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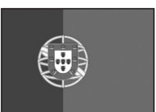
ALL IN THE FAMILY: SIBLINGS = CONFLICT IN INTERNATIONAL ARBITRATION?

By Filipa Cansado Carvalho



In ICSID case ARB/11/29,[1] the respondent challenged the arbitrator appointed by the claimants on a not-your-everyday ground for refusal, namely that said arbitrator was the brother of the arbitrator named by one of the claimants in another dispute against the same respondent and in which the same facts were being discussed.

The particulars of this case – especially in a context of shortage of publicly available information (in global terms) regarding decisions on conflicts of interest in arbitration – make it worthy of attention.[2]

The relevant facts are quite simple: in May 2011, following the termination, by presidential decree, of the concession agreement for the port of Conakry, the concessionaire initiated, pursuant to the arbitration clause in the concession agreement, arbitration against the Republic of Guinea under the rules of the OHADA Common Court of Justice and Arbitration (the "OHADA arbitration") and nominated as arbitrator Juan António Cremades.

In addition to the OHADA arbitration, in which the concessionaire sought compensation pursuant to the contractual provisions, the concessionaire and other companies of the same group brought ICSID proceedings against the Republic of Guinea later that year on the basis of both the convention on the settlement of investment disputes between states and nationals of other states (the "Washington Convention") and the Republic of Guinea's investment legislation (the "ICSID arbitration"). In these proceedings the claimants appointed Bernardo Cremades as arbitrator.

Prior to the first session of the ICSID tribunal, the Republic of Guinea announced its intention to make an application for the disqualification of Bernardo Cremades pursuant to article 57 of the Washington Convention[3] and rule 9 of the Rules of Procedure for ICSID Arbitration Proceedings. Upon conclusion of the exchange of submissions on the matter and the presentation of comments by the arbitrator in question, the proposed disqualification of Bernardo Cremades was voted on by the other members of the tribunal. Since they were equally divided, the issue was referred to the chairman of the Administrative Council (the "chairman") for decision.

In summary, in its application, the State argued that

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the nomination/appointment, by the claimant party, of two brothers in parallel proceedings could only be a deliberate strategy to illegitimately create an advantage to the detriment of the respondent.

In Guinea's submission, the claimants had created an objective situation which was, in and of itself, sufficient to generate legitimate and reasonable doubt as to the independence and impartiality of Bernardo Cremades for the following reasons:

(i) Violation of the principle of party equality: there was a link between the arbitrators nominated/appointed by the claimant party in the two sets of proceedings, whereas no such link existed between the arbitrators nominated/appointed by the respondent;

(ii) Risk of communication of confidential information[4] and opinion between the two arbitrators/brothers: a third party could reasonably fear that Bernardo Cremades would have access to more information than the other members of the ICSID tribunal. This would in turn violate due process to the extent that arbitrators must decide the case based solely on the elements presented and argued before them;

(iii) Risk that Bernardo Cremades could be positively influenced by the decisions taken by the OHADA tribunal because his brother sat on said tribunal: Guinea deemed this analogous to the situation considered in paragraph 3.3.4 of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines" or "Guidelines"), with the main difference that the link between the two arbitrators was, rather than professional, a family one;

(iv) Failure to disclose: the fact that Bernardo Cremades had not disclosed that his brother was acting as arbitrator nominated by concessionaire in the OHADA arbitration reinforced the legitimacy of the doubts regarding his independence and impartiality. The public nature of the family tie between the two arbitrators was said to be irrelevant in view of article 4.1 of IBA Rules of Ethics for International Arbitrators.

The claimants denied the accusation that the nomination/appointment of the two brothers had been determined by a deliberate intention to thus obtain decisions going in the same direction in both arbitrations. They noted that Guinea's position implied that both arbitrators would be willing to breach their ethical duties including their duty of confidentiality, something which was difficult to reconcile with the fact that Republic of Guinea did not call into question (in fact, quite the opposite) the professional qualities or probity of either arbitrator.

