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).

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UNCITRAL standard (''justifiable doubts''). Typically the procedure involves two rounds of comments from the parties, and comments from the challenged arbitrator. Parties regularly cite the IBA Guidelines on Conflicts of Interest (but only in one case did the parties agree that they would be binding). Except for two instances in which a hearing was requested, challenges are determined on the papers. Reasons are provided (unless parties decline or there are exceptional circumstances), and decisions are made public only with consent.

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

It is widely acknowledged that an arbitrator challenge ''can severely disrupt the arbitration if it occurs at an advanced stage of the proceedings.''[2] To discourage ''late-in-the-game'' challenges, time limits are set in the applicable rules. Under Article 13(1) of the UNCITRAL Rules, a party is required to send notice of a challenge within fifteen days after the circumstances become known.[3] Article 9(1) of the ICSID Rules requires that a disqualification proposal be filed ''promptly'' in any event before the proceeding is declared closed. ICSID proceedings are automatically suspended until challenges are decided.

An example of the time bar in practice is *AWG v. Argentina* (UNCITRAL) and its two parallel ICSID cases. The cases began in 2003; jurisdiction was upheld in 2006; and a hearing on the merits was set for October 29, 2007. On October 12, 2007, Argentina challenged the claimants' arbitrator on the basis of an award issued on August 20, 2007, in another case against Argentina involving the same arbitrator. Argentina alleged that the award ''was so flawed, particularly in its findings of fact . . . that [the arbitrator's] very participation in that decision 'reveals a prima facie lack of impartiality.'''[4] The co-arbitrators rejected the challenge in both the UNCITRAL proceedings (on the basis that it was brought 38 days late) and the ICSID proceedings (on the basis that it was not made ''promptly'').[5] Their decision was rendered in time to preserve the hearing dates.

That was not the only case involving a party who challenged an arbitrator because it was disgruntled with decisions taken by that arbitrator in a different (or even the same) case. In *Abaclat v. Argentina*, after the tribunal rejected an interim measures request and upheld jurisdiction, the respondent challenged the majority. The challenge was rejected in December 2011, with the appointing authority observing that the respondent's submissions were based on legal arguments directed at the substance of the rulings of the challenged arbitrators. To justify a challenge, objective evidence beyond mere inference was needed.[6] Two years later, the respondent, again dissatisfied with procedural rulings, challenged the majority. Rejecting that challenge, the appointing authority noted:

[2] Yves Derains & Eric A. Schwartz, A Guide to the ICC Rules of Arbitration 185 (1998).

[3] The equivalent provision in the PCA 2012 Rules expands this period to 30 days (acknowledging that states sometimes require longer to check conflicts and consider disclosures).

[4] Suez v. Argentine Republic, ICSID Case No. ARB/03/17; Suez & Vivendi v. Argentine Republic, ICSID Case No. ARB/03/19; AWG Group v. Argentine Republic (UNCITRAL) [hereinafter *Suez and AWG Group*], Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, para. 13 (Oct. 22, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC689_En&caseId=C18.

[5] *Id.* paras. 21, 26. The co-arbitrators addressed the merits of the challenge anyway.

[6] Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Recommendation on Proposal for Disqualification Decision on Proposal to Disqualify Majority of Tribunal, para. 63 (Dec. 19, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0240.pdf.

> The mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence . . . If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.[7]

Cost orders may also be deployed to deal with late and unjustified arbitrator challenges. In a recent investor-state case, the tribunal's decision on jurisdiction was imminent. For planning purposes, in order to reserve dates for a possible merits hearing, the parties asked the tribunal to inform them of the impending decision on jurisdiction, with reasons to follow. After the tribunal advised that it would be declining jurisdiction, the claimant challenged respondent's arbitrator, on the basis of his connections and activities with the respondent state. The circumstances had been known since the outset of the case. The challenge delayed the issuance of a reasoned award and entailed much effort by the parties, arbitrators, and registry to deal with it. The challenge was rejected. The tribunal ordered the claimant to pay 100% of the costs incurred in connection with the challenge.

There is a risk of late-in-the-game challenges when a new counsel is introduced mid-way through proceedings and the new counsel has a relationship with the arbitrators. In *Hrvatska Elektroprivreda v. Slovenia*, at an ''extremely late stage of proceedings,'' one party announced that new counsel would be appearing at the hearing, and he happened to be a door tenant at the same chambers as the tribunal's president. The other party objected. The tribunal exercised its ''inherent power to take measures to preserve the integrity of its proceedings,'' and, finding the counsel's participation inappropriate, ruled that he could no longer participate.[8] Subsequent tribunals have characterized the *Hrvatska* decision as more of an ''*ad hoc* sanction for the failure to make proper disclosure in good time.''[9] When sufficient notice is given, an obvious solution is to have participants confirm in writing that they do not object.[10] To preempt the situation even earlier, a clause can be inserted into the terms of appointment or procedural rules along the lines of the example in the Atlanto-Scandian Herring Arbitration:[11]

> To avoid future conflicts of interest after the appointment of members of the Tribunal, the Parties agree that any proposed additions to or changes in their representatives . . . shall be communicated to the Tribunal and shall only take effect if the Tribunal does not object for reasons of conflict of interest.

