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Disqualification Based on Multiple Appointments—Divergence in Recent ICSID Decisions?

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The four most recent ICSID disqualification decisions (*Universal Compression v. Venezuela*, *OPIC Karimum v. Venezuela*, *Tidewater v. Venezuela* and *Urbaser v. Argentina*) have unanimously rejected applications to disqualify arbitrators on ICSID tribunals. This post addresses an issue raised in three of the most recent decisions—disqualification based on repeat appointments by the same party or counsel—and the apparent divergence of views in the *Tidewater* and *OPIC Karimum* disqualification decisions as to whether repeat appointment is a neutral factor in a challenge to an arbitrator.

In *Tidewater*, the claimants challenged Venezuela’s appointee, Professor Stern, who had been appointed by Venezuela to three other ICSID tribunals in the past six years. As is well known, the Orange List in the *IBA Guidelines on Conflicts of Interest in International Arbitration* addresses multiple appointments in two sections:

3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

The two remaining members of the *Tidewater* Tribunal (Professor McLachlan and Dr Rigo), although noting that Section 3.1.3 of the IBA Orange List provides guidance, stated that whether “multiple appointments to arbitral tribunals may impugn the independence or impartiality of an arbitrator is a matter of substance, not of mere mathematical calculation” and that “either fewer or more appointments might, in combination with other factors, be needed to call into question an arbitrator’s impartiality.” (para. 59) The Two Members then stated that the “starting point is that multiple appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function” (para. 60).

This reasoning is also arguably reflected in the most recent disqualification decision, *Universal Compression v. Venezuela*. In this decision the Chairman of the Administrative Council, Mr. Robert Zoellick, rejected a challenge to Professor Stern based on her multiple appointments by Venezuela, noting that there was “no objective fact” to suggest her independence or impartiality

would be manifestly impacted by the multiple appointments (para. 77).

In contrast, in *OPIC Karimum*, where the claimant challenged Professor Sands based on multiple appointments by Venezuela and by the law firm representing Venezuela, the two remaining members of the Tribunal (Professors Jones and Tawil), expressly disagreed with the statement in *Tidewater* that multiple appointments are neutral. The Two Members state that “multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge.” (para. 47). They continued:

In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.

The Two Members therefore proceeded on the basis that multiple appointments of an arbitrator by a party or its counsel is a factor that “may lead to the conclusion that it is manifest that the arbitrator cannot be relied upon to exercise independent judgment as required by the Convention.” (para. 50). Turning to the facts, the Two Members found that the multiple appointments alone in case before them were not sufficient. In particular, the Two Members noted that there was no issue of the arbitrator being financially dependent on the party or counsel.

Although on their face the two disqualifications decisions appear to disagree over the significance of multiple appointments, from a practical perspective there appears to be little difference in how they address the concrete issues.

The *Tidewater* decision certainly suggests that multiple appointments in and of themselves are not a basis for disqualification—in that sense they are neutral. This is consistent with the inclusion of multiple appointments in the IBA’s Orange List. Depending on the facts, multiple appointments *may give* rise to justifiable doubts as to the arbitrator’s impartiality or independence. But as the *Tidewater* decision notes more than one appointment by the same party is “not necessarily suggestive of a conflict.”

As support for the proposition that multiple appointments are neutral, the Two Members reference the idea that since a claim for recusal would not lie against a judge who had heard prior cases, by the same reasoning, the rule should be no different in arbitral proceedings. This analogy seems inapposite for two reasons. First, parties in court proceedings normally do not choose the judge who will hear their case. Judges are typically assigned, not picked by a party. Second, judges have security of tenure and salaries that do not depend on reappointment in future cases. In my view, the argument that multiple appointments are not suggestive of conflict should not rest on the analogy between judge and arbitrator.

The Two Members in *Tidewater* then state that a conflict of interest may arise from multiple appointments if: “(a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator’s judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.” (para. 62)

The Two Members in *Tidewater* found that the mere fact of holding three other arbitral appointments by the same party does not, without more, indicate a manifest lack of independence or impartiality. They noted that Professor Stern holds many appointments in ICSID cases and cannot be said to be in any way dependent on one party. Second, Professor Stern had joined unanimous preliminary decisions rejecting applications made by Venezuela, suggesting Professor Stern had been appointed on subsequent occasions because of her independence (para. 64).

The decisions in both *Tidewater* and *OPIC Karimum* suggest that something more is needed than the mere fact of multiple appointment—for example a relationship of financial dependence or a decision-making history with respect to a party that raises concerns about independence and impartiality. The statement in *Tidewater* that multiple appointments are “neutral” suggests that the number of multiple appointments will never, in and of itself be sufficient to sustain a challenge. Something more is needed. In contrast, *OPIC Karimum* can be read as suggesting that multiple appointments alone could be grounds for disqualification. Yet, without additional contextual factors, disqualification only on the basis of multiple appointments would seem unjustified. Although one might imagine situations where the sheer number of multiple appointments might be sufficient to establish an evidentiary burden that there is a “manifest” lack of independence, other factors must invariably be part of that determination—including the arbitrator’s actual decision-making history. The picture is quite different between an arbitrator that has invariably sided with the state (perhaps with multiple dissenting opinions) and a decision-making history that shows mixed results.

The reasoning in *OPIC Karimum* introduces a healthy dose of *realpolitik* into the discussion of arbitrator appointment:

In a dispute resolution environment, a party’s choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute. In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.

I wonder, though, about the broader implications of this statement. Does it not equally apply to multiple appointments by a type of party? If an arbitrator is repeatedly appointed by either claimant investors or respondent states, does this not equally provide “an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.” The statement seems to reflect the truism that counsel’s recommendations and a party’s choice of arbitrator always reflects a forensic assessment that the appointee will play a role in contributing to a successful outcome of the dispute. But the mere fact that a party or counsel appoints a certain arbitrator repeatedly, or that a certain type of party (either investor or state) appoints the arbitrator, tells us little about independence and impartiality, unless one is willing to stretch the boundaries of those concepts to catch general normative predispositions. And this is very dangerous territory indeed.

The jurisprudence is clearly and rightly not going down that route. Taken together, the decisions reinforce the arguably high threshold for disqualification under Art. 57 of the ICSID (“a manifest

lack of qualities”). As noted by the Two Members in *OPIC Karimum*:

There thus exists a relatively high burden for those seeking to challenge ICSID arbitrators. The Convention’s requirement that the lack of independence be “manifest” necessitates that this lack be clearly and objectively established. Accordingly, it is not sufficient to show an appearance of a lack of impartiality or independence. (para. 45)

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