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HEADLINE: Arbitrator Challenges: Warranted Or Abuse?

BODY:

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Selecting the right arbitrator to preside over an international arbitration is a critical step toward securing a desirable outcome. Finding an arbitrator that has the requisite level of experience, expertise, impartiality, and independence enhances the likelihood not only that the arbitration will achieve a correct, equitable result, but also that the resulting arbitral award will be enforceable in a court of law.

Selecting arbitrators, however, often is not a simple process. Generally, arbitral institutions grant parties the right to challenge an arbitrator's appointment for a lack of impartiality or independence.

When used properly, such challenges are necessary and effective means to ensure the integrity and fairness of arbitral proceedings. Unfortunately, arbitrator challenges are not always used with the proper motive in mind.

Parties have increasingly resorted to challenging arbitrators more for procedural gamesmanship than to ensure the integrity and fairness of proceedings. Although arbitrators are rarely disqualified due to a party challenge, the challenge itself can be an effective way to delay proceedings or frustrate the opposing party. Accordingly, it is important to understand the basics of arbitrator challenges to not only assess whether asserting a challenge is in a party's interest, but also to detect frivolous challenges.

This article will identify the basics of arbitrator challenges in three of the leading international arbitral institutions: the International Chamber of Commerce International Court of Arbitration ("ICC"), the London Court of International Arbitration ("LCIA"), and the International Centre for Settlement of Investment Disputes ("ICSID"). It will then examine several case studies to help parties differentiate between weak or frivolous arbitrator challenges indicative of procedural gamesmanship and those challenges that reflect substantive concerns regarding arbitrators' impartiality or independence. The article will then conclude with a discussion of best practices for arbitrator challenges.

I. Institutional Rules For Arbitrator Challenges

The ICC, LCIA, and ICSID are three preeminent institutions for international arbitration. Whereas the ICC and LCIA focus on commercial disputes, ICSID focuses on international investment disputes, often between foreign investors and sovereign states. Each institution has its own set of rules governing arbitrations, but there are many similarities in how each institution functions. One such similarity is how each institution handles party challenges to arbitrators. All three institutions allow parties to nominate arbitrators for appointment and to thereafter challenge an appointed arbitrator for circumstances that the arbitrator failed to disclose prior to appointment. The specific rules pertaining to arbitrator challenges for each institution are discussed further below.

A. ICC

The ICC's rules require that arbitrators remain impartial and independent throughout arbitral proceedings. To ensure such impartiality and independence, the ICC requires each arbitrator to submit a signed statement of acceptance, availability, impartiality, and independence before appointment. The statement must also disclose in writing any facts or circumstances that might be of a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. Appointed arbitrators also have a continuing obligation to disclose any facts or circumstances concerning the arbitrator's impartiality or independence that may arise during arbitral proceedings.

Article 14 of the ICC's rules provides that a party may challenge an arbitrator for a lack of impartiality or independence, or "otherwise." Although the ICC's rules leave room for a challenge based on a reason other than a lack of impartiality or independence, those two grounds remain the predominant bases for arbitrator challenges.

B. LCIA

Like the ICC, LCIA requires that arbitrators remain impartial and independent during arbitral proceedings. LCIA ensures such conduct by requiring arbitrators, before appointment, to provide a written resume of past and present professional positions, agree in writing upon fee rates, and sign a declaration that the arbitrator is unaware of circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. As with the ICC's rules, appointed arbitrators have a continuing obligation to disclose facts or circumstances concerning their impartiality or independence that may arise during arbitral proceedings.

Article 10 of LCIA's rules states that a party may challenge an arbitrator where the arbitrator has become unable or unfit to act, or if circumstances exist that give rise to "justifiable doubts" as to the arbitrator's impartiality or independence. An arbitrator is considered unable or unfit to act where the arbitrator deliberately violates the underlying arbitration agreement or LCIA's rules, or otherwise fails to act fairly or impartially as between the parties or fails to diligently conduct the arbitral proceedings.

