Outcomes

To date, 58 of the 84 challenges have been decided. In four instances, the challenged arbitrators were disqualified. In a further 21 instances, the arbitrator resigned. Three proposals were withdrawn before a decision was issued, and two are pending. As a result, while there have been very few disqualifications under the ICSID rules, the composition of the Tribunal after a challenge has changed in 30% (25 out of 84) of the cases.

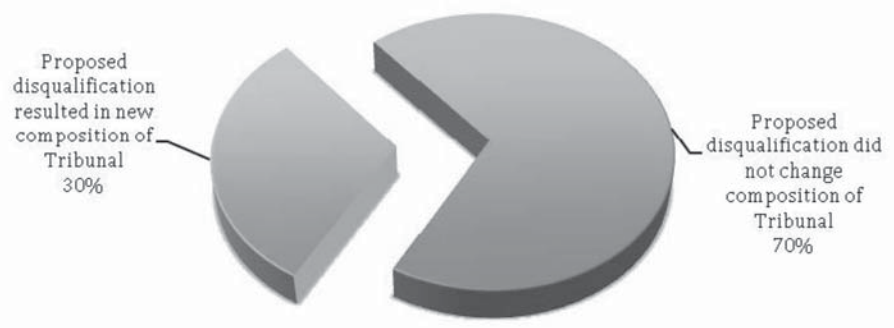

Fig. Outcome of Proposals for Arbitrator Disqualification

Conclusion

The trend of increased challenges to arbitrator appointments will likely continue in the near future, as the fact situations and grounds for challenge pose increasingly complex questions for institutions and the profession at large. Over time, decisions on challenges and broader initiatives within the profession should assist in reducing the number of challenge applications filed in arbitration.

Remarks by Luke A. Sobota*

Professor Giorgetti has asked me to offer some comments on the issue of multiple appointments of an arbitrator by the same party or law firm, which is an issue that affects the integrity of international arbitration.

Status Quo

Although party autonomy in arbitration is fundamental, the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) state that multiple appointments of the same arbitrator may give rise to ''justifiable doubts as to the arbitrator's impartiality or independence.''[1] This reflects the perception that through repeated selection, an arbitrator may develop feelings of loyalty to, or may be influenced by the hope of reappointment by, the appointing party. Even without the appearance of partiality, repeated appointments may provide the appointing party and its counsel an undue tactical advantage given their greater familiarity with the arbitrator's predilections, prior rulings, and general decision-making process. Although such negative perceptions of the practice are not universal—some may view repeat appointments as a positive reflection upon the arbitrator's expertise or fairness—they are neither anomalous nor unreasonable. Thus, balancing one party's

* Founding Partner, Three Crowns LLP.

[1] IBA Guidelines, Part I, Section 2(b) (2014).

https://doi.org/10.5305/procannmeetasil.108.0416 Published online by Cambridge University Press

right to choose an arbitrator against the other party's right to a fair hearing, the IBA Guidelines classify multiple appointments as an ''Orange List'' item[2] and call for arbitrators to disclose the fact that they have been appointed by the same party two or more times, or by the same firm three or more times, in the past three years.[3]

Recusal of arbitrators based upon repeated appointments is rare. Although there are different formulations for recusal among the major arbitral facilities, in practice all are relatively lenient toward arbitrators. The ICSID standard requires the party challenging an arbitrator to establish facts indicating a ''manifest lack of . . . independent judgment.''[4] By contrast, in UNCITRAL, LCIA, and SCC proceedings, there need only be circumstances that ''give rise to justifiable doubts'' about the arbitrator's independence or impartiality.[5] Three recent ICSID decisions indicate that multiple appointments standing alone are not enough to warrant recusal—the challenging party must show some additional factors, such as the arbitrator's financial dependence on the appointing party or knowledge of information not in the record.[6] While one tribunal acknowledged that multiple appointments are problematic, it refused to disqualify the challenged arbitrator because it viewed ICSID's ''manifest lack'' standard as requiring more than an ''appearance of a lack of impartiality or independence.''[7]

A More Stringent Standard

In the limited time available, I want to explore whether the standard for recusal should be more stringent, with the focus being on the appearance of bias, not actual bias. We begin in *media res*. There are already many significant challenges to the legitimacy of international arbitration, wholly apart from the issue of multiple appointments. Selecting a proper standard is thus of a piece with the continual obligation vigilantly to protect and promote the field of international arbitration.

