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Challenges of Arbitrators in International Disputes: Two Tribunals Reject the "Appearance of Bias" Standard

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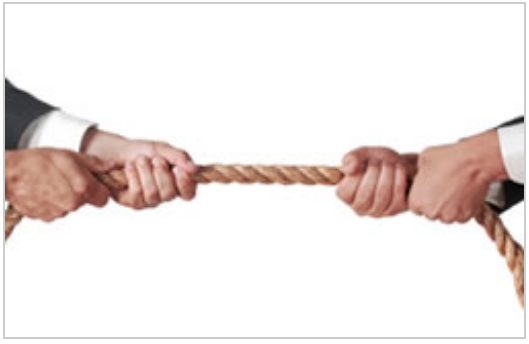

Introduction

Challenges of arbitrators in international disputes have become more common in the last ten years.[1] There are several reasons for this development, including the simple fact that, as more parties choose international arbitration as a dispute resolution mechanism, the number of overall cases has increased. The pool of arbitrators chosen to decide such cases, however, has not increased in parallel. This has resulted in more real or perceived conflicts, which in turn has resulted in challenges. Challenge procedures are also at times used to delay proceedings.

Recent decisions on challenges of arbitrators in two high-profile arbitrations underscore the increasing importance of this issue in international litigation. This *Insight* discusses the applicable standard of review and highlights some peculiarities in and consequences of challenge proceedings.

Mauritius' Challenge of Judge Greenwood

The first decision, the *Reasoned Decision on Challenge*,[2] relates to the challenge of Judge Sir Christopher Greenwood CMG QC in a dispute between the Republic of Mauritius ("Mauritius") and the United Kingdom of Great Britain and Northern Ireland ("United Kingdom" or "UK") under the 1982 UN Convention on the Law of the Sea ("UNCLOS").

In the underlying case, Mauritius had commenced arbitration in 2010, following the UK's creation of a Marine Protected Area ("MPA") in the Chagos Archipelago.[3] The Archipelago is a group of atolls in the Indian Ocean—the largest being Diego Garcia—which is administered by the UK. Mauritius argued that the establishment of the MPA violates certain UNCLOS provisions.[4]

Shortly after receiving the UK's nomination of Judge Greenwood as party-appointed arbitrator in the case, Mauritius requested further disclosure from him, expressing concern

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at the “long standing” and “close working” character of the relationship between Judge Greenwood and the UK government, and also at the fact that Judge Greenwood had advised the UK “on many of the most sensitive issues of international law and foreign policy.”[5] Mauritius also questioned the service by Judge Greenwood—who was elected to the International Court of Justice (“ICJ”) in 2009— on the Appointment Board for the new Legal Adviser of the British Foreign and Commonwealth Office (“FCO”) in 2011.

Dissatisfied with Judge Greenwood’s response, Mauritius challenged his appointment, arguing that it was incompatible with the relevant principles of independence and impartiality because he “had acted for the UK within the past three years, and that this relationship continued, as evidenced by his participation in the selection of the new FCO legal adviser, which occurred after his appointment to the Tribunal.”[6]

Mauritius did not argue that Judge Greenwood was biased, and instead maintained that the long, close, and continuing relationship of Judge Greenwood with the United Kingdom was incompatible with the objective of “Appearance of Bias Standard,” as codified by the International Bar Association Guidelines on Conflicts of Interests in International Arbitration (“IBA Guidelines”) and as applied by numerous tribunals, which Mauritius considered a general principle of law.[7] Mauritius contended that “the proper inquiry is not whether actual bias or dependence upon a party exists, but, instead, whether there is an appearance of bias or lack of independence.”[8]

Conversely, the UK argued that the “principle test of conflict of interest is prior involvement in the subject-matter of the case,”[9] as demonstrated by the rules and practice of the ICJ, the International Tribunal for the Law of the Sea, and other inter-State tribunals, which required the arbitrator not to “have had any involvement with the actual dispute that is before the arbitral tribunal.”[10]

As is the norm in challenge proceedings, Judge Greenwood also commented on the challenge and stated that he regarded the requirement of independence and impartiality—whether as a judge or as an arbitrator—as a matter of great importance. He denied any involvement with either the issues set out in the Statement of Claim or, more generally, the Chagos Islands. He also recalled that he assisted the UK on a range of issues not connected with this arbitration, while at the same time appearing against the UK in a number of matters; he also noted that he advised and represented more than twenty states other than the United Kingdom.[11]

The Tribunal—constituted by the remaining four members, with the President of the Tribunal having a casting vote in the absence of a majority—announced its decision on October 13, 2011, and provided its reasoning for rejecting the challenge on November 30, 2011.