They rejected the suggestion that the situation was analogous to paragraph 3.3.4 of the Guidelines stating that it is natural and legitimate that lawyers in the same firm share information and that this can happen even inadvertently since they often have access to the files and information of the whole firm. Conversely, none of this happens in the case of two brothers that do not work together and who are required to keep professional secrecy between them.[5]

As to the coincidence of the facts under discussion in the two cases, the claimants noted that if, as decided in Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19[6] ("Electrabel"), the same person could sit in two different arbitrations in which the same facts or similar facts and the same legal issues were being discussed, the two brothers could, all the more, sit in the two parallel proceedings.

Since there was no conflict of interest and no case law or doctrine identifying such a situation as problematic – the claimants concluded – there was no reason for disclosure, moreover because the relationship between the two arbitrators is public.

The last submission on the subject was filed on May, 11th and on June, 28th the chairman issued his decision. In it the chairman noted that the disqualification procedure exists to ensure that disputes are decided by people that possess the characteristics described in article 14 of the Washington Convention and not to address other issues that do not directly concern those characteristics such as the strategy of the other party. Thus, whether or not Bernardo Cremades should be disqualified by the simple fact that his brother was nominated in the OHADA arbitration had to be decided based upon objective elements of evidence.

The proposal to disqualify Bernardo Cremades was then dismissed for the following reasons:

(i) Regarding the alleged violation of equality of the parties, the chairman decided that the Republic of Guinea had not shown how this could affect the independence of Bernardo Cremades;

(ii) The chairman additionally dismissed as speculation the suggestion that two experienced and renowned international arbitrators that do not have patrimonial and professional common interest would be willing to violate their ethical and deontological duties with the purpose of assisting the claimants in obtaining favourable decisions;

(iii) On the danger of Bernardo Cremades being influenced by the decisions of the other panel, the chairman noted that it was not at all clear or certain that this arbitrator could be influenced by said decisions any more than the remaining members of the ICSID panel or any more than any arbitral tribunal called to rule on issues that had already been decided by another tribunal;

(iv) While the Republic of Guinea had argued that there was no jurisprudence regarding this specific issue,[7] the chairman upheld the argument used by the claimants that – a fortiori and by analogy with the decision in Electrabel – there should be no disqualification;

(v) On the absence of disclosure, the chairman – underlining the non-mandatory nature of the IBA Guidelines[8] – mentioned that the lack of disclosure is not equivalent to a lack of independence and that only the facts and circumstances that have not been disclosed can call into question the arbitrator's independence. He added that it was not clear that Bernardo Cremades was aware of the nomination of his brother in the OHADA arbitration. He also considered that even though the public nature of certain information – such as the

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relationship between the two brothers within the arbitration world – is insufficient to justify not disclosing facts that should otherwise be disclosed, the said public nature can be taken into account when deciding if the lack of disclosure constitutes a manifest lack of the qualities required by article 14 (1).

This decision confirms the truism that decisions on challenges against arbitrators are very fact-specific. Its wording suggests that, in terms of arguments, the identity and characteristics of the arbitrators in question were more decisive than the decision in Electrabel.[9]

Since it is well-known that there is a higher threshold for disqualification of arbitrators in ICSID arbitration (and this is patent from the decision, which contains numerous references to the fact that Guinea's proposal was based upon supposition and unproven allegations), one may wonder whether, had this been an international commercial arbitration, the result would have been the same.

We cannot, of course, decisively answer this question, also because the decision on whether or not to uphold a challenge depends on more than the actual facts invoked, and includes, for instance, practical considerations such as the timing of the challenge (for instance, all things being equal, the decision may be different depending uniquely on whether the challenge was made before or after the confirmation of the arbitrator by the institution).

With this proviso it seems, however, that absent any palpable indication that the arbitrators in question would be inclined to violate their duties, institutions[10] allowing the same arbitrator to sit in two parallel proceedings in similar conditions would, a fortiori, have also rejected the challenge.

