SUBMISSION FOR

CIARB'S YOUNG MEMBERS GROUP WRITING COMPETITION 2023

Name: Anna Avdulova ACIArb

Affiliation: Ivanyan & Partners / National University of Singapore

Title: Associate / LLM (IADR) Student

Location: Moscow / Singapore

[DRAFT] DECISION ON THE CHALLENGE TO MR. ONE

I. ANALYSIS

A. Introduction

1. The arbitral proceedings in the present case are governed by the 2013 UNCITRAL Rules. The legal standard applicable to the challenges is set forth in Article 12(1) of the 2013 UNCITRAL Rules, under which an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence". The standard is an objective one, and the challenge should be assessed through the lens of a fair, reasonable and informed third party.[1] The proof of actual bias is not necessary.[2]

2. In this case, the Respondent's Challenge is based on two grounds: (i) the alleged involvement of Mr. One and his firm in the Bias Corp/Induria case; and (ii) Mr. One's failure to disclose this fact. In evaluating the Challenge, I have considered all the Parties' submissions and Mr. One's explanations, although below I address only those issues that are necessary to reach my decision.

B. Involvement of Mr. One and his firm in the Bias Corp/Induria case

3. Respondent submits that Mr. One cannot be deemed to be impartial and independent because as a partner of the Firm he is representing Bias Corp. in the Bias Corp/Induria case, which similarly to this case raises a legal issue of whether a refusal to prolong a permit granted after the tender constitutes expropriation. The Respondent's position is essentially premised on an assumption that involvement of Mr. One and his firm in the Bias Corp/Induria case creates an issue conflict with respect to the present case.

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[1] J. Paulsson and G. Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International (2017), paras. 4, 5.
[2] *Ibid.*

4. In international arbitration, an "issue conflict" is described as "a situation in which an arbitrator is inappropriately predisposed to favor a particular outcome with respect to the issues at stake in the proceedings".[3] Under certain circumstances, arbitrator's concurrent role as a counsel ("double-hatting") can give rise to the issue conflict.[4] However, an appearance of pre-judgment of a certain issue relevant to the dispute must be demonstrated. As was aptly noted in *Saint Gobain v. Venezuela*, "[i]t is at the core of the job description of legal counsel […] that they present the views which are favorable to their instructor […]. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case".[5] Hence, if an appearance of pre-judgment is not supported by any specific circumstances, an arbitrator should be presumed to be "a legal professional with the ability to keep a professional distance".[6]

5. As a starting point, in the present case, it is not proven that Mr. One acts as a counsel for Bias Corp. To demonstrate that Mr. One is leading the Bias Corp/Induria case, Respondent submitted a news article and a press release of Bias Corp. However, this is not sufficient evidence as both pieces contain only general statements mentioning Mr. One in his capacity of the Firm's partner. They were likely made for the marketing purposes and may not accurately reflect the reality. In the explanations, Mr. One confirmed that he is not the leading counsel in the Bias Corp/Induria case and not even a part of the team representing Bias Corp. Mr. One further stated that he was consulted a couple of times on certain

[3] *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Recommendation on the Proposal to Disqualify the Tribunal, 4 March 2019, para. 112.
[4] See e. g. ICSID's Background Paper on Issue Conflict (2021), para. 5.
[5] *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013, para. 80.
[6] *Id*., para. 81.

matters of the Bias Corp/Induria case a year ago. However, these consultations alone cannot create an appearance of pre-judgment of any issue raised in the Bias Corp/Induria case since the views expressed in these consultations do not necessarily present Mr. One's genuine opinion.

6. The issue then is whether the fact that Mr. One's partner, Mr. Two, represents Bias Corp/Induria case can give rise to justifiable doubts with respect to Mr. One's independence and impartiality. Under IBA Guidelines on Conflicts of Interest in International Arbitration,[7] "[t]he arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator's law firm *should not automatically* create a conflict of interest. The *relevance* of the activities of the arbitrator's firm […] should be considered".[8] In the recent case of *Deutsche Lufthansa AG v. Venezuela*, the Secretary-General of the PCA faced a similar situation where two partners of the same firm were acting either as an arbitrator or as a counsel in two concurrent arbitration proceedings. In that case, the Secretary-General found that the arbitrator could be perceived biased as both arbitrations involved "claims against the same respondent for the same effects caused by the same measures to similarly placed actors in the same industry".[9] The relevant factor to be considered is thus the extent to which two arbitration cases raise similar factual and legal issues.[10] Views on the general questions of law "are not *per se* sources of conflict that require removal of an arbitrator".[11]

