Kluwer Arbitration Blog

GSI v. Canada: Old Problems and New Take-Aways concerning Counsel Conflicts

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Not so long ago, as a lawyer you started your career at the same firm from which you would later retire. Today, the opposite is true. Ambitious young lawyers and sometimes even entire practice groups move to new firms. Counsel switch between in-house and law firm positions, between public and private employers, and occasionally between firms and third-party funders (TPFs).

By now, we are all accustomed to arbitrator challenges based on these kinds of interconnections. But the increased mobility and connectivity among counsel is leading to a new breed of potential conflicts of interest—those between counsel and parties in international arbitration. Like arbitrator conflicts, counsel conflicts can directly hinder the integrity of the arbitral proceedings. However, unlike arbitrator conflicts, challenges based on alleged counsel conflicts of interest have not received the attention they deserve, even if they can be equally disruptive.

As alleged counsel conflicts become more frequent and more complex, tribunals must engage with these issues more substantively and more formally. There are, however, several fundamental questions with no clear answer. Are tribunals being asked to decide a procedural issue or one of professional ethics? Which rules or standards apply, or do multiple sources apply to the same conduct? What remedies are within the tribunal's competence? All three of these issues are addressed in the recent decision issued in *GSI v. Canada*, an investment arbitration under UNCITRAL Rules and administered by ICSID. The case also raises interesting new questions about whether conflicts can exist as between third party funders (TPFs) and counsel, and how parties should manage allegations of conflicts, even as they contest them.

The Case and the Challenge

After filing their claim, but before the tribunal was constituted, GSI (Claimant) wrote to the Canadian Government (Respondent) alleging that an individual member of Respondent's legal team (Counsel) had a conflict of interest with the Claimant. The allegation was that, during her prior employment with the Claimant's TPF, Counsel obtained confidential information relevant to the arbitration. Based on (disputed) details about Counsel's access, Claimant argued that Counsel had a conflict of interest that created a serious risk of prejudice to Claimant. In light of this risk, Claimant argued, the tribunal should disqualify Counsel and another member of the Respondent's

team with whom Counsel allegedly shared the confidential information.

Respondent refuted Claimant's arguments that Counsel had received confidential information. Respondent also argued that, while employed by the TPF, Counsel was not acting as a lawyer and did not have an attorney-client relationship with Claimant. Consequently, according to Respondent, Counsel did not have any duty of loyalty to Claimant and could not have a conflict of interest with Claimant. Despite these arguments, upon notice of Claimant's concerns, Respondent voluntarily cordoned Counsel off from the case with a so-called *ethics wall* until the disqualification issue could be formally resolved.

After this exchange, but still before the tribunal had been constituted, Claimants petitioned the Federal Court of Canada to provide relief by disqualifying Counsel. As discussed in a previous blog, the Court rejected the petition on both of the arguments raised.

First, the Court determined that the composition of the Trade Law Bureau's (TLB) legal team was not a public issue and, as such, was not amenable to judicial review under the *Federal Courts Act*.

Second, the Court declined to intervene in an ongoing arbitration because Claimants had not demonstrated the arbitral tribunal's lack of jurisdiction to deal with the conflict of interests issue. In the Court's view, the tribunal was "the proper forum to deal with the issue."

Claimant's subsequent appeal was stayed pending the decision of the arbitral tribunal, before which Claimant had raised the challenge in the meantime.

The Tribunal's Decision

Ultimately, the tribunal disqualified the Counsel. In reaching this decision, the tribunal first sought to distinguish between "(1) regulating the conduct of counsel in terms of their professional duties and applicable ethical rules or (2) ensuring the integrity of the arbitration process itself, including fundamental principles of fairness, natural justice and equality as between the parties." (para. 91)

In the tribunal's view, any request falling under the former category of issues would be beyond its powers. However, the tribunal interpreted GSI's request, as falling within the second category—a request addressed to the tribunal's obligation to maintain integrity of the proceedings and ensure fundamental fairness.

Having framed the key issues as ones of procedural fairness and integrity, the tribunal then looked to international investment jurisprudence and scholarship, as well as the provisions of NAFTA (the applicable treaty) and the UNCITRAL Rules, to determine that it had jurisdiction to decide the request for disqualification. Both NAFTA and the UNCITRAL Rules grant arbitral tribunals broad discretion to conduct the proceedings in a manner that will ensure the equal treatment of both parties and their right to fully present their case. In declining to exercise its jurisdiction, the Federal Court of Canada also affirmed that arbitral tribunals have "wide latitude" in conducting the proceedings, without regard to national law.

The tribunal also looked to various cases cited by the parties, most notably *Fraport*, *Khudyan*, *Hrvatska* and *Rompetrol*. In all four of these cases, one party requested the removal of counsel representing the opposing party. In *Hrvatska* and *Rompetrol*, the alleged counsel conflicts related

to members of the arbitral tribunal and not the broader notions of procedural fairness. The *GSI* tribunal took note of the distinction and primarily relied on *Fraport* due to the similar nature of the challenge and factual background. The tribunal did not consider itself bound by prior investment awards, but nevertheless applied them as a matter of due process (as both parties relied on the same cases in their submissions) and *jurisprudence constante*.

