EXPLORING THE APPLICATION OF SECTION 3.1.3 OF THE IBA GUIDELINES*

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Abstract

The topic of *Repeated Appointments* or *Repeating Arbitrator* has been vastly discussed since the launch of the 2004 IBA Guidelines as well as the Orange List in Section 3.1.3 of the 2010 IBA Guidelines. An arbitrator's neutrality or impartiality may be directly impacted by its multiple appointment by the same or affiliated parties. This phenomenon becomes an interesting subject of research and deliberation by academicians and practioners. This Article then serves as a reflective report to the existing framework, practices, case laws and application of Section 3.1.3 of the IBA Guidelines.

Intisari

Adanya Penunjukan Berulang atau Pengulangan Arbiter telah sering menjadi topik pembahasan sejak peluncurannya IBA Guidelines 2004 dan juga Orange List pada Bagian 3.1.3 di IBA Guidelines 2010. Neutralitas atau ketidakberpihakan seorang arbiter dapat secara langsung dipengaruhi oleh pengangkatannya yang berganda oleh pihak yang sama atau berafiliasi. Fenomena ini merupakan subjek yang menarik untuk penelitian dan pertimbangan oleh para akademisi dan praktisi. Dengan demikian, Artikel ini berfungsi sebagai semacam laporan terhadap kerangka, praktik, kasus, dan penerapan Bagian 3.1.3 dari IBA Guidelines.

Keywords: international arbitration, repeated appointments, repeating arbitrator, 2004 IBA Guidelines on Conflicts of Interest in International Arbitration
Kata Kunci: *arbitrase internasional, pengulangan dalam penunjukan arbitrator, 2004 IBA Guidelines on Conflicts of Interest in International Arbitration*

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A. General Rules and Standards in case of Repeating Arbitrators

The concept of *Repeating Arbitrators* have garnered significant academic spotlight.[6] It has been especially relevant due to its nature that may or may not lead to myriad of possible ethical problems, so much so that the IBA Guidelines listed the scenario of repeating appointment of arbitrator in the Orange List, which describes a "*situation that may give raise doubts to the impartiality and independence of the arbitrator*" (See Mullerat, 2009, pg. 17).

Broadly speaking, *Repeating Arbitrator* can be duly defined as circumstances where an arbitrator has been previously appointed on several occasions by the same party, company, counsel, or an affiliate to one of the parties *(Giraldo, 2011, pg. 81)*. This jargon also refers to the situation in which the same parties or companies belonging to the same group of companies as the party, appoints the same arbitrator in several arbitration *(Slaloui, 2009, pg.109)*.

The above circumstances are listed in Section 3.1.3 of the 2010 *Guidelines on Conflicts of Interest in International Arbitration* as provided by the International Bar Association ("**IBA Guidelines**"). The IBA Guidelines neither *per se* manifests as a binding instrument in the practices of arbitral proceedings, nor does it professes to have such authority. (*IBA Guidelines pg. 2, ¶¶ 3, 7*). However, due to nature of IBA Guidelines that seeks to provide integrated and homogenous reference of the best arbitral practice, various arbitral institutions such as Stockholm Chamber of Commerce, London Court of International Arbitration and various others arbitral institutions have explicitly shown positive reception to the IBA Guidelines.[7]

With the exception of the International Chamber of Commerce, which had asserted that there are *fundamental incompatibility* between the ICC Rules and the IBA Guidelines – specifically philosophical divergence in regard to disclosure rules –there is almost no traction against the application of IBA Guidelines as the primary guidelines in determining the ethical standards of arbitrators *(Jung, 2008, pg 20-21)*.[8] The next sections will discuss briefly the elements of Section 3.1.3.

1. General Framework of Section 3.1.3

Repeating Arbitrator as described in Section 3.1.3, indicates that: *the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties* are to categorized in the Orange List.

The Orange List provides a number of situations that may raise *justifiable doubts* from a *reasonable third person having knowledge of the fact and*

[6] See various academic piece : Fatima-Zahra Slaoui, *The Rising Issue of Repeat Arbitrators : A Call for Clarification,* Arbitration International, Vol. 25, No. 1, LCIA, (2009); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review*, 1, 47-90 (2010); Natalia Giraldo, *The Repeat Arbitrator Issue : A Subjective Concept, 19 International Law, Revista Colombiana de Derecho Internacional, (2011).*

[7] See Helena Jung, *The Standards of Independence and Impartiality for Arbitrators in International Arbitrators : A comparative study between the standards of the SCC, the ICC, the LCIA and the AAA,* Master Thesis, Faculty of Law Uppsala University (2008), pg. 8, 9, also Nigel Blackaby, *Redfern and Hunter on International Arbitration*, 272 (5th ed., Oxford University Press, Oxford, 2009).