C. ICSID

ICSID requires arbitrators participating in an arbitral proceeding to sign a declaration stating that, to the best of the arbitrator's knowledge, there is no reason why the arbitrator should not serve as an arbitrator in a given proceeding and that the arbitrator will judge fairly as between the parties. Moreover, ICSID requires arbitrators to submit a statement of past and present professional, business, and other relationships with the parties, and any other circumstances that might cause the arbitrator's reliability for independent judgment to be questioned by a party. Like under the ICC and LCIA's rules, arbitrators have a continuing obligation to disclose facts and circumstances that arise during arbitral proceedings that affect the above statement.

Pursuant to Article 57 of the ICSID Convention, a party may propose the disqualification of an arbitrator "on

account of any fact indicating a manifest lack of qualities required by paragraph (1) of Article 14" or on the ground that an arbitrator was ineligible for appointment pursuant to Section 2 of Chapter IV of the ICSID Convention. Paragraph (1) of Article 14 requires arbitrators to be persons of high character and legal competence who can be relied upon to exercise independent judgment. Section 2 of Chapter IV of the ICSID Convention specifies default appointment procedures where the parties have not otherwise agreed to other procedures for selecting arbitrators.

II. Case Studies

As is highlighted above, the ICC, LCIA, and ICSID each allow a party to challenge an arbitrator for a lack of impartiality and independence. In theory, these challenges should only be invoked where there is a real threat that an arbitrator's involvement in proceedings will affect the integrity and fairness of those proceedings. In practice, however, arbitrator challenges do not always follow this principle. Below is a discussion of five cases before LCIA and ICSID that demonstrate the varying extents to which arbitrator conduct may be considered objectionable and a valid basis for disqualification. These cases demonstrate the high evidentiary burden on parties seeking to disqualify arbitrators, and provide valuable guidance on the limitations faced by parties considering an arbitrator challenge.

A. Disagreement With Arbitrator Rulings Is Not A Valid Basis For Arbitrator Disqualification.

In Abaclat v. Argentine Republic,1 Argentina challenged two of three arbitrators, claiming that the two arbitrators were responsible for procedural decisions regarding the briefing calendar that demonstrated an "absolute lack of equality in treatment accorded to the parties." Argentina's challenge centered around the two arbitrators' refusal to grant Argentina an extension of time to file its Rejoinder Memorial, despite the claimant receiving similar extensions and, on the whole, having considerably more time to prepare its Reply Memorial than Argentina was granted to prepare its Rejoinder Memorial. In response, the claimant argued that Argentina's challenge was based solely on its disagreement with the Tribunal's ruling, which is not a valid basis for arbitrator disqualification. Moreover, the claimants alleged that Argentina's challenge was untimely and "groundless on its face," and that Argentina should not be rewarded for its "tactical abuse of ICSID procedures" to secure additional time to file its Rejoinder Memorial.

ICSID found that Argentina's challenge, while timely, was based solely on its disagreement with the Tribunal's procedural rulings, which is insufficient to establish the manifest lack of the qualities required by Article 14(1) of the ICSID Convention to disqualify an arbitrator. ICSID stressed that, contrary to Argentina's assertions, the arbitrators reached each procedural ruling after due consideration of the parties' respective arguments.

More recently, in ConocoPhillips v. Bolivarian Republic of Venezuela,2 ICSID affirmed the principal that a party's mere dissatisfaction with a Tribunal's decision is not a basis for disqualification. In ConocoPhillips, the respondent alleged that Venezuela's arbitrator challenge was based solely on its disagreement with a Tribunal ruling and that Venezuela's challenge was "patently frivolous and . . . a part of a series of meritless and desperate delaying tactics." ICSID denied the challenge.

