

Kluwer Arbitration Blog

The Problem of Repeat Arbitrators in Investment Arbitration

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The very nature of an arbitrator requires that she or he be imbued with the principles of independence and impartiality, qualities that should never be doubted. Nonetheless, there has recently been an increased number of challenges to arbitrators in Investment Arbitrations subject to the procedures of the International Centre for Settlement of Investment Disputes (the “ICSID”). There is a strong view that the ICSID arbitrators appear to be earning an unfortunate reputation as lacking in the aforementioned independence and impartiality due to, for example, multiple appointments by the same parties or counsel who happen to be called upon to resolve similar disputes or issues at the ICSID. What is happening in practice is very far removed from the essence of such principles and, for that matter, arbitration itself. Therefore, I believe we must reflect on the parties’ willingness to exercise their freedom to appoint the arbitrator of their preference, while naturally considering the convenience of determined arbitrators’ expertise in particular issues or facts which repeatedly arise in certain cases. The other side of this coin is that multiple appointments of the same arbitrators could well be leading to an unhealthy perception of bias and credibility, putting at risk the very credibility of the ICSID system

The problem of these frequent appointments is that it could undermine the trust in an arbitrator’s impartiality and independence and might therefore affect the general trust in the ICSID as an institution. These reiterated situations are giving rise to reasonable suspicions of bias, since one of the essential reasons one resorts to arbitration is because of its aura of “trust” and this is a supremely valuable and fundamental feature of arbitration that must be preserved at all cost. If independence and impartiality are equally pertinent they are decisive for the effectiveness of the ICSID system, and it is important to examine the unusual fact that it is ever more common to see repeated the names of the arbitrators who are customarily appointed by claimants and states alike. In fact, one could make a limited list of the arbitrators appointed by determined parties and for determined subject matters and the same names will keep appearing. These inescapable facts, such as an ongoing relationship between an arbitrator and a law firm or her/his multiple appointments due to activities on another ICSID Tribunal where the same or very similar issues were dealt with, create an indelible perception of a biased arbitrator and, worse, a biased ICSID. So the relevant question here is whether all these doubts about an arbitrator’s ability to act impartially and independently – in light of reiterated and similar appointments – are in fact justified?

Case law and numerous challenges would recommend, at least, reasonable doubt. A particular case in question involves the appointment of an arbitrator that was challenged because she was appointed four times by the State and three by the same counsel, regardless of the fact that the issue discussed in the four cases was identical to an issue raised in previous arbitrations. The

challenge was rejected since the Tribunal concluded that the multiple appointments did not demonstrate a manifest lack on the arbitrator's part of the quality of independent and impartial judgment. The arbitrator's natural sympathy for the arguments raised was obvious and it clearly put the other party on an unequal footing. As if this did not suffice, the awards were identical in all four cases.

Article 57 of the ICSID Convention imposes the disqualification of an arbitrator in the event of "manifest" lack of independence. The very limited number of decisions upholding challenges and the fact that the procedure for upholding such challenges is too strict raises far too many doubts. Therefore, these weaknesses must be eliminated and procedures for challenges must be clearly and objectively established. Article 57 provides that it is not sufficient to simply give the appearance of a lack of impartiality or independence. The grand intention of this rule is none other than that of "preserving the integrity, impartiality and independence of the ICSID arbitration system", which also, naturally, tends to frustrate the speediness of the proceedings. Great weight must be given to guaranteeing such principles since one of the core issues that must be carefully considered is that a faulty application could possibly influence an arbitrator's independence of judgment and impartiality; and the other is the wobbly legitimacy of ICSID, therefore such careful consideration could have a significant impact on the future of the ICSID.

To conclude, I believe that all the circumstances on which the challenge of an arbitrator is based should be examined closely in order to determine whether it is enough to raise reasonable doubts as to a member's ability to make a free and independent decision. It is, moreover, very difficult to determine when it is sufficient to establish the appearance of dependence or bias. The Tribunal must also consider that the parties' freedom to appoint their arbitrators should not be undermined. Hence, there is a substantial burden for those seeking to challenge ICSID arbitrators since they have to predict the conduct of the arbitrator vis-à-vis multiple appointments and, at the same time, demonstrate that this could lead the arbitrator to act without independence and impartiality. Therefore, I believe that this issue must be considered seriously and discussed with closer attention since arbitrators are human beings who may have a determined position in a particular case, which is, after all, normal. That is not the problem, since it could be predictable to an extent; the issue is to being blind to this situation. There is no doubt that there is a very thin line when it comes to determining when a limit should be established to multiple appointments that would demonstrate the manifest lack of independence and impartiality required in order to grant a challenge. This will therefore depend strictly on the deliberations of the Arbitral Tribunals. I do think that the limitation on multiple appointments should be strictly imposed, since two appointments of the same arbitrator discussing the same issue obviously opens the possibility of a biased judgment, and the mere reason that such possibility exists is a risk that has to be reviewed – perhaps to preserve the very legitimacy itself of the ICSID system.

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