Even for institutions that would not allow this, it is not clear that the result would have been different. Effectively, there are relevant differences between the two situations: whereas the same arbitrator has automatic and unlimited access to the information of either case without any violation of his/her duties and cannot split his/her mind in two to ignore in one arbitration the facts and arguments of the other, in the case under analysis the access to said information would require a conscious violation of the said duties.

The Republic of Guinea argued that this type of situation was precisely what paragraph 3.3.4 of the IBA Guidelines was intended to avoid and that the only reason why the brotherly relationship was not considered in it was because of its rarity, an argument that seems flawed.

As a matter of fact and as a complement to the above arguments, there is no reason to suppose that two siblings, that do not work together, that do not have common professional or financial interest and that are recurring and recognised participants in the international arbitration system would be more willing to violate ethical and deontological rules or more prone to be influenced in one way or the other by the decisions of the panel in which the other seats than, for instance, two friends.[11]

Furthermore, under point 3.3 of the IBA Guidelines (on "Relationship between an arbitrator and another arbitrator or counsel") close family relationships and close personal friendship were considered, as were parallel proceedings in broad terms. Despite this, close personal friendships were only addressed by reference to relationships between arbitrator and counsel of one party and not between two arbitrators (be it in the same or different disputes). Since this situation will presumably be more frequent than the appointment of siblings, its omission cannot be taken to mean that the reason it was not included anywhere in the Guidelines was because of its rarity and that, had it been thought of, it would be identified as a problematic or potentially problematic situation.

Also, the Republic of Guinea sought to apply paragraph 3.3.4[12] by analogy to automatically disqualify Bernardo Cremades without further consideration, a consequence that the Guidelines do not impose for the situation expressly mentioned in that article. Furthermore, as explained in General Standard 6 referring to "*Relationships*", although "[i]*n the opinion of the Working Group, the arbitrator must in principle be considered as identical to*

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his or her law firm", "the activities of the arbitrator's firm should not automatically constitute a conflict of interest."

As to the lack of disclosure, there is no hard and fast rule that failure to disclose automatically generates justifiable doubts as to the arbitrator's impartiality and independence. On the contrary, point 5 of Part II of the IBA Guidelines reads "*In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so*."

Also, article 4.1 of IBA Rules of Ethics for International Arbitrators[13] states that a failure to disclose may – rather than will – of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification. It is difficult to argue that this will be the case when (i) the specific situation at stake is not referred to in any rule, guideline, case-law, etc. and (ii) it is unclear whether the arbitrator was even aware of the facts in question. In fact, in the current state of the art it seems difficult to sustain that the reasonable enquiries to investigate that are the other side of the duty to disclose would include investigating whether a sibling had been appointed in a related affair.

As to the Republic of Guinea's allegations on the supposed violation of the equality principle, they seem somewhat formalistic: not all differences between the parties are tantamount to a (relevant) violation of this principle.

In conclusion, while independence and impartially are nowadays generally recognised as a cornerstone of arbitral proceedings (and not only in international arbitration), in practice doubt continues to exist in regard to conflicts of interest. The reasons behind the publication of the IBA Guidelines[14] are as relevant today as they were in 2004. While certain types of conflicts are recurrent and have been extensively debated, there is virtually no guidance when it comes to close personal relationships (including family and friends) outside the cases expressly addressed in the IBA Guidelines. This grey area will assume a darker tone when combined with problematic issues in arbitration as is the case of parallel proceedings.

It is easy to understand why these issues are not specifically addressed in the IBA Guidelines. They were prepared based upon the known and available information and judgment of the members of the Working Group and others involved in international commercial arbitration and this type of situation was not very common. In addition, they do not purport to be comprehensive.

This being said, to the extent that it would be possible to establish some further guidelines in respect of this type of situation,[15] this might prove beneficial in the future. While it is fair to assume that conflicts involving two arbitrator siblings will remain rare, anedoctal evidence suggests that other types of close personal relationships between participants in the arbitration arena are increasing. While they will most probably never become pervasive, they may give rise to different decisions[16] which may in the long run cause disturbance to the entire system.

