The Annulment of Eiser v. Spain: A Call for Improvements to the System?

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In 2017 Spain was ordered to pay Eiser €128 million on account of its failure to afford fair and equitable treatment. This award was subsequently annulled because the claimant-appointed arbitrator omitted to disclose a professional relationship with the claimants' damages expert which led to, *inter alia*, the tribunal being improperly constituted. The full costs of the proceedings, including Spain's legal fees and expenses, were shifted to Eiser.

The Annulment Decision reignited conversations about arbitrator impartiality, disclosure requirements and double hatting (including on this blog, here, here and here). Without addressing the correctness of the Annulment Decision,[fn] See e.g. Gary B. Born, International Commercial Arbitration, 3rd ed. (Kluwer Law International, 2021), Chapter 12, fn 1476, who states that the Annulment Decision is "an unrepresentative and clearly erroneous decision in the investment arbitration context."[/fn] it highlighted the lack of (i) uniform decision-making; and (ii) appropriate mechanisms for dealing with non-disclosure in an international setting, neither of which contributes to certainty or legitimacy of ISDS.

This post takes a closer look at these two issues, before concluding with some concrete solutions.

Lack of Uniformity

Compared to the total number of ICSID awards ever rendered, a rather small portion are annulled. Applications for annulment on the ground of improper constitution of the tribunal have been extremely rare and, up until the Annulment Decision in *Eiser v. Spain*, unsuccessful.

Despite the infrequent reliance on this ground, several Committees have analyzed Article 52(1)(a) of the ICSID Convention rather extensively. Yet, many Committees interpreted this provision almost anew because they did not consider themselves bound by earlier annulment decisions and contrary views expressed therein.[fn] See, e.g. *Suez 03/19*, para. 76; *Eiser*, para. 158 [/fn]

In *Azurix v. Argentina* the latter's annulment request was refused because Article 52(1)(a) could only give rise to annulment "*if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention*." If the grounds for disqualification became known only after the issuance of the award, such newly discovered fact could provide a basis for revision under Article 51 of the ICSID Convention, but not annulment.

Although in *Vivendi v. Argentina* (*Vivendi II*) the ground for disqualification became known only after the issuance of the award, the Committee deemed that the facts in question could give rise to annulment.

Similarly, in *EDF v. Argentina* the Committee held that "changes in the circumstances of an arbitrator may mean that a tribunal which was properly constituted at the outset may cease to be so during the course of the proceedings."

If there was a decision on a proposal for disqualification, a Committee could only find a ground of annulment if the refusal to disqualify the arbitrator in question was "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*." This approach was subsequently followed in annulment proceedings in *Suez 03/19* and *Suez 03/17*.

In the absence of a tribunal's disqualification decision, the Committee would, after

ensuring that there was no waiver under Rule 27, examine, *de novo*, "whether there exist grounds which a reasonable third party would consider give rise to reasonable doubts whether a member of the tribunal was sufficiently independent and impartial." If so, the Committee would finally determine whether the lack of impartiality or independence on the part of the arbitrator *could* have had (and not whether it actually had) a material effect on the award.

The Committee in *OI European Group B.V. v. Venezuela* reverted to the *Azurix* approach, holding that the lack or loss of qualities listed in Article 14(1) were to be dealt with through provisions on disqualification, found in Articles 57 and 58 of the Convention, and not through annulment.

As appears from the above, two schools of thought have developed: whereas one addressed newly discovered facts through revision (*Azurix* and *OI European Group B.V.*), the other allowed for annulment (*EDF* and the others). If the latter view is followed (as the *Eiser* Committee did), is a tribunal to be considered *in statu nascendi* throughout the proceedings? How is this reconciled with the provisions of the ICSID Convention and the ICSID Rules that refer to tribunal constitution as a specific point in time?[fn] See, e.g. Article 56 of the ICSID Convention and the following Rules of the ICSID Convention Arbitration Rules: 6, 13, 20, 30 and 41(5). [/fn] Considering that the statement of ICSID's founding Secretary General, Mr. Aron Broches ("if the grounds for disqualification only became known after the award was rendered, this would be a new fact which would enable a revision of the award") was disregarded, has the drafting history become an obsolete source of guidance? Since the view of the *EDF* Committee is that "it is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal", what is the value of Article 52(1)(a), in light of Article 52(1)(d)?