It is interesting to note that the U.S. Arbitration Act provides for the enforcement of arbitral awards absent, among other things, ''evident partiality''[8] on the part of the arbitrator. This deferential standard is premised upon the notion that the parties, in choosing to select their own arbitrators from a tight-knit community, have chosen expertise ''at the expense of complete impartiality.''[9] For example, the Seventh Circuit rejected a challenge to repeat appointments in the reinsurance area because the interest in future employment is ''endemic to arbitration that permits parties to choose who will decide'' the disputes.[10] In other words,

[2] The IBA Guidelines include a series of color-coded lists which classify conflicts of interest in international arbitration. The Orange List describes situations which could be a conflict and which must be disclosed.

[3] IBA Guidelines, Part II, Sections 3.1.3, 3.1.5, and 3.1.7 (2014).

[4] ICSID Convention, arts. 14(1) & 57 (2006).

[5] UNCITRAL Arbitration Rules, art. 12(1) (2010); UNCITRAL Model Law on International Commercial Arbitration, art. 12(2) (1994); LCIA Arbitration Rules, art. 10.1 (2014); SCC Arbitration Rules, art. 15(1) (2010).

[6] *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela,* Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, ICSID Case No. ARB/10/5 (Dec. 23, 2010); *Universal Compression Int'l Holdings, S.L.U. v. The Bolivarian Republic of Venezuela,* Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, ICSID Case No. ARB/10/9 (May 20, 2011); *OPIC Karimun Corp. v. The Bolivarian Republic of Venezuela,* Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ICSID Case No. ARB/10/14 (May 5, 2011).

[7] *OPIC Karimun Corp. v. The Bolivarian Republic of Venezuela,* Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ICSID Case No. ARB/10/14, paras. 45, 57 (May 5, 2011).

[8] U.S. Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (1982) (court may vacate an arbitrator's award ''[w]here there was evident partiality . . . in the arbitrator[ ] . . .'').

[9] *Morelite Construction Corp. v. N.Y. City District Council Carpenters Benefit Funds,* 748 F.2d 79, para. 16 (2d Cir., 1984).

[10] *Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.),* 631 F.3d 869, 873 (7th Cir. 2011).

U.S. courts accept the appearance of partiality in the current arbitral system because they believe that is what the parties want.

We may therefore ask whether this trade-off fairly describes international arbitration today. Noting the growth, sophistication, and importance of investor-state arbitration, Sundaresh Menon, Singapore's Chief Justice, noted at the 2012 ICCA Congress that ''the modern arbitrator must recognize that international investment arbitration at least is no longer simply a manifestation of party autonomy in the resolution of private disputes. 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.''[11] Expertise is important, but so is judicial temperament; this is not an either-or proposition. Parties in international arbitrations expect some modicum of neutrality. If parties want to appoint their own arbitrator, they also want the other side's arbitrator to be open to reason. Most clients, private and sovereign, would say ''yes'' in response to the following question: ''Would you like a way to keep the other side from appointing someone who may turn out to be partisan and obstreperous?''

Yet the law today is that it is easier to recuse a national judge in domestic court than it is to recuse an international arbitrator. That makes little sense given the other appurtenances that protect litigants in (well-functioning) domestic courts, including selection through a transparent vetting process, guaranteed salaries, fixed terms, *de novo* appellate review, and limited personal and professional interactions between bench and bar. The absence of these protections in the arbitral realm only heightens the need to take independence and impartiality seriously.

