

INTERNATIONAL COMMERCIAL ARBITRATION

2014/2015 Autumn Semester

Faculty: Simon Greenberg and Galina Zukova

ASSIGNMENT No. 1

- 1) Identify the issue in each of the three situations below.**
- 2) If you were a member of the ICC Court of Arbitration, what would be your decision and analysis of the parties' objections to the arbitrator nominee / challenge to an arbitrator?**
- 3) Length of the submissions: maximum one A4 single-spaced page, font 12, per situation**
Deadline: 5 October 2014
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SITUATION No.1

An arbitration clause in a construction contract provides the following:

“The Parties shall submit the dispute to arbitration, and such arbitration will be administered by the ICC. The arbitral tribunal will comprise 3 (three) arbitrators selected as hereafter provided.

Each arbitrator so appointed shall have the requisite experience, knowledge and understanding of real estate laws and regulations, and conventions and practices of [name] Country. In addition, none of such arbitrators shall be a Person who has any pecuniary interest in or relationship with any of the Parties and shall have at least 5 (five) years experience with construction and/or management of projects similar to the Project.”

The term “Project” is defined in the Contract as follows:

“Project” shall mean 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.”

The Claimant nominated as its arbitrator Justice Armawi, the Supreme Court judge of that Country.

Justice Armawi declared in his Statement of Acceptance, Availability, Impartiality and Independence 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.

Respondent, after receiving the Statement, commented that although it held Justice Armawi in “*very high regard*” and did not doubt his “*credentials and achievements in the field of law*”, however, 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.

SITUATION No.2

Mr. Antares is a Sole Arbitrator. Mr. Polaris is Respondent's counsel. Messrs. Antares and Polaris have previously acted as co-counsel in three arbitrations. In addition, between 2009 and 2011, Messrs. Antares and Polaris jointly represented a party in annulment proceedings related to an ICC arbitration, and in 2010, Messrs. Antares and Polaris were joint legal advisers to Claimant 2 before a national court.

The Respondent states that, in all of the cases, Mr. Antares and Mr. Polaris charged their fees separately. Mr. Antares confirmed this arrangement as far as the last case is concerned without denying its existence in other cases. The Claimants do not challenge these statements either. According to the Respondent, all proceedings, in which Messrs. Antares and Polaris acted as co-counsel, ended a long time ago, with the exception of one that ended in April 2011, and since 2011 Messrs. Antares and Polaris have not acted together in any new case. Neither Mr. Antares nor the Claimants called into question the accuracy of these statements. Mr. Antares also stated that his involvement in the case involving Claimant 2 was limited to the drafting of a legal opinion regarding the annulment proceedings. Mr. Antares did not disclose his previous work with Mr. Polaris in the ICC Arbitrator Statement of Acceptance, Availability, Impartiality and Independence.

The Claimants challenged Mr. Antares acting as an arbitrator in this particular matter, arguing that such a relationship between Mr. Antares and Mr. Polaris gives rise to justifiable doubts as to Mr. Antares' impartiality. According to the Claimants, Mr. Antares' failure to disclose his participation in the above mentioned cases has undermined the “*Claimants' trust in Mr. Antares' fairness*”, calling into question his independence. The Claimants mainly allege that Mr. Antares' and Mr. Polaris' serving as co-counsel in several arbitrations (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.

SITUATION No.3

Claimant: Company (Country M)

Respondent: State-owned entity (country Z)

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 (not a party to this arbitration) in a case filed by the latter against Z's Ministry of Interior (itself not a party to this arbitration) in the dispute arising out of the contract for the refurbishment of Z Ministry of Interior's information data system ("the Group case").

Respondent indicates that in the past eight years Mr. Zuckenburg has rendered three expert opinions expressing opinions and views that are diametrically opposed to Respondent's position in this case. In such regard, in the Group case Mr. Zuckenburg has expressed views against Z's judiciary indicating that there is an absolute political control of the executive over the judiciary and that it is unreasonable for Group Inc to litigate its dispute with Country Z in Z's courts. Mr. Zuckenburg has commented disapprovingly of the provision of the Z's Arbitration Law. The Attorney General of Country Z has taken a firm and detailed position in regard to Mr. Zuckenburg's opinions and "*completely rejected Mr. Zuckenburg's premises and conclusions*". Given the precise circumstances of the Group case and this arbitration and Mr. Zuckenburg's different roles in them, he cannot act impartially as he evidently has a consolidated opinion about Z's legal system and most of the issues in dispute in this arbitration.

Claimant states the issues at the heart of this dispute are dissimilar to those in the Group case. Neither Claimant nor Respondent were parties to the Group case. The two proceedings are completely separate and distinct.

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. He has not been counsel for any of the parties and has no financial or professional interest in the outcome of either the Group case or this arbitration. His independent assessment in the Group case concerning the conditions present in Z's legal system, relate to a question of whether it has become impracticable to adhere to an arbitration *forum* selection agreed upon by the parties to the Group case which established the capital of Country Z as the place of arbitration.