Regardless of one's views on the correctness of the outcome in each of these cases, the fact remains that the same provision was applied differently, causing parties to spend valuable resources only to end up, years later, in the same or even worse position than before. Though a plurality of interpretations is sometimes desirable, fundamental questions such as "what is 'constitution' and when is a tribunal deemed 'constituted'" should not be debatable.

Unenforceability of Disclosure Duties

The *Eiser* Annulment Decision also casts doubt on the effectiveness of disclosure duties. Undisputedly, arbitrators must be neutral and must disclose facts or circumstances that may (or may be perceived to) cloud their judgment.[fn] See, e.g. the CCAC Code of Ethics, Art. 11. [/fn] Many codes and rules specify that this duty is continuous.[fn] See, e.g. BCDR Arbitration Rules, Art. 10.6; LCIA Notes for Arbitrators, Section 2, para. 9; WTO Rules of Conduct, Section III, para. 1 and Annex 2; Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Art. 10(4), and other codes of conduct: CETA (Art. 3(3)), HKIAC (Rule 2), NAFTA (Section II, para. C), SIAC (para. 2), Vietnam International Arbitration Centre (para. 3).[/fn] Yet, the vast majority of these instruments envisage no consequence for non-disclosure. This, coupled with the fact that arbitrators enjoy immunity from legal process pursuant to Article 21 of the ICSID Convention, leaves room for nonchalance when disclosing potential conflicts.

Though the *Eiser* Committee stated that "even a disclosure by [the expert] would not have absolved [the arbitrator] from his disclosure obligations," one cannot help but notice that neither the expert, nor the Claimants' counsel saw fit to disclose the existing relationship, though both arguably have this duty. In its Article 4(4)(b), the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, requires the expert to state in their written opinion "any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel […] other witnesses and any other person or entity involved in the Arbitration" (admittedly, the CIArb Protocol did not apply in *Eiser*). Lawyers likewise have a duty of candor to the tribunal, as appears from both international [fn] e.g. the IBA International Principles on Conduct for the Legal Profession, Principle 2[/fn] and national [fn]e.g. the ABA Model Rules of Professional Conduct, Rule 3.3; the Québec Code of Professional Conduct of Lawyers, Art. 112[/fn] authorities. Whatever the reasons for non-disclosure were in *Eiser v. Spain*, it remains that there is no satisfactory way to address non-disclosure in the international context.

Solutions?

The creation of a multilateral investment court, which has been suggested as a better alternative for resolving investor-State disputes, appears to enjoy little

support, at least among the respondents to the latest Queen Mary Survey. Asking the Secretary-General to scrutinize annulment decisions before their issuance to the parties is also unlikely, as the Secretary-General ought to perform "purely administrative" duties.[fn] Gabriel Bottini, "Present and Future of ICSID Annulment: The Path to an Appellate Body?", 31(3) ICSID Review –FILJ 712, p. 726, citing the *History of the ICSID Convention*, p. 108. [/fn]

Perhaps, what the system needs to achieve uniform interpretation of the ICSID Convention is an initiative similar to the CISG Advisory Council. This private initiative comprised of leading experts promotes a uniform interpretation of the UN Convention on the International Sale of Goods by issuing opinions on specific subjects/articles. Taking this a step further, during the ongoing revision of the ICSID Rules, provisions on annulment could be supplemented to provide for something similar to the preliminary reference procedure to the European Court of Justice. Persons who are already on the ICSID Panel of Arbitrators, from which members of Committees are selected, could provide opinions to Committees regarding the Convention's specific provisions, thus ensuring their uniform interpretation and consistent application.

The consequences of non-compliance with disclosure duties could be written into the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement ("Draft Code"). A provision similar to Article 13 of the Code of Ethics of the Milan Chamber of Arbitration, which empowers the Chamber of Arbitration to replace or refuse to confirm the non-complying arbitrator in subsequent proceedings by taking into consideration the seriousness and the relevance of the violation, may prove helpful. The SIAC Code of Ethics for Arbitrators, which in paragraph 1.3 enables the Registrar of SIAC to consider an arbitrator's failure to ensure a fair determination of the dispute when fixing the quantum of their fees, may likewise serve as inspiration. Though not precisely in this context, several institutional rules (e.g. the Rules of the ICC, Appendix III, Article 2, and the Vienna International Arbitration Centre, Articles 16(6) and 44(7)) link the arbitrators' fees to the performance of their duties. Envisaging any kind of consequence for a breach of disclosure obligations would likely increase the effectiveness of the Draft Code.

In the meantime, law firms and states could guard against *Eiser*-like situations by keeping centralized records of all experts retained in any past or present matters.

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