Appearance of Bias

Actual bias may not be a real concern: most international arbitrators have high ethical and intellectual standards and are perfectly capable of separating other relationships from the case at hand. But it is impossible to know the inner workings of an arbitrator's mind. This is an area where perceptions matter and where self-proclamations of impartiality are not sufficient. If a country is ordered to pay a multi-billion dollar award, the citizens of that country should have no doubt as to the integrity of the panel. One solution is therefore to adopt a test that is objective and simple: Can the arbitrator's impartiality reasonably be questioned? This ''appearance'' test goes to the residual doubts reasonable people might harbor about an arbitrator's motivations. Such doubts are especially pernicious in this setting, where participation is voluntary and there are already a host of other challenges to its legitimacy.

Measured against this standard, multiple appointments by the same party would be presumptively impermissible because, as indicated by the IBA Guidelines, they create an ''appearance'' of partiality. Although it would slightly curtail the freedom of parties to choose their arbitrators, moving towards an objective and bright-line rule with respect to multiple appointments would have salubrious effect. Recusal is strong medicine—it can be seen as a personal attack on the ethics of an arbitrator of high standing. This puts the arbitral institutions and co-arbitrators who have been asked to decide recusal motions in a sensitive and difficult position. An objective test would lessen their burden. By focusing solely on the context of the appointment, there would be no need to perform

[11] Sundaresh Menon, Keynote Address, Opening Plenary Session of the ICCA 2012 Congress: International Arbitration: The Coming of a New Age for Asia (and Elsewhere) (June 10, 2012).

a searching and individualized inquiry into ''additional factors'' such as the arbitrator's personal financial situation or the arbitrator's rulings in the prior arbitrations. A clear standard that can be applied efficiently, an appearance test would provide predictability to parties as they select their arbitrators. Perhaps most important, however, it would enhance the credibility of the regime by removing any doubt as to an arbitrator's impartiality and independence.

It may be countered that making recusal easier would only fuel the flames of what many perceive to be an abuse of recusal motions for dilatory and strategic reasons. There may well be abusive practices that need to be curtailed through time limits or strict sanctions, an issue outside the scope of these limited remarks. But abuse at one end of the spectrum does not negate the need for integrity at the other. The standard for recusal in the case of multiple appointments must stand or fall on its own merit. For the reasons given, a more rigorous and objective standard—focusing on appearances and not on individuals—may help to ensure the integrity of international arbitration for all of its users and for all affected by its awards.

''Late-in-the-Game'' Arbitrator Challenges and Resignations

By Judith Levine[*]

My remarks will focus on arbitrator challenges and resignations that occur at a late stage in proceedings and the tools available to minimize their disruptive effect. I will first provide a brief overview of the activities of the Permanent Court of Arbitration (PCA), in particular with respect to investor-state disputes and arbitrator challenges.

Update from the Permanent Court of Arbitration

The PCA's activities are at an all-time high. Of the 225 cases administered by the PCA since its founding in 1899, over 170 were commenced in the last ten years. As of today, April 12, 2014, the PCA is administering 91 cases, of which eight are inter-state arbitrations; 27 arise out of contracts in which at least one party is a state, state-controlled entity, or intergovernmental organization; 50 are arbitrations pursuant to bilateral or multilateral investment treaties; and six fall into another category (such as the PCA's environmental rules).[1] The PCA has administered over 100 investor-state arbitrations since 2001, mostly conducted under the UNCITRAL Rules.

In addition to registry services, one area of activity for the PCA that has seen increased activity is its work in appointing authority matters under the UNCITRAL Rules of Arbitration, pursuant to which the PCA helps resolve impasses in the constitution of a tribunal. Under the UNCITRAL Rules, a party may request the PCA Secretary-General to designate an appointing authority to appoint arbitrators or resolve challenges. The PCA has dealt with over 530 such requests since the UNCITRAL Rules were promulgated, including over 50 cases where the parties agreed the PCA Secretary-General would directly act as appointing authority.

The PCA Secretary-General has designated an appointing authority in 18 challenge cases, and directly decided 22 challenges himself. Usually he is asked to apply the

[*] Senior Legal Counsel, Permanent Court of Arbitration.

[1] As of May 12, 2014, the caseload has continued to increase (http://www.pca-cpa.org).

https://doi.org/10.5305/procannmeetasil.108.0416 Published online by Cambridge University Press