

The International Court of Arbitration

Assignment No.1
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Situation No.1

The Claimant nominated as its arbitrator Justice Armawi, the Supreme Court judge of Country X. Justice Armawi declared in his Statement that *“while he has the requisite experience, knowledge and understanding of real estate laws and regulations, conventions and practices in his country, he does not have five years experience with construction and/or management of projects similar to the Project in question”*.

In its correspondence, Respondent objects to the nomination of the prospective arbitrator claiming that although it holds Justice Armawi in *“very high regard”*, and does not doubt *“his credentials and achievements in the field of law”*, *“the lack of at least five years experience with construction and/or management of projects similar to the Project makes it impossible for Justice Armawi to act as an arbitrator in this case and asked the ICC Court not to confirm him as an arbitrator”*.

With regards to Article 13(1) of the ICC Rules of Arbitration (**“the Rules”**), the Court may confirm the nomination of each arbitrator, as it deems appropriate.

Firstly, it results from the Arbitration Clause (**“the Clause”**) contained in the construction contract (**“the Contract”**), that the Parties agreed onto the nomination of arbitrators who have great knowledge of Country X. Given that Justice Armawi holds the function of Supreme Court Judge of that Country, the Court shall consider thereof that Justice Armawi demonstrates sufficient links with regards of his nationality, residence and other relationship with the country of which the parties or the other arbitrators are nationals.

Secondly, the Parties’ agreement requires the prospective arbitrator to have specific skills and qualifications as the Clause provides for several detailed requirements. Consequently, the Court shall evaluate the prospective arbitrator’s availability and ability to conduct the arbitration in light of the criteria contained in the above referenced Clause.

In the matter at hand, Respondent points out *“the lack of at least five years experience with construction and/or management of projects similar to the Project”*.

Indeed, the Project refers to a very complex construction project defined in the contract as *“the development, in accordance with Real Estate Act, other Applicable Laws and Schedule IV, of the Project Land by construction thereon of commercial and serviced apartments, hotel and information technology units to include, subject to the actual area sanctioned for construction as per the architectural drawings approved by the Investors, a constructed area of approximately 1.6 million square feet, including car parks common areas, internal roads, landscaping, cafeteria and other ancillary facilities as may be permitted by the relevant local Applicable Law and as mutually agreed between the Parties”*.

Therefore, it results from the peculiarities and the complexity of the Project, as well as from the wording and layout of the Clause, that the Parties did not mean to provide an exhaustive list of criteria to respect, but rather guidelines to follow to nominate an agent with a high degree of expertise. With regards to the necessity to conduct the arbitration in an expeditious and cost-effective manner, despite Respondent’s objection, the Court shall rule on favour of Justice Armawi’s ability and availability to conduct the arbitration in accordance with the Rules.

Thus, as no objection was made on the prospective arbitrator’s independence and impartiality with regards to Article 11(1) of the Rules, the Court shall confirm its nomination in accordance of Article 13.

Situation No.2

Claimants challenge Mr. Antares acting as an arbitrator. Claimants allege that Mr. Antares and Mr. Polaris serving as co-counsel in several arbitrations and litigations “(i) *prove the existence of a long-standing professional association between them*, (ii) *which enables the latter to have an insight into Mr. Antares’ legal reasoning and, thus, to secure an advantage over the Claimants’ counsel*”, giving rise to “*justifiable doubts as to Mr. Antares’ impartiality*” and “*independence*”.

According to Article 14(3) of the ICC Rules of Arbitration (“**the Rules**”), the Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge.

As with regards to the admissibility, the Court shall refer to the Secretariat of the ICC, in order to determine whether Claimant submitted a “*written statement specifying the facts and circumstances on which the challenge is based*”, as provided by Article 14(1). If so, the Court shall then decide upon the respect of the delay according to Article 14(2). Pending the Secretariat’s answer, the Court shall suspend its decision. However, as Claimants’ “*challenge*” was followed by an exchange of letters, giving to the Parties the opportunity to comment within sufficient period of time, the Court may proceed to a preliminary examination of the merits.

As to the merits of the challenge, Article 14(1) states a challenge may be brought “*whether for an alleged lack of impartiality or independence, or otherwise*”, with regards to Article 11(1) and (2).

Firstly, Claimants highlights prior relationships between the arbitrator and a Party, as Mr. Antares, the sole arbitrator, and Mr. Polaris, the Respondent’s Council, “*were joint legal advisers to Claimant 2 before a national court*”. Mr. Antares states that “*his involvement in the Case involving Claimant 2 was limited to the drafting of a legal opinion regarding the annulment proceedings*”.

If we refer to Article 3.1.1 of the IBA Guidelines on Conflict of Interest (“**the IBA Guidelines**”), the fact that “*the arbitrator has within the past three years served as counsel for one of the parties [...] or has previously advised or been consulted by the party making the appointment in an unrelated matter*” is listed under the Orange List, that is to say situations which in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality and independence. However, the “*involvement*” of Mr. Antares, whether as a council or for his legal opinion, happened in 2010, four years ago. Therefore, it seems that the relationship between the arbitrator and Claimant 2 does not impact Mr. Antares’ independence and impartiality.