[8] See http://arbitrationblog.practicallaw.com/the-end-of-the-blanket-application-of-the-iba-guidelines-on-conflicts-of-interest-a-wake-up-call-for-arbitration-practitioners/ that states 80% of the modern arbitration practices have used the guidelines as reference

circumstances, and the primary obligation that arises from situations that are listed in the Orange List are disclosure by either the Arbitrator or the affiliate party. *(General Standard 7 (a); Practical Application of the General Standard, pg. 17-18, ¶. 2, 3)*.

2. Challenges against Arbitrator under Section 3.1.3

Concerning the situations listed in the Orange List, once the arbitrator or the concerned parties communicates any of the circumstances that may influence the independence or impartiality as set in the Orange List, the parties can object to the appointment or the continuity of the arbitrator. This objection needs to be done in a reasonable time after the circumstance is disclosed by the arbitrator or the party learns about it, which General Standard 4 (a), Explanation to General Standard 4(a) currently requires that an explicit objection needs to be made within 30 days after the receipt of the arbitrator's disclosure or after the party learns of the circumstance that could constitute a potential conflict. (*Practical Application of the General Standard, pg. 18, ¶ 6; See Mullerat, 2009, pg.6*)

Generally, practices affirm the 30-days limitation set out by General Standard 4, when a party has had ample notice of an arbitrator's impartiality, but has failed to raise any objection until the award is rendered, the parties will not thereafter be allowed to repudiate the award on the grounds of the arbitrator's partiality[9] or when a representative of a party has, during the proceedings, become aware of the existence of bias, prejudice fraud, partiality or dependence of the arbitrator to one of the parties, but does not raise an objection, such inaction would render the right of the parties to challenge the arbitrator to be waived[10] *(See also Mullerat, 2009, pg. 7-8)*.

3. Expanding the Term *Affiliate to one of the Parties*

In the opinion of several drafters of the IBA Guidelines, the construction of the word "*Affiliate*" would have a long-reaching effect that encompasses various mode of relationship between the disputing parties and external parties (*See Mullerat, 2009, pg. 7-8)*.

To help illustrate the extent the wording of *Affiliate*, picture a situation where Arbitrator X was appointed by Company A, whereas Company B has also appointed Arbitrator X previously in another arbitration. Both Company A and B are within the same Group of Companies, or has parent-subsidiary relationship.

In such a case, Mullerat finds that distinction would be irrelevant if not probably harmful; subjects that belong in one group of companies even if considered as separate legal entities, parent and subsidiary companies must fall under the definitions of *affiliated* (*Mullerat, 2009, pg. 7; Explaination to General Standard 6(b); Pratical Application of the General Standard ¶2.3.4)*.

For the purposes of the IBA Guidelines, any entity having any relationship, direct or indirect with the arbitrator and the party, or any third party that exerts controlling influence over the party, including parent company, major shareholders managers, directors and members of the supervisory board of a legal entity of a parent or subsidiary company as equivalent to the legal entity itself. Note 5 of the Guidelines states that:

[9] See for example : *Fox v. Hazetton*, 27 Mass. 275, 10 Pick 275 (1830), *Cook Industries, Inc. v. C. Itoh & Co. (America) Inc.*, 449 F.2d 106 (2nd Cir. 1971) *cert. denied*, 405 U.S. 921, 92 S.Ct. 957 (1972).

[10] See for example : *Tobacco Co. v. Alliance Ins. Co.*, 131 N.E. 213, 238 Mass. 514 (1921).

"… throughout the Application Lists, the term "affiliate" encompasses all companies in one group of companies including the parent company" *(Kumar, 2014, pg. 16-17; Explanation to General Standard 6(b))*.

This view is particularly supported under the Investment Company Act, 15 U.S.C.A. § 80a-(3) (A). Where it can be understood that a company could be considered as an affiliate of another, if the latter holds an ownership (direct or indirect) of 5% or more of the voting stock, both companies could be understood as affiliated. This is because economic involvement, no matter how incremental, would exert undue controlling influence *(Mullerat, 2009, pg. 14)*.

Limitation that requires the affiliate is "directly involved" in the subject matter of the dispute is unnecessary. The independence and impartiality of the arbitrator, to a certain degree, may be affected if the arbitrator had served an affiliate to the current disputing parties, even if the affiliate is not involved or is indirectly involved in the subject matter of the dispute. *(Kumar, 2014, pg. 16-17; Mullerat, 2009, pg. 14)*.

B. Cases and Practices of the Section 3.1.3 of the IBA Guidelines

This section will briefly highlight and analyse the cases in various arbitral institutions that have invoked Section 3.1.3 of the IBA Guidelines as grounds to challenge the appointment of arbitrators.