Filipa Cansado Carvalho

1. I am a member of the legal team of one of the parties in this case. All the factual information from the cases mentioned in this article is publicly available on line. The decision commented on here is res judicata and is available in the French original at https://icsid.worldbank.org.
2. This article does not purport to make a thorough analysis of all the arguments used by both parties and will merely focus on the most significant or interesting ones.
3. This article reads in the relevant part: "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." Article 14 (1) in turn reads: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."
4. Such as information regarding the discussions within each panel regarding the case.
5. Guinea had commented en passant that, in fact, the two arbitrators had worked together in the past. In his observations reiterating his independence, Bernardo Cremades stressed that he had not had a professional or financial relationship with his brother for the past 13 years.
6. While the decision on disqualification is not public, reference can be made in this regard to published comments of claimant's counsel: "the claimant sought to challenge the appointment by the respondent of Professor Brigitte Stern on the basis that she had also been appointed as an arbitrator by Hungary in another Energy Charter Treaty claim, AES Summit Generation v Republic of Hungary. Electrabel's complaint was that: both arbitrations arose out of similar factual circumstances relating to the generation of electricity in Hungary and out of similar long-term Power Purchase Agreements; both arbitrations concerned the same governmental decree which had the effect of reducing tariffs significantly; both arbitrations related to the Energy Charter Treaty; both arbitrations were registered on the same day consequent to which the proceedings would likely run more or less in parallel; and Professor Stern would very likely be privy to evidence and arguments in the AES arbitration which would not have been seen by counsel to the claimant or the other two arbitrators in the Electrabel arbitration. The two remaining arbitrators, Professor Kaufmann-Kohler and Mr V.V. Veeder QC (chairman), rejected the challenge." Audley Sheppard, Arbitrator Independence in ICSID Arbitration, International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer, 2009, page 154.
7. Guinea grounded its position on (i) the nature of the link between the two arbitrators and (ii) on the identity of facts discussed in the two arbitrations, which in its submission meant that the dispute in question before both tribunals was the same. On this point specifically, the chairman stated that in any event the legal grounds for the claims in the two arbitrations were different.
8. This is clear from the wording of the Guidelines themselves. In their submissions the parties never discussed the nature of the IBA Guidelines, although the respondent referred to them as the "IBA Rules" and the claimants referred to them as the "IBA Guidelines".
9. This decision was not a guarantee that the disqualification of Bernardo Cremades would be rejected, inter alia, because the chairman was not bound by said decision.
10. What is said here regarding institutions applies mutatis mutandis to courts that are called to analyse this question.
11. While this distinction does not exist in the IBA Guidelines, which consider these two types of personal relationship jointly, the situation might be different for other types of close family relationship, i.e. if instead of siblings we were for instance talking about spouses or life partners.
12. This paragraph is included in the Orange List, which non-exhaustively enumerates specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence.
13. And not of the IBA guidelines, as mentioned by lapse in the chairman's decision.
14. While this is not the only available instrument on the subject of conflict of interest practice, arbitration literature and case law reveals that the IBA Guidelines are consistently referred to for guidance on the subject of conflicts of interest in international arbitration.
15. Going beyond acknowledging independence and impartiality as an overriding requirement of arbitration as a legitimate alternative mechanism of solving disputes and the general principles of Part I of the Guidelines and including some of these situations in the existing red – non-waivable and waivable –, orange and green lists as appropriate.
16. Thus, in separate ICC arbitrations in which I was recently involved two seemingly similar situations were addressed in a distinct manner by two equally distinguished and knowledgeable international arbitrators: in one case, the arbitrator nominated by the claimants disclosed that the wife of respondents' counsel was a partner in his office; conversely, in the other the President failed to disclose that the wife of the respondents' counsel worked in his office.

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