turn, demand that tribunal members engage in a more rigorous and comprehensive disclosure process, making more information on potential conflicts of interest available; that is, any information that may risk a decision becoming annulled, with this new standard in mind, should be carefully considered.