B. Challenges To Arbitrators' Impartiality Or Independence Require Compelling Evidence.

In a case decided by LCIA in March 2010,3 the respondent challenged one of three arbitrators selected and appointed by LCIA. Specifically, the respondent claimed that the arbitrator: (1) lacked independence because of the arbitrator's previous relationship with respondent's counsel during an ICC arbitration, which the arbitrator failed to disclose; and (2) lacked impartiality because, during the proceedings, the arbitrator's statements and behavior suggested that the arbitrator had predetermined the case against the respondent. To support the respondent's charge that the arbitrator lacked independence, the respondent emphasized the arbitrator's admission that he had one previous contact with the respondent's counsel in connection with an ICC arbitration. To support the respondent's allegation that the arbitrator lacked impartiality, the respondent offered excerpts from transcripts of the proceedings in which the arbitrator made statements the respondent interpreted to indicate bias.

LCIA first dealt with the respondent's challenge to the arbitrator's independence and ruled that the respondent's challenge was untimely because the respondent knew or should have known, with reasonable diligence, about its counsel's previous relationship with the arbitrator many months before filing its challenge. In any event, the court added that the arbitrator did not draw a significant part of his revenues from an ongoing relationship with respondent's counsel, which LCIA stated was the only relevant inquiry when evaluating an arbitrator's relationship with counsel.

With respect to the respondent's challenge to the arbitrator's impartiality, LCIA similarly found insufficient evidence in the record to support a finding of bias. The court noted that arbitrators often form preliminary views on issues and that such a practice, absent more egregious conduct, is not sufficient to justify a finding that the arbitrator was unwilling to impartially assess the merits of the respondent's position. Additionally, the court found that the arbitrator's statements and conduct during the proceedings, while perhaps insensitive at times, did not rise to the level of impartiality. Accordingly, based on the limited evidence set forth by the respondent, the court concluded that the arbitrator had exhibited neither bias, nor the appearance of bias, and dismissed the challenge.

C. An Arbitrator's Repeat Appointments Or Failure To Disclose Circumstances Relevant To Independence Or Impartiality Is Not Dispositive Of The Disqualification Inquiry.

In Burlington Resources, Inc. v. Republic of Ecuador,4 Ecuador challenged one of three arbitrators on three grounds: (1) the arbitrator lacked independence as evident by the arbitrator's repeat appointments in eight arbitrations involving a single law firm; (2) the arbitrator breached his duty to disclose by failing to disclose the eight appointments; and (3) the arbitrator demonstrated a lack of impartiality based on the arbitrator's questions and dissenting comments during the arbitration and personal attacks directed at Ecuador's counsel in the arbitrator's written response to Ecuador's challenge. Burlington countered that Ecuador's challenge was untimely and a "transparent attempt to sabotage [the] proceedings," and that an arbitrator's repeat appointments, alone, is insufficient to justify disqualification.

In considering Ecuador's challenge, ICSID noted that Ecuador's first two grounds for the challenge were time barred. ICSID emphasized that, despite an arbitrator's continuing obligation to disclose circumstances that might cause his reliability for independent judgment to be questioned, Ecuador knew of at least four of the arbitrator's eight appointments approximately two years before it filed its challenge, and should have known about at least three of the remaining appointments, which became public months before Ecuador filed its challenge. As such, ICSID found that the practical considerations underlying the continuing obligation to disclose were satisfied by the fact that Ecuador knew or should have known of the majority of the arbitrator's appointments well before it actually filed its challenge.

With regard to the remaining ground of Ecuador's challenge, ICSID determined that Ecuador did not provide objective evidence indicating that the arbitrator's conduct during the arbitral proceedings demonstrated bias or an appearance of bias. However, ICSID concluded that the arbitrator's written response to Ecuador's challenge did evince an appearance of lack of impartiality. In that response, the arbitrator criticized the allegedly unethical behavior of Ecuador's counsel in allegedly disclosing confidential information from another case to advance its client's interest in the present arbitration. ICSID found that the arbitrator's remarks were wholly unnecessary in the context of responding to an arbitrator challenge and that the remarks, viewed by a neutral third party, indicated a manifest lack of impartiality with respect to Ecuador and its counsel. Accordingly, ICSID upheld Ecuador's challenge.