The Tribunal examined the applicable law and general principles evidenced by the practice of international courts and tribunals relating to the qualification of judges and arbitrators.[12] It concluded that the applicable standard for arbitrator impartiality and independence in inter-State arbitral tribunals is embodied in Article 10 of the PCA Optional Rules for Arbitrating Disputes between Two States, which provides that an arbitrator may be challenged if “circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”[13] The Tribunal concluded that this standard, also known as the “justifiable doubts” standard, could be considered to form part of the practice of inter-State tribunals. At the same time, the Tribunal rejected the applicability to inter-State

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disputes of principles and rules relating to arbitrators developed in the context of international commercial arbitration (including the IBA Guidelines) and investment arbitration.[14]

Applying the "justifiable doubts" standard to Judge Greenwood's challenge, the Tribunal held that a party challenging an arbitrator had to demonstrate and prove "justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case."[15] Here, Judge Greenwood had not been involved in the dispute prior to his appointment as arbitrator, and the Tribunal was not persuaded that his prior activities as counsel for the UK were "such as to give rise to justifiable doubts as to his independence or impartiality."[16] Similarly, Judge Greenwood's participation in the selection procedure of the FCO Legal Adviser was advisory only, of limited scope, and "of considerably limited duration."[17] The Tribunal thus dismissed the challenge, reserving the issue of cost for later.[18]

Venezuela's Challenge of Mr. Fortier

Another, more recent, challenge decision issued in an arbitration at the International Centre for Settlement of Investment Disputes ("ICSID"), the *Decision on the Proposal to Disqualify an Arbitrato*r, touches on similar issues of applicable standard of review.[19]

The challenge was brought by respondent Venezuela after claimant-appointed arbitrator, L. Yves Fortier QC, informed the Secretary General of ICSID on October 5, 2011, that the firm Norton Rose OR LLP, where he was a partner, had announced a merger with Macleod Dixon LLP, to become effective on January 1, 2012.[20] Mr. Fortier disclosed that he had only then learned, through conflict checks performed as part of the due diligence conducted in relation to the merger, that Macleod Dixon's Caracas office was acting for ConocoPhillips (claimant in the arbitration) in several matters, and that he was making it known at the first possible opportunity.[21]

After the disclosure was transmitted to the co-arbitrators (Judge Kenneth Keith, a judge at the ICJ, and Egyptian professor Georges Abi-Saab), Venezuela proposed Mr. Fortier's disqualification. The regular ICSID proceeding was thus suspended until the challenge was resolved. A few days later, Mr. Fortier informed the parties and the Tribunal members that he had resigned from Norton Rose effective December 31, 2011. He also confirmed that an ethics screen put in place on October 5, 2011, would be maintained until his departure.[22]

In its pleading, Venezuela argued that several facts constituted "a circumstance that might cause [an arbitrator's] reliability for independent judgement to be questioned by a party." For example, it noted that Macleod Dixon had been more adverse to Venezuela than any other law firm in the world.[23] Venezuela asserted that its objection was "not predicated on any actual lack of independence or impartiality, but on apprehension of the appearance of impropriety," and that the standard to be applied is "an objective one."[24]

In contrast, ConocoPhillips argued that the notion of arbitral independence applied by ICSID tribunals is "an objective test for the existence of circumstances that result in a manifest lack of independence." Thus, a disqualification must be based on facts that "demonstrate such a manifest lack of the required qualities" in an arbitrator.[25]

In his comments, Mr. Fortier confirmed that he did not know of legal matters handled by Macleod Dixon for ConocoPhillips until late September. He repeated his profound conviction that he was and would remain able to exercise independent judgment in the arbitration.[26]

The Tribunal found that the applicable legal standard was provided by Article 57 of the ICSID Convention, which provides that a party may propose the disqualification of any tribunal member for "manifest lack of the qualities" required to sit as an arbitrator, namely a high moral character and the capacity to exercise independent judgement.[27] The Tribunal also remarked that ICSID decisions recognise that the term "manifest" in Article 57 means not only possible but "obvious" and highly probable.[28] It also observed that the IBA General Guidelines on which the respondent relied in its argument "are not law for ICSID Tribunals" but "guidelines."[29]

Applying the "manifest" standard, the Tribunal concluded that it had no reason to doubt the accuracy of Mr. Fortier's statements that he had

> not been involved in any way in the negotiation, that he had not taken part in or been privy to the plans for the international arbitration group in the combined firm, that he had no knowledge of any file, if any exists, on which lawyers from the two firms had been working together and he "categorically" stated that he had no involvement in any such file, nor had he been made privy to any information about any such file.[30]

With that, the Tribunal found that while a non-disclosure may by itself give rise to a reasonable suspicious of bias, no evidence showed that Mr. Fortier had known or should have known about the merger before October 4 and hence would have been under an obligation to disclose.[31] The Tribunal thus dismissed the proposal for disqualification and decided to resolve the issue of cost at a later stage.

Relevance of the Two Challenges

These two decisions are important for the following reasons.

First, although different in many aspects—including their form (the first is an inter-State dispute, the second is an investor-State dispute), forum (PCA and ICSID), and procedure (UNCLOS Annex VII and ICSID)—both decisions focus on the applicable standard for challenges to arbitrators, and specifically on whether an "appearance of bias" standard is required. In both cases, the Tribunals, after a fairly detailed analysis of the parties' submissions and prior ICSID and other international decisions, clearly rejected the requirement of an "appearance of bias" standard, instead opting for a less stringent standard. Once the "appearance of bias" standard was disregarded, however, the contours of the applicable standard adopted remain unclear.

