Kluwer Arbitration Blog

Book Launch Event: Challenges and Recusals of Arbitrators in International Investment Disputes

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By: Kiran N. Gore and Alexandros Diplas

The Blog recently featured a book review of the recently published *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*, edited by Professor Chiara Giorgetti of University of Richmond Law School. This review was a timely follow up to the December 10, 2015 book launch event hosted by Young ICSID and the American Society of International Law (ASIL) at the World Bank in Washington DC. The volume is a notable contribution to the discourse on the appointment of judges and arbitrators and features a wide range of contributors, including prominent academics, arbitrators, and practitioners.

The book launch program was well-attended and featured a panel of distinguished speakers: Andrea Carlevaris (Secretary General, ICC); John Crook (George Washington Law School); Luke Sobota (Three Crowns LLP); and Janet Whittaker (Simpson Thacher & Bartlett LLP). Among the issues discussed by the panelists was the sanctity of the arbitral decision-making process. More specifically, how can we ensure that arbitrators are impartial and independent? This discussion was of course an extension of the dialogue among the authors featured in the book. The book`s chapters include, among other things, an analysis by Judith Levine of late-in-the-game challenges and tools available to minimize their disruptive effects (Chapter 9); and observations by Judge Charles Brower informed by a series of anecdotes arising from his own experiences as a challenged arbitrator (Chapter 11). The book also provides two proposals for reform of conflict challenges.

One reform proposal is advanced in Chapter 8, “Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in *Devas v. India* and Its Impact.” In this chapter, Romain Zamour examines conflict challenges in *Devas v. India* and advocates for the application of issue conflict challenges in Investor State Dispute Settlement (ISDS). An “issue conflict” arises where an arbitrator has a particular relationship with the subject matter of a dispute, rather than with a particular party or counsel. Zamour relies on *Devas* to illustrate how issue conflict challenges can ensure that disputes are resolved before open-minded arbitrators who will entertain competing arguments concerning controversial legal issues.

In Zamour’s view, issue conflict challenges properly disqualify potential arbitrators because litigating parties are entitled to have their disputes heard by open-minded arbitrators. On balance,

he concludes that unbiased arbitrators are of greater normative importance to parties than a party's unfettered autonomy in its selection of an arbitrator.

Zamour remains unconcerned about any potential chilling effect the issue conflict framework may have on academic scholarship. He concludes that academic freedom is "not an operative principle of dispute settlement" and that in ISDS "impartiality must prevail." Zamour also dismisses as "unverifiable" the concern that arbitrators will refrain from issuing concurring or dissenting opinions and will aim for fact-specific decisions to avoid future challenges. While these contentions were not addressed specifically during the launch event, one can imagine that the complexities of practical application of this approach would give many practitioners pause.

Chapter 10, "Repeat Arbitrator Appointments in International Investment Disputes," explores repeat appointments by the same party or counsel as a ground for challenging a party-appointed arbitrator. Unlike Zamour, Sobota emphasizes the importance of objective legal standards in protecting proceedings from the risk of arbitrator bias. The implications of this risk are significant in the investment treaty context. While arbitration is borne of an interest in party autonomy, ISDS often implicates issues of public concern. This broader public interest underscores the need for impartial and independent arbitrators.

Under ICSID Convention Articles 14 and 57, disqualification of an arbitrator is allowed upon sufficient proof of a "manifest lack of independence or impartiality." In *Tidewater v. Venezuela*, the tribunal found that this standard set a "relatively high burden" and required the existence of an "aggravating factor" in addition to the repeat appointment to "clearly and objectively establish" that the arbitrator is not independent or impartial and thus subject to disqualification. This search for additional factors requires the non-challenged arbitrators to engage in a rigorous investigation of the challenged arbitrator's personal and professional circumstances in order to ascertain whether *actual bias* exists. Views expressed in prior arbitral decisions and sources of personal income are just two of the factors that such panels will scrutinize.

Sobota is critical of the "manifest" standard applied in *Tidewater* and recommends a shift toward a more objective test for arbitrator disqualification in ICSID arbitrations. The manifest standard fails to address the *appearance* of impartiality inherent in repeat appointments and falls short of the "greater role and responsibility" arbitral institutions have in promoting the integrity of the proceedings they administer. As suggested by Sundaresh Menon, the Chief Justice of Singapore, "the arbitrator today is the custodian of what is rapidly becoming the primary justice system integral to the proper functioning of international trade and commerce. This role demands that ICSID reconsider the existing balance between party autonomy and procedural fairness." This criticism was shared by others at the launch event, including Giorgetti, Whittaker, and also audience members who joined the discussion during the Q&A session.

Sobota's alternative objective standard is easily understood and applied. It asks whether an arbitrator's impartiality can reasonably be questioned. Such an objective inquiry circumvents the infinite number of obstacles involved in attempting to intuit an arbitrator's actual state of mind and allows for the application of a standard metric. For instance, repeat appointments that exceed the disclosure threshold set in the IBA Guidelines might be deemed to constitute grounds for disqualification. An objective test also neutralizes the inquiry, which serves to relieve the strain that a disqualification determination can impose on an arbitrator's professional relationships and reputation. Despite any tradeoffs resulting from this approach, Sobota remains optimistic about the "expansion and maturation" of investment arbitration and the availability of qualified arbitrators to

serve in these disputes.

Zamour and Sobota propose modest reforms that directly address many of the public's concerns regarding conflicts of interest in arbitral tribunals and both perspectives set a compelling backdrop for continuing developments in this area.

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