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[7] They are not binding in this case but are used as a reflection of "the best current international practice". IBA Guidelines on Conflicts of Interest in International Arbitration, Introduction, para. 4.
[8] *Id.*, Guideline 6(a) (emphasis added).
[9] *Deutsche Lufthansa AG v. Bolivarian Republic of Venezuela*, PCA Case No. 2022-03, Decision on the Challenge to Dr. Wolfgang Peter, 10 October 2022, para. 39.
[10] The relevance of this factor was also highlighted in *Ks Invest v. Spain*, albeit in a slightly different context. See *KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on Proposal for Disqualification of Arbitrator Kaj Hobér, 15 May 2020, paras. 83, 90.
[11] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 58.

7. In this case, as it stems from the parties' submissions, Respondent does not contest that the cases at issue involve different parties, different measures, and different industries. Rather, it argues that the cases raise a similar factual pattern of the state's refusal to renew a license granted after the tender, which may be considered expropriation or the breach of fair and equitable treatment ("**FET**"). However, the issues of expropriation and FET are raised almost in any investment arbitration case. Furthermore, there are numerous cases involving the revocation of licenses by the state, and tender procedures in the investment context are not rare. The two cases are therefore united only by general questions of investment law, and the Firm's representation of Bias Corp. cannot shed justifiable doubts on independence and impartiality of Mr. One.

8. The first ground for the Respondent's Challenge is therefore dismissed.

C. Failure to disclose the involvement in the Bias Corp/Induria case

9. Article 11 of the 2013 UNCITRAL Rules obliges arbitrators to "disclose any circumstances *likely to give rise* to justifiable doubts as to his or her impartiality or independence". Given that Mr. One is FCIArb, both Parties in their submissions have also relied on the CIArb Code of Professional and Ethical Conduct for Members ("**CIArb Code**"),[12] which obliges members to "disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which *might reasonably be perceived as likely to do so*" before and during the dispute resolution process.[13] As the language of this provision indicates, the standard for disclosure for the CIArb members is considerably low.

[12] This is treated as the Parties' agreement on the application of the CIArb Code to this issue.
[13] CIArb Code of Professional and Ethical Conduct (October 2009), Part 2, Rule 3 (emphasis added).

10. Given that issue conflict and double-hatting are hot topics raising much concern in international arbitration now, and some commentators suggest quite broad interpretations of what can fall within these concepts,[14] the facts raised by Respondent might reasonably be perceived as likely to affect Mr. One's independence and impartiality. Hence, Mr. One as FCIArb had to disclose them.

11. Nevertheless, the failure to disclose relevant circumstances "does not automatically give rise to justifiable doubts" under the 2013 UNCTIRAL Rules.[15] This depends on the facts of the case including "whether the failure to disclose was […] intentional", "whether the facts that were not disclosed raised obvious questions about the impartiality and independence", and "whether the nondisclosure is an aberration on the part of a conscientious arbitrator".[16]

12. In the present case, the Firm's involvement in the Bias Corp/Induria case is far from the "obvious" question of independence and impartiality, and given Mr. One's limited involvement in the Bias Corp/Induria case, it is highly likely that Mr. One's non-disclosure was unintentional. Mr. One explained that he forgot about consultations he gave a year ago and he is not tracking progress of the Bias Corp/Induria case now. In light of this, non-disclosure of Mr. One does not give rise to justifiable doubts as to Mr. One's independence and impartiality.

13. The second ground for the Respondent's Challenge is therefore also dismissed.

II. DECISION

For the foregoing reasons, the Respondent's Challenge is rejected.

London, 3 November 2023

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[14] See e. g. ICSID's Background Paper on Issue Conflict (2021), para. 5; ICSID's Background Paper on Double-Hatting (2021), para. 5.
[15] *Merck Sharpe & Dohme (I.A.) LLC v. Republic of Ecuador*, PCA Case No. 2012-10 (formerly AA 442), Decision on Challenge to Arbitrator Judge Stephen M. Schwebel II, 8 August 2012, para. 7.
[16] *Ibid.*