Second, it is significant that challenges to arbitrators are becoming increasingly common in international arbitrations. In part, this is caused by the repeated use of a limited number of arbitrators to resolve similar international disputes, which increases the potential for real or perceived conflicts of interest, whether personal, professional, or case- or issue-related. Additionally, in certain instances, challenges are also used as a procedural posture to delay and protract proceedings.[32]

Third, the decision to challenge an arbitrator is an important tactical decision by counsel, and practice shows that challenges are very rarely upheld.[33] Challenges suspend the underlying arbitration and are litigated at length by the parties. Important consequences, both for the parties and the arbitration system, are the increased cost of the dispute and the length of the proceedings.

Finally, it is interesting to note a peculiar procedural feature that characterizes most international challenges—namely the fact that the challenge is, in most cases, decided by the remaining members of the tribunal—which may create uneasy situations for arbitrators and may need to be re-examined.[34]

Discussion on these and other related issues is sure to continue to grow in importance for the international dispute resolution community.

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Endnotes:

[1] Of the thirty-six challenges filed at ICSID, all but two were filed after 2001. *See* Challenges and Disqualification of Arbitrators in International Arbitration 515 – 527 (Karel Deale ed., 2012) (table of cases).

[2] Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland in the Matter of an Arbitration Before an Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea, Reasoned Decision on Challenge (Perm. Ct. Arb. Nov. 30, 2011), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1429 [hereinafter Reasoned Decision].

[3] Peter Prows, *Mauritius Brings UNCLOS Arbitration Against The United Kingdom Over the Chagos Archipelago*, ASIL Insight (Apr. 5, 2011), *available at* http://www.asil.org/insights110405.cfm.

[4] The five-member Tribunal was appointed in accordance with Annex VII of UNCLOS, under which the dispute is litigated. Mauritius appointed Judge Rudiger Wolfrum, the United Kingdom appointed Judge Sir Christopher Greenwood CMG QC, and the President of the International Tribunal of the Law of the Sea appointed the remaining three arbitrators: Judge James Kateka, Judge Albert Hoffmann, and Professor Ivan Shearer (President). The Permanent Court of Arbitration ("PCA") hosts the arbitration. Information about the case is available at http://www.pca-cpa.org/showpage.asp?pag_id=1429.

[5] Reasoned Decision, *supra* note 2, ¶ 10.

[6] *Id.* ¶ 12.

[7] *Id.* ¶¶ 39-46; *see also id.* ¶¶ 58-62.

[8] *Id.* ¶ 43.

[9] *Id.* ¶ 52.

[10] *Id.* ¶ 53; *see also in general* ¶¶ 47-57 & 63-70.

[11] *Id*. ¶¶ 121-131. Notably, the United Kingdom submitted as part of its pleadings statements by Dame Rosalyn Higgins and Judge Gilbert Guillaume, both highly regarded former ICJ Presidents and arbitrators. Mauritius also relied on statements by well-known legal experts, including Judge Thomas Mensah and Professor Yuval Shany.

[12] *Id.* ¶¶ 132-151.

[13] *Id.* ¶ 151.

[14] *Id.* ¶¶ 156-160.

[15] *Id.* ¶ 166.

[16] *Id.* ¶¶ 172-173.

[17] *Id.* ¶ 182.

[18] *Id.* ¶ 185.

[19] ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Feb. 27, 2012), *available at* http://icsid.worldbank.org/ICSID/Index.jsp.

[20] *Id.* ¶ 1.

[21] *Id*. ¶¶ 2-5.

[22] *Id*. ¶ 11.

[23] *Id*. ¶¶ 23-25.

[24] *Id*. ¶ 31.

[25] *Id*. ¶ 35.

[26] *Id*. ¶¶ 46, 50.

[27] *Id.* ¶ 51.

[28] *Id.* ¶ 56.

[29] *Id.* ¶ 59.

[30] *Id.* ¶¶ 64-65.

[31] *Id.* ¶¶ 60-67.

[32] Argentina also challenged two arbitrators in the *Abaclat et al. v. Argentina* ICISID case, which was filed "on the very day that each side was supposed to make filings on procedure." *See* Clemmie Spalton, *Arbitrator Challenges Filed in Argentina Mass Claim*, Latin Law. (Sept. 27, 2011), *available at* http://www.latinlawyer.com/news/article/42468/arbitrator-challenges-filed-argentina-mass-claim/.

[33] In ICSID, for example, of the thirty disqualification proposals decided by ICSID procedure all but one were dismissed. *See* Challenges and Disqualification, *supra* note 1, ch. 4, ¶¶ 4.009-4-016.

[34] Note for example that in ICSID arbitration "no arbitrator has ever been disqualified by the other members of the tribunal. Out of the twenty-five disqualification proposals that have been submitted to the co-arbitrators for voting, twenty-one proposals have been rejected. In the remaining four cases, the co-arbitrators were divided, and the decision was referred to the Chairman of the Administrative Council of ICSID." *Id*. ¶ 4-009.