Secondly, Claimants point out relationships between the arbitrator and a Party’s Counsel. Indeed, Mr. Antares and Mr. Polaris “*have previously acted as co-counsel in three arbitrations*”, and, “*in between 2009 and 2011 [...] jointly represented*” two parties in litigation proceedings. Furthermore, as stated by Respondent, “*all proceedings*” where they acted together “*ended a long time ago with*”, and, they “*charged their fees separately*”, which Mr. Antares confirmed only as far as it concerned the last case. If we refer to Article 4.4.2 of the IBA Guidelines, the fact “*the arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel*” is listed under the Green List, that is to say situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view, and, in which disclosure is not required. As their professional relationship ended three years ago, it cannot be considered as creating a significant commercial relationship, nor be qualified as a conflict of interest *per se*. Therefore, even though Claimants alleged “*Mr. Antares’ failure to disclose his participation*” in the above-mentioned cases, is “*sufficient to give rise to justifiable doubts*”, as with regards to his impartiality and independence, the challenge should not be accepted.

Nevertheless, as Mr. Antares is sole arbitrator in this matter, his approximation regarding the fees and his failure to disclose the full extent of the relationship does increase suspicion, despite the IBA Guidelines’ acceptance of non-disclosure in such a situation. The Court shall thus accept the challenge and refer the Parties to Article 15 of the Rules for the replacement of the said arbitrator. The Court shall also remind the Parties of the necessity to conduct the arbitration in an expeditious and cost-effective manner.

Situation No.3

On 30 August 2014, Respondent filed a challenge against the Claimant's nominated arbitrator, Mr. Zuckenburg, because of his participation as an expert witness appointed by Group Inc in a case filed by the latter against Z's Ministry of Interior in the dispute arising out of the contract for the refurbishment of Z Ministry of Interior's information data system ("**the Group case**").

According to Article 14(3) of the ICC Rules of Arbitration ("**the Rules**"), the Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge.

As with regards to the admissibility of the challenge, the Court shall consider Respondent submitted a "*written statement specifying the facts and circumstances on which the challenge is based*" as provided by Article 14(1). However, as the Court does not dispose of sufficient information with regards to the delay, it shall refer to the Secretariat. Pending the Secretariat's answer, the Court shall suspend its decision. Nevertheless, as Respondent's submission was followed by an exchange of letters, giving to the Parties the opportunity to comment the challenge within a sufficient period of time, the Court may proceed to a preliminary study of the merits.

As to the merits of the challenge, Article 14(1) states a challenge may be brought "*whether for an alleged lack of impartiality or independence, or otherwise*", with regards to Article 11(1) and (2).

Respondent claims that "*Mr. Zuckenburg's [...] cannot act impartially as he evidently has a consolidated opinion about [...] most of the issues in dispute in this arbitration*". If we refer to Article 2.1.1 of the IBA Guidelines on Conflict of Interest ("**the IBA Guidelines**"), the fact that "*the arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties*" is listed under the Waivable Red List. Indeed, it is common practice to refuse confirmation to co-arbitrators who have provided legal opinions or other advice in connection with dispute for party or affiliate.

Nevertheless, with regards to the Parties to the arbitration, Group Inc and Z Ministry of Interior are Parties to the Group case, and in no event to the present arbitration proceedings. Even though Respondent is a "*State-owned entity*" of Country Z, Respondent cannot be affiliated to Z's Ministry of Interior as each of them constitute a distinct legal person.

Furthermore, Mr. Zuckenburg claims that the facts raised by Respondent refer to an unrelated issue in which he has had "*limited involvement as an independent expert retained by counsel for one of the parties which are not involved in this arbitration*". If we refer to Article 4.1.1 of the IBA Guidelines, the fact "*the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated)*" is listed under the Green List. If public expression of opinions, regarding the particular dispute involved in the arbitration, is usually held to constitute grounds for removal, on the contrary, in most instances, an arbitrator's public statements concerning particular legal issues are not considered relevant to the arbitrator's independence and impartiality. Indeed, it is necessary for the Arbitral Tribunal to include experienced individuals, which involves the formulation of positions and thoughts, with regard to which they are generally appointed.

Finally, Mr. Zuckenburg has rendered only three expert opinions expressing views opposed to the Respondent's ones in the past eight years, and no evidence have demonstrated he has displayed his opinion on the matter subject to arbitration. Therefore, in light of the details brought by Mr. Zuckenburg's, Respondent's allegations are not susceptible to give rise to justifiable doubts as to the arbitrator's independence and impartiality.

Thus, the Court shall reject Respondent's challenge against Claimant's nominated arbitrator and, remind thereof the Parties of the necessity to conduct the arbitration in an expeditious and cost-effective manner.