[7] *Abaclat*, Decision on Proposal to Disqualify Majority of Tribunal, para. 80 (Feb. 4, 2014), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4152_En&caseId=C95. *See also Suez and AWG Group*, paras. 35–36; ConocoPhillips Co. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Proposal to Disqualify Majority of Tribunal, paras. 53–56 (May 5, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3162.pdf.pdf. *But see* Caratube v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Proposal for Disqualification of Arbitrator Bruno Boesch, paras. 88–91 (Mar. 20, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3133.pdf (overlapping facts, witnesses, and legal issues with prior case).

[8] Hrvatska Elektroprivreda v. Republic of Slovenia, ICSID Case No. ARB/OS/24, Order Concerning the Participation of a Counsel (May 6, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69; Filip De Ly, Mark Friedman & Luca Radicati Di Brozolo, *Report for the Biennial Conference in Washington D.C. 2014* 12 (Comm. on Int'l Commercial Arbitration, Int'l Law Ass'n), *available at* http://www.ila-hq.org/download.cfm/docid/C3C11769-36E2-4E93-8FDA357AA1-DABB2F.

[9] Rompetrol Grp. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, para. 25 (Jan. 14, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1370_En&caseId=C72.

[10] Eureko v. Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, para. 17 (Oct. 26, 2010), http://server.nijmedia.nl/pca-cpa.org/showfile.asp?fil_id=1661.

[11] Atlanto-Scandian Herring Arbitration (Den. in respect of the Faroe Islands v. EU), PCA Case No. 2013-30, Rules of Procedure, Art. 3.1 (Mar. 15, 2014), http://pca-cpa.org/showfile.asp?fil_id=2524.

A final example of a late-in-the-game challenge scenario is when a tribunal member says something outside proceedings, raising bias concerns. I will leave it to Judge Brower to discuss *Perenco v. Ecuador,* and I will mention instead a case from the ICTY. *Prosecutor v. Šešelj* involves the prosecution of a Serbian military commander, indicted in 2003 for war crimes and crimes against humanity, and accused of participating in a joint criminal enterprise (JCE) directing paramilitary forces. In June 2013 a judge sitting on the trial sent a ''private letter'' to a group of 56 friends, which was later published widely. In the letter the judge said that he faced a dilemma due to recent changes to the JCE doctrine, departing from ''more or less set practice'' to convict military commanders for crimes committed by subordinates. Šešelj argued that the letter showed bias to convict persons of Serbian ethnicity. A specially constituted chamber disqualified the judge by a 2-1 majority.[12] This already lengthy trial was thus effectively delayed by another year until the replacement judge had familiarized herself with the record.

To minimize the disruptive effects of legitimate late-in-the-game concerns, challenges should be resolved as soon as possible (as in *AWG*). Alternatively, the concerned party may choose not to challenge but instead accept the situation with assurances from the arbitrator.[13] In addition to the tools already discussed for discouraging spurious challenges (time bars, costs, disqualification of counsel, express provisions to deal with counsel conflicts), publishing decisions which have rejected spurious challenges may also have a deterrent effect, as could guidelines to navigate some gray areas of challenges.[14]

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

I want to briefly touch on ''late-in-the-game'' arbitrator resignations. As Meg's statistics demonstrated, resignations are the lesser appreciated flip side of arbitrator challenges. As with late arbitrator challenges, the ''resignation of an arbitrator can severely disrupt an arbitration, particularly if it occurs at a late stage of the proceedings.''[15]

Sometimes, resignation is inevitable for personal or professional reasons (e.g., illness, a government appointment). In other circumstances, a question arises as to whether arbitrators have a duty to the parties not to resign if they consider the challenge to be unfounded and for dilatory purposes.[16] Redfern and Hunter state that in such circumstances ''the arbitrator should not resign, but should permit the matter to be dealt with by the relevant challenge

[12] Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, para. 13 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 28, 2013), http://www.icty.org/x/cases/seselj/tdec/en/130828.pdf:

> By referring to a ''set practice'' of convicting accused persons without reference to an evaluation of the evidence in each individual case, the Majority . . . considers that there are grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias . . . in favour of conviction. . . . This appearance of bias is further compounded by [the] statement that he is confronted by a professional and moral dilemma . . . a clear reference to his difficulty in applying the current jurisprudence of the Tribunal. In the circumstances, the Majority considers that the Letter, when read as a whole, rebuts the presumption of impartiality.