1. *Opic Karimum v. Venezuela*

On 28 May 2010, *OPIC Karimum Corporation*, a company based in Panama, entered into a dispute against the Bolivarian Republic of Venezuela. The Claimant, OPIC Karimum Corporation proposed Prof. Guido Santiago Tawil an Argentine national, as an arbitrator. Respondent, or the Bolivarian Republic of Venezuela appointed Professor Philippe Sands, a UK nationals and France as arbitrator (*Opic Karimum, ¶¶5-6*).

Based on the Declaration made by Professor Sands, it became evident that Professor Sands has been appointed by both Respondent and the law firm that represented Venezuela, Curtis Mallet-Provost LLP twice within the past three years (*Opic Karimum, ¶10*). Claimant then filed notion to disqualify Professor Sands at October 18, 2010, citing that the connection between Professor Sands and Respondent would be well beyond the threshold of the Orange List (*Opic Karimum, ¶19*).

In identifying the connection between Professor Sands and Respondent that manifest lack of independence and impartiality, Claimant put forward a 4-pronged test as upheld in the *Suez Case (Opic Karimum ¶22)*. The tests include:

a. The proximity of connection test

Claimant asserts that, by virtue of his appointments, "the connection between Professor Sands and the Respondent and its counsel is direct" while the Respondent does not challenge the directness of the connection. Respondent contends that the proximity is limited to the relation as a judge in dispute against third party, and that repeating appointments are not uncommon under ICSID (*Opic Karimum ¶36*).

b. The intensity or frequency of any interaction

Claimant submitted that, the frequency of which Professor Sands and the Respondent or Respondent's law firm has interacted and contacted each other seems to suggest substantial intensity. This is exacerbated by the assumption that Professor Sands appears to have relied on

the Respondent and Respondent's law firm to provide substantial amount of arbitration appointments, which is referring to the fact that Professor Sands was appointed by Respondent's law firm to sit in 3 pending ICSID cases, and Professor Sands that 5 of 8 concluded arbitration that has been concluded in the last year have been appointed by the Respondent's Law firm *(Opic Karimum, ¶18)*.

Despite that Respondent contends that the appointment of Professor Sands in the Nova Scotia Commercial Arbitration and in the Related UNCITRAL Arbitration cases were publicly known, and had been disclosed. Further, the IBA Guidelines does not prove anything beyond the existence of situation triggering disclosure, but not automatic disqualifications that are affirmed in the Practical Application to the General Standard ¶4 *(Opic Karimum, ¶18)*.

The tribunal ruled its positions regarding repeating appointment and departs from the positions in *Tidewater* that suggest multiple appointments by the same party in an unrelated case cannot be a sole reason to challenge arbitrator. [11] Instead, the tribunal here finds that multiple reappointments must be carefully considered in a case of challenge. Multiple appointment of the same arbitrator could foster unwarranted relationship, familiarity and confidence inimical to the requirement of independence established by the Convention *(Opic Karimum ¶47)*.

The tribunal surprisingly announced that *multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case,* casting multiple appointment of arbitrator by the same parties in a very negative light, and acquiesced that this practice may raise suspicion *(Opic Karimum, ¶47)*.

However, despite this revelation, the tribunal sets a standard that ***two appointment in two unrelated cases by the same parties*** does not in itself demonstrate lack of independence required to manifest lack of independency *(Opic Karimum ¶53)*.

c. The degree of dependence of an arbitrator upon a party for any benefits and the materiality or significance of any benefit

The fact that Professor Sands have received appointment multiple times would indicate that he receives direct financial benefits or advantage from the Respondent and Respondent's law firm, to a point of major financial significance. In its core, the cluster of appointments by Respondent and Respondent's law firm and the accompanying financial incentives would have suggested economic interest or dependencies that is material enough and thus cast justifiable doubts against Professor Sands ability to exercise independent judgment.

Respondent points that the existence of financial remuneration in a previous case does not translate to the existence of other *financial incentives*. In addition to this, the standard of *financial dependencies* requires more ***than singular, or sporadic remuneration, but indicatives to an arbitrator to derive substantial financial reliance, if not primary financial reliance to one of the alleged parties in question.***

Such requirement is not met in this case, as Professor Sands has other professional activities *(Opic Karimum ¶34)*. He acted as a barrister, tenured professor in certain universities, and had declined a

[11] *Tidewater v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, dated Dec. 23, 2010 ¶ 60.

number of arbitration proposals including the one that was proposed by Respondent in several occasions. As such, this indicates financial independence. *(Opic Karimum ¶39)*. The tribunal affirmrs Respondent's positions *(Opic Karimum ¶55)*.

