

ICSID TRIBUNAL DISQUALIFIES ARBITRATOR

Blue Bank International & Trust (Barbados) Ltd. v Venezuela (ICSID CASE No.ARB/12/20)

Introduction

In a decision dated 12 November 2013 in *Blue Bank International & Trust (Barbados) Ltd. v Venezuela*, the Chairman of the ICSID Administrative Council, Dr. Jim Yong Kim, disqualified Mr Jose Maria Alonso as arbitrator on the grounds that a third party would find an evident or obvious appearance of lack of impartiality.

Ethics of arbitrators

Article 14(1) of the ICSID Convention (adopted in 1966 to provide for Investor claims against States) provides that persons designated to serve as an arbitrator in an ICSID proceeding “*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.*”

Under Article 57 of the ICSID Convention, an arbitrator may be challenged on the grounds of “*of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14*”.

Background

The Claimant is Blue Bank International & Trust (Barbados) Ltd., a company incorporated under the laws of Barbados which is a trustee of the Qatar International Authorised Purpose Trust. On 25 June 2012, the International Centre for Settlement of Investment Disputes (“ICSID”) received a Request for Arbitration filed by the Claimant against Venezuela, in which the Claimant alleged that Venezuela had breached the Venezuela/Barbados BIT as a result of actions taken in connection with the Claimant’s investment in numerous tourism and hospitality facilities throughout Venezuela for which it was granted concessions to develop and to operate.

On 8 October 2012, the Claimant appointed Mr. Jose Maria Alonso as arbitrator; and on 5 November 2012, Venezuela appointed Dr. Santiago Torres Bermirdez as arbitrator.

On November 5, 2012, Venezuela submitted a proposal to disqualify Mr. Alonso pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

Subsequently, 12 June, 2013, and before the Tribunal had been constituted, the Claimant submitted a proposal to disqualify Dr. Torres Bermirdez. As the two proposals together would constitute a proposal for disqualification of the majority of the members of the

tribunal, the proposals were to be decided by the Chairman in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9.

Jose Maria Alonso

Venezuela proposed the disqualification of Mr. Alonso based on his position at Baker & McKenzie, which represented the claimant investor in the case of *Longreef Investments A. V. V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11 /5). In particular, Venezuela noted:

- Mr. Alonso was (i) a Managing Partner of the Litigation and Arbitration Department of Baker & McKenzie Madrid and (ii) a Member of the Steering Committee of the Global Arbitration Practice Group and the Steering Committee of the Baker & McKenzie International European Dispute Practice Group, and the Caracas office of Baker & McKenzie in Caracas represented complainants in administrative proceedings against Venezuela.
- Baker & McKenzie is structured and publicized as a global legal practice, and that each office cannot be considered as a separate legal person for the purposes of a challenge application.
- The fact that Longreef Investments A. V. V. was a current client of the law firm where Mr. Alonso was a partner was sufficient to give rise to reasonable doubts as to Mr. Alonso's independence and impartiality, even if Mr. Alonso received minimal remuneration from the client. In any event, Venezuela contended that Mr. Alonso had direct and indirect economic interests in the outcome of these two cases against Venezuela, given that part of his remuneration depended on the results of other firms and that a favorable result in *Longreef v. Venezuela* in addition to a vote favorable to the Claimant in the present case would contribute to the expansion of the practice of Baker & McKenzie in the investment arbitration community.
- Mr. Alonso's interests were adverse to Venezuela's interests because Baker & McKenzie represented interests against Venezuela.
- Mr. Alonso would be deciding issues similar or identical to those which Baker & McKenzie would be arguing against Venezuela in *Longreef v. Venezuela*.
- Any reasonable person would have justifiable doubts as to whether an arbitrator that coordinates the global arbitration practice of a firm could sign an award rejecting arguments that are being defended by other partners of the same firm against the same respondent.

In response, Mr. Alonso concluded that there was no basis to find reasonable doubt as to his capacity to act impartially, especially given that he did not or had never personally represented any of the Parties, he had never acted in any case against Venezuela and had no economic or other interest in the result of the *Longreef v. Venezuela* case.

Dr. Torres Bermirdez

The Claimant's proposed disqualification of Dr. Torres Bermirdez was based on (i) repeat appointments by the Argentine Republic, and by Venezuela when represented by the former Attorney General of the Argentine Republic; and (ii) Dr. Torres Bermirdez's alleged systematic findings in favor of States.

Dr. Torres Bermirdez rejected the Claimant's position, but resigned prior to the hearing. The Chairman therefore did not address the disqualification of Dr. Torres Bermirdez in his decision.

Decision

The Chairman of the ICSID Administrative Council granted the application to disqualify Mr Alonso. Having referred to both Articles 57 and 14 of the ICSID Convention, the Chairman noted that while the English version of Article 14 refers to "independent judgment", the Spanish version requires "imparcialidad de juicio" (impartiality of judgment). On that basis, he accepted that arbitrators must be both impartial and independent, distinguishing between the two as follows: "*Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control*". The applicable legal standard was an "*objective standard based on a reasonable evaluation of the evidence by a third party*".

The Chairman found that it had been demonstrated that a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts in this case on the basis that:

- The sharing of a corporate name, the existence of an international arbitration steering committee at a global level, and Mr. Alonso's statement that his remuneration depends "primarily" but not exclusively on the results achieved by the Madrid firm imply a degree of connection or overall coordination between the different firms comprising Baker & McKenzie International.
- Given the similarity of issues likely to be discussed in *Longreef v. Venezuela* and the present case and the fact that both cases were ongoing, it was highly probable that Mr. Alonso would be in a position to decide issues that were relevant in *Longreef v. Venezuela* if he remained an arbitrator in this case.

For further information on issues relating to ethical requirements for arbitrators and counsel, please see our previous mailing here

17th December 2013