D. An Arbitrator's Previous Participation In A Factually Similar Arbitration May Be A Valid Basis For Disqualification.

In Caratube International Oil Co. LLP v. Republic of Kazakhstan,5 the claimants challenged the Republic of Kazakhstan's appointment of an arbitrator because the arbitrator: (1) previously participated in a factually similar arbitration; and (2) was appointed by the same law firm for numerous arbitrations in the past. The two factually similar arbitrations shared many similarities. For example, the Republic of Kazakhstan was the respondent in both arbitrations, and the claimants, although different, had one common owner. Additionally, the prior dispute arose out of broadly the same facts as the present dispute and involved witness statements that were likely to be relied upon in the present dispute.

After considering the parties' respective arguments for and against the disqualification of the arbitrator, ICSID ruled in favor of the claimants, finding that the arbitrator's involvement in the prior factually similar arbitration raised questions as to the arbitrator's ability to remain impartial throughout the proceedings. ICSID found that, irrespective of the arbitrator's intentions and best efforts to act impartially and independently, a neutral third party would find it highly likely that, due to his involvement in the prior factually similar arbitration, the arbitrator's objectivity and open-mindedness were tainted by his exposure to the facts and legal arguments presented in the prior arbitration. Noting that this was a sufficient basis to uphold the arbitrator challenge, ICSID also addressed whether the knowledge the arbitrator obtained from the prior proceeding posed an additional problem for his continued participation in the present arbitration. On that point, ICSID found that a neutral third party would find that there is a manifest or obvious appearance of imbalance within the Tribunal because the arbitrator acquired knowledge during the prior arbitration that may not be available to the other two arbitrators who did not participate in the prior arbitration. However, ICSID declined to state whether this second ground was sufficient on its own to support disqualification, or whether it was a merely an aggravating circumstance.

In upholding the claimant's arbitrator challenge, ICSID also noted that the arbitrator's numerous appointments were not sufficient on their own to justify disqualification. ICSID emphasized that there was no evidence that the arbitrator had become financially dependent on the law firm responsible for his multiple appointments or that the arbitrator's ability to exercise independent judgment was compromised. Nevertheless, because of the arbitrator's participation in the prior factually similar arbitration, ICSID found that disqualification was warranted.

III. Lessons Learned & Best Practices

As the above cases demonstrate, the selection of arbitrators for a particular proceeding can often be a contentious matter, one that parties will continue to contest even after the arbitral proceeding has begun. As such, it is important for parties to understand the arbitrator selection process and the grounds for disqualification to not only better understand when a challenge is warranted, but also to detect abuse of challenge procedures.

Moving forward, parties should be aware of the high evidentiary burden placed on parties seeking the disqualification of an arbitrator and ensure that both their own challenges and those of their adversary meet that high burden. Additionally, both when initially selecting arbitrators and throughout the ensuing proceeding, parties should pay close attention to arbitrators' disclosure statements and consider any other readily available information regarding the arbitrators' associations or views. This will assist parties in identifying warranted grounds for disqualification, as well as detecting frivolous and untimely challenges by the opposing party.

Finally, parties should consider the often untold impact of asserting weak or meritless challenges and be aware of this impact when contemplating a challenge or responding to a challenge. Arbitral institutions are well-versed in identifying frivolous challenges, and a weak challenge could offend the arbitral panel, which could cause the panel to question the party's credibility as well as the merits of the party's case. As such, parties should not only think carefully before launching a weak arbitrator challenge, but also be alert for opportunities to bring weak or frivolous challenges by the opposing party to the panel's attention.

Endnotes

1. Abaclat v. Argentine Republic, ICSID Case No. ARB/07/05, Decision Rendered Feb. 4, 2014.

2. ConocoPhillips v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision Rendered May 5, 2014.

3. LCIA Reference No. 81224, Decision Rendered Mar. 15, 2010.

4. Burlington Res., Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision Rendered Dec. 13, 2013.

5. Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision Rendered Mar. 20, 2014.

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