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Towards A Revised Threshold for Arbitrators' Challenges Under ICSID?

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The ICSID Convention threshold for arbitrators' challenges, upholding challenges only if arbitrators exhibit a manifest lack of the qualities required to sit as arbitrators (Art. 57 ICSID Convention), has in the past been criticized as being too strict.

Recently, however, few decisions, discussed in this post, seem to show that the ICSID "manifest" threshold is being interpreted differently, and more in line with the more common "appearance of bias" standard.

In *Blue Bank v. Venezuela*, decided in November 2013, the Chairman of the World Bank Administrative Council (Chairman), Dr. Jim Yong Kim, decided and accepted the proposal to disqualify Claimant's appointee, José María Alonso.

The posture of the case is interesting, as a double challenge to the majority of the Tribunal occurred before the Tribunal was constituted. Respondent Venezuela challenged Mr. Alonso on November 5, 2012 pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. On June 12, 2013, Claimant submitted a proposal to disqualify Dr. Torres Bernárdez pursuant also to Art. 57, ICSID Convention and Rule 9, ICSID Arbitration Rules. Claimant indicated that the majority of the Tribunal (once constituted) was challenged and accordingly requested that the Chairman decide the challenge in accordance with Art. 58 ICSID Convention. The Tribunal was constituted on August 16, 2013, with the appointment of Mr. Söderlun as the Tribunal's president. On the same date, ICSID transmitted the proposals to disqualify Mr. Alonso and Dr. Torres Bernárdez to the three members of the Tribunal, suspended proceedings and established a procedural calendar.

Dr. Torres Bernárdez resigned from the Tribunal on September 2, 2013.

Respondent's challenge was based on Mr. Alonso's partnership at Baker & McKenzie, which at the time was representing investor Claimant in another ICSID case against Venezuela. The Chairman noted [para. 66] that several facts were undisputed at the time of the proceedings, and namely that Mr. Alonso was a partner in the Madrid office of Baker & McKenzie, that Baker & McKenzie's offices in New York and Caracas currently represented the claimant in an ongoing ICSID case against Venezuela, that Mr. Alonso was not involved with that case, and that he was also a member of Baker & McKenzie's International Arbitration Steering Committee. The

Chairman applied “an objective standard based on a reasonable evaluation of the evidence by a third party” [para. 60] and interpreted the word “manifest” of Art. 57 ICSID Convention as meaning “evident” and “obvious” and relating to the ease with which the alleged lack of qualities can be perceived.” [para. 61]. Based on the facts as viewed under Articles 14(1) and 57 of the ICSID Convention, and the similarity of the issues between the two ICSID cases against Venezuela, the Chairman found that a reasonable third party would find the appearance of the lack of impartiality in Mr. Alonso’s judgment and, thus, upheld the challenge.

A similar analysis was used to resolve the challenge of an arbitrator in another recent case. In *Burlington Resources v. Ecuador*, in a decision dated December 13, 2013, the Chairman upheld the disqualification proposal of Prof. Orrego Vicuña by Respondent Ecuador.

Ecuador challenged Claimant-appointed arbitrator, Francisco Orrego Vicuña, on three grounds: first, claimant’s counsel, Freshfields Bruckhaus Deringer, had appointed Prof. Orrego Vicuña too frequently, second, he had failed to disclose the circumstances of his involvement in cases involving Freshfields, and, third, he had shown “a blatant lack of impartiality towards Ecuador as represented by his conduct during the proceedings.” [para 20]. The two unchallenged arbitrators were unable to reach a decision, and referred the case to the Chairman. The Chairman dismissed much of the proposal concerning the first and second grounds, arguing that Ecuador should have been, and likely was, well aware of Orrego Vicuña’s involvement with Freshfields before his accepted appointment, and considered those reasons to challenge untimely.

On the last ground, however, the Chairman noted that in his explanations following the challenge of July 31, 2013, Prof. Orrego Vicuña had made some allegations about the ethics of counsel for Ecuador that did “not serve any purpose in addressing the proposal for disqualification” [para. 79] and conclude that a third party undertaking a reasonable evaluation of those remarks would conclude that they “manifestly evidence[d] an appearance of lack of impartiality” with respect to the Ecuador and it counsel [paras.80 and 81]. The Chairman again explained that Art. 57 and 14(1) of the ICSID Convention “do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.” [para. 66]

Lastly, in the much discussed *Caratube v. Kazakhsan*, for the first time in ICSID’s history two unchallenged arbitrators upheld the disqualification proposal of a peer.

Similarly to the two cases discussed above, this case also involved repeated appointments by the same law firm, as well as the involvement by the arbitrator in other case against the same party. Specifically, claimant challenged Bruno Boesch on the grounds that he may prejudge the merits of the case because of his involvement in a related UNCITRAL case against Kazakhstan, which arose out of the same factual context [paras 71, 74-75], that there was an imbalance on the tribunal because of Mr. Boesch’s involvement in the other case, and that Mr. Boesch had been appointed multiple times by the Kazakhstan’s counsel, Curtis Mallet.

The unchallenged arbitrators agreed that the UNCITRAL case arose our of the same factual context and that Mr. Boesch could not be expected to “to maintain a ‘Chinese wall’ in his own mind” [para. 75]. The arbitrators explained that they did not question Mr. Boesch’s moral character, his actual impartiality, or his honesty, but concluded that “a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case [para. 91]. Accordingly, they upheld Claimants’ proposal for disqualification [para.111].

Interestingly, the adoption of this new interpretation of the challenge threshold is not confined to decision upholding challenges. For example, in *ConocoPhillips Petrozuata B.V., et al. v. Bolivia* of May 5, 2014, the Chairman of the Administrative Council rejected the challenge against Judge Kenneth Keith and Yves Fortier and held that there was no evidence that a reasonable third-party would infer a manifest lack of impartiality in the circumstances.[para. 56]

Similarly, in *Repsol S.A. and Repsol Butano S.A. v. Argentina*, dated December 13, 2013, the Chairman also rejected the challenges to Prof. Orrego Vicuña and Dr. von Wobeser and noted that in the given case, a reasonable third-party observer would not find any evidence that would prove a manifest lack of impartiality. [para. 86]

This is a significant development in ICSID jurisprudence on arbitrators' challenges, and brings the threshold adopted by the Center more in line with the threshold adopted by other international arbitral institutions.

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