Emphasizing that disputing parties have a fundamental right to be represented by counsel of their choice, the tribunal reasoned that *Fraport* and *Khudyan* established a high standard for the removal of counsel in international arbitration. Under this standard, mere speculations do not suffice and there must be a real risk of prejudice to justify the removal of counsel.

In light of these standards the tribunal formulated the test warranting disqualification only if:

> *[T]here is clear evidence of a material risk that [the Counsel] and [the team member] have received confidential information from Claimants about the dispute that could be of significance in the present proceedings such that there would be prejudice to the fair disposition of the dispute in this arbitration if Respondent were allowed to continue being represented by them.* (para. 143)

This test requires a tribunal to balance the risk posed by the presence of the allegedly conflicted attorney against the likelihood of prejudice to the other party. Applying this standard, the tribunal ultimately removed Counsel (but not her colleague with whom she may have allegedly shared confidential information).

The tribunal's decision rested on a finding that a real risk existed that Counsel had been exposed to confidential information and that exposure could be prejudicial to Claimant. The tribunal also expressed concern about the risk that "latent memories" may be triggered by future events, making further information available to the Respondent's team. The tribunal found no similar risk for Counsel's colleague and dismissed the challenge against him.

Take-Aways from the Decision

Arbitral tribunals will continue to face challenges to counsel based on alleged conflicts of interest, and courts will also be called on to weigh in, either on an interim basis or as part of award review. Just recently, a US appellate court was presented with a public policy challenge to a Peruvian award based on allegations of attorney side-switching (*Tecnicas Reunidas De Talara S.A.C. v. Ssk Ingenieria y Construccion S.A.C.*)

Despite the increasingly obvious need for clearer guidance about applicable standards, tribunal competences, and the inter-relationship between national rules and international standards, little has been done to formally address these issues. Not even the IBA Guidelines on Party Representation in International Arbitration address the issue. As the complexity of these issues cannot be fully resolved in a blog post, we instead provide comments on some wholly original issues raised in *GSI.*

First, *GSI* appears to be the first case to identify the potential for counsel conflicts of interest with a

TPF or a person employed by a TPF. Canada sought to side-step the issue by arguing Counsel was not serving as a lawyer while at the TPF and, as such, did not owe any duty of loyalty that would be the basis for a conflict once she joined the TLB.

Not so long ago, some TPFs raised a similar argument that they could not have conflicts of interest with arbitrators because funders were simply providing financing for the case. That argument has been summarily rejected as States, institutional rules, arbitral tribunals, and the IBA Guidelines on Conflicts of Interest have established clearer guidance for when a TPF's participation must be disclosed and when that participation may give rise to a potential conflict. Similar clarifications will be needed with respect to counsel and TPFs.

Second, the Canadian court confirmed that arbitral tribunals are "the proper forum to deal with the issue" (para. 62, emphasis in the original) and characterizing any judicial disqualification is an unnecessary interference.

This Canadian decision adds weight to one side of conflicting cases that considered whether arbitrators have the power to disqualify counsel. For example, in *Malik v. Ruttenberg*, the court reasoned that attorney disqualification "falls directly within the adjudicative functions of the arbitrator." Meanwhile, in *Wurttembergisch Fire Ins. Co. v. Republic Ins. Co.*, the court concluded any disqualification decision by a judge "would have only advisory effect upon the arbitrators" and interfere with the arbitrators' ability "to control their internal procedures."

A third take-away relates to Canada's voluntary establishment of an ethics wall, even as it contested the existence of any conflict. An ethics wall is a series of protocols within an organization, designed to create a barrier to the exchange of information between a potentially conflicted individual and others in the organization. An ethics wall is more than just an informal agreement to avoid discussing a particular case or certain topics; rather, it is a precise set of formally acknowledged procedures to prophylactically cordon off the flow of information that otherwise naturally occurs among colleagues. This can be a difficult process, especially if a change in employment that may give rise to a conflict is contemplated but is still confidential.

TLB's willingness to respond quickly and effectively to GSI's challenge, despite its obvious disagreement, undoubtedly aided the tribunal in deciding that Counsel's colleague had not received any confidential information. Indeed, it was the lack of this responsiveness in *Hrvatska* that influenced the tribunal's decision to disqualify. The tribunal in that case had specifically noted that the party's late revelation of and "subsequent insistent refusal to disclose the scope of [the allegedly conflicted lawyer's] involvement" were "errors of judgment" that "created an atmosphere of apprehension and mistrust which it is important to dispel" (para. 31).

The *GSI* case demonstrates that even with uncomfortable and disputed allegations of counsel conflicts of interest, parties can minimize the harm by adopting a common sense approach as they seek formal resolution. Those solutions, however, should not be left entirely to the discretion of the person who is allegedly conflicted or later to a tribunal or court to sort out. As the 10th anniversary of the 2013 IBA Guidelines of Party Representation in International Arbitration approaches, perhaps it is time to consider formally clarifying these issues.

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