[13] See, e.g., the placement of an ''ethical screen'' in *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) ''so as to shield that arbitrator from his law firm's separate prosecution of an unrelated NAFTA arbitration against Canada.'' Luke Eric Peterson, *Ethical Screen Erected in NAFTA Case to Ensure that Arbitrator Remains Cut Off from His Law Firm's Prosecution of a Separate Claim*, Inv. Arb. Rep., Mar. 18, 2014, http://www.iareporter.com/articles/20140319.

[14] Such as the Joint ASIL/ICCA taskforce on issue conflicts.

[15] Derains & Schwartz, *supra* note 2, at 185.

[16] *Id.* at 195.

procedure.'' They acknowledge that ''this course may create delay'' but stress that ''it helps to discourage unmeritorious disruptive tactics.''[17]

Sadly, there are some situations in which resignation seems to be the result of bad faith collusion with a party.[18] In former times and in purely ad hoc arbitrations this may have led to a procedural quandary, but the main rules applicable to investor-state arbitrations currently provide four types of solutions. First, the rules may require that the institution or co-arbitrators give their consent in order for the resignation to be effective.[19] Second, a party might be deprived of its right to appoint the replacement arbitrator, as contemplated by the 2010 UNCITRAL Rules in ''exceptional circumstances.''[20] Third, depending on the rules and/or *lex arbitri*, the remaining arbitrators may be entitled to proceed as a truncated tribunal.[21] Fourth, there may be consequences as to liability or fee entitlement for arbitrators who resign in bad-faith.[22]

Remarks by Charles N. Brower*

Introduction

Thank you for inviting me to join today's panel. As the only member of the panel who has been challenged, I can provide a different perspective on this issue.

In her remarks, Meg Kinnear mentioned the first-ever ICSID challenge in *Amco Asia* v. *Indonesia*. As counsel for Indonesia in that case, I was involved in challenging the claimant's appointee. Over 30 years later, I can report that I have been challenged six times (that I can remember). Of note, I am the only U.S. member of the Iran-United States Claims Tribunal, in the Tribunal's 33-year history, to have been challenged by Iran—and, in another case, I was challenged by the party that appointed me.

[17] Nigel Blackaby et al., Redfern and Hunter on International Arbitration 286 (5th ed. 2009). Derains and Schwartz describe the dilemma as follows:

> [A]n arbitrator may consider that, whatever the actual merits of the challenge, it would be in the best interests of the arbitration and of both parties ultimately for the arbitrator to be replaced, in order to permit the arbitration to proceed in a better climate of confidence and trust and to minimize the likelihood of recourse against the arbitral award when it is rendered. The decision of whether to stay or to go in such circumstances inevitably involves the consideration of a number of different factors that may be particular to the case in question. . . . [T]here appears to be a relatively broad international consensus . . . that an arbitrator may legitimately choose to withdraw if challenged, even if the challenge is not considered to be founded, and withdrawal in such case need not constitute an admission of the validity of the challenge.

Derains & Schwartz, *supra* note 2, at 185. Finally, Article 13(3) of the UNCITRAL Rules acknowledges this reality, providing: ''When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.''

[18] *See, e.g.,* Himpurna Cal. Energy Ltd. v. Rep. of Indon., Final Award of 16 October 1999, 15 YB Comm. Arb. 186 (2000).

[19] ICSID Convention art. 56; Christoph H. Schreuer, The ICSID Convention: A Commentary 1192 (2d ed. 2009); ICC Rules art. 15(1).

[20] UNCITRAL Rules art. 14 (2010). The UNCITRAL Rules (2010) have been described as a major departure from the UNCITRAL Rules (1976) and as an improvement thereon. David D. Caron & Lee M. Caplan, The UNCITRAL Arbitration Rules: A Commentary 314–17 (2d ed. 2013). *See also* PCA Arbitration Rules art. 14(2); Brooks W. Daly, Evegeniya Goriatcheva & Hugh A. Meighen, A Guide to the PCA Arbitration Rules, paras. 4.62–4.65 (2014) (which uses a slightly different formulation).

[21] *See* PCA Arbitration Rules art. 12(4) and UNCITRAL Rules (2010) art. 14(2). For a novel solution in a national arbitration law, see Mauritian International Arbitration Act 2008, Sections 15–16.

[22] For example, with regard to arbitrations conducted in England, there are relevant provisions in the English Arbitration Act 1996 which subject such entitlements to the English courts. Arbitration Act, 1996, c.23, § 25 (Eng.). *See also id.* § 27 (provisions on filling of vacancies in the event of resignation).

* Of 20 Essex Street Chambers, London; Judge, Iran-U.S. Claims Tribunal.