2. *Tidewater Inc. v Republic of Venezuela*

On 16 February 2010, Tidewater Inc., Tidewater Investment SRI, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., (together Tidewater) as the Applicant filed a Request for Arbitration under the ICSID Convention against the Republic of Venezuela as the Respondent. Tidewater appointed Dr. Andreas Rigo Sureda as an arbitrator, while Respondent appointed Professor Brigitte Stern as an arbitrator. (*Tidewater ¶3-5)*

Based on the Declaration made by Professor Stern, it became evident that Professor Stern has been appointed by both Respondent and the law firm that represented Venezuela, Curtis Mallet-Provost LLP two times within the past six year,[12] with a pending case that are not yet constituted[13](*Tidewater ¶8, 14)*. Later, Claimant acquired information outside the Declaration made by Professor Stern, which is the fact that Professor Stern has been appointed 4 times by the Venezuelan Attorney General (*Tidewater ¶14)*.

Claimant then filed notion to disqualify Professor Stern following the disclosure by virtue of ICSID Arbitration Rule 6 (2) and Section 3.1.3 of IBA Guidelines (*Tidewater ¶13-14)*.

a. Claimant's Position

Claimant argues that *first,* the doubt against Professor Stern's independence and impartiality are compounded by the failure to disclose the multiple appointments in the first statement, and not all of the circumstances of these appointments are publicly known (*Tidewater ¶16.)*.

Second, Claimant underlines that the *Vanessa* Arbitration case takes place in 2004, which exceeds the three-year time bar of the Section 3.1.3, must be taken into account as a factor exerting undue influence. This is because IBA Guidelines are not to be applied in a rigid formalistic manner to avoid dilatory tactics that could undermine Section 3.1.3. Thus, Claimant asserts to extend ambit of Section 3.1.3 to also include *Vanessa* (*Tidewater, ¶19-21)*.

b. Respondent's Position

On the other hand, Respondent argued that Professor Stern has made all appropriate disclosure in accordance to ICSID Arbitration Rule 6. Moreover, all of Professor Stern's appointments by the Respondent have been made available in the ICSID Website, even prior to the first declaration. As such, the information are publicly available (*Tidewater ¶22)*, Respondent does not raise significant arguments against the second argument of Claimant (*Tidewater ¶23)*.

c. Professor Stern's Statements

Professor Stern affirms the position of the Respondent. She also acknowledges her duty to disclose facts that are still undisclosed or unknown and also not to reiterate publicly known facts; such has been her practice throughout all her appointment (*Tidewater ¶29)*. She also added that the number of States and of most experienced arbitrators is limited. If a State cannot nominate the same arbitrator

[12] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB(AF)/04/6), in the year 2004; *Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela, ICSID* Case No. ARB/08/3, in the year 2008.

[13] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9).

in several cases, it *would undermine the freedom of States to choose their arbitrator* (*Tidewater* ¶*27*).

d. The Tribunal's Position

Prior to assessing each formulation of the two parties, the Tribunal clarifies that the standard of '*likely to give rise to justifiable doubts*', referred to in the ICSID Arbitration Rule 6(2)(b), and Article *57* of the ICSID Convention, exerts a very high burden of proof and standard. It requires not only ***the possibility*** that the arbitrator might not be able to exercise independence and impartial judgment, but ***obvious and highly probable*** (*Tidewater* ¶*39*).

That being said, the mere input of *justifiable doubt* due to the view that non-disclosure would itself indicate such gravity that would manifest lack of impartiality only if the facts or circumstances should be carefully applied (*Tidewater* ¶*40*).

i. Non-disclosure of other ICSID Arbitral Appointments by the same party

The parties disagree on the matter concerning whether information relating to appointment of Professor Stern in the *Vanessa Arbitration* and *Brandes Arbitration* are within the public domain. Arbitration Rule 6(2) does not limit disclosure to circumstances that would not be known in the public domain. The wording of this rule is broadly encompassing without distinguishing among categories of circumstances to be disclosed. (*Tidewater* ¶*40*). Further, the arbitrators have the burden to conduct sufficient due diligence to find out information that might raise potential conflicts (*Tidewater* ¶*51*).

For example, despite that the ICSID Website provided the appointments of Professor Stern in *Brandes Arbitration* and *Vanessa Arbitration,* it does not provide the parties that appoint them. Yet at the same time such information, including the name of the parties that appoints arbitrator, are available for inspection on the ICSID Register of Request for Arbitration. Thus, the Tribunal cautioned that although the Arbitration Rule 6 (2) requires disclosure of all information, both publicly known or otherwise, non-disclosure itself should not be the sole ground of disqualification, considering the vast publicly available information in the website (*Tidewater* ¶*54)*

Although Professor Stern cannot avail herself by claiming that her appointment was publicly known and thus unrequired of to be included in her declaration, the tribunal finds that failure to disclosure alone does not warrants automatic disqualification. It must be assessed in light of other relevant factors (*Tidewater* ¶*47*). In this situation, Professor Stern failure to disclose must be deemed as an honest exercise of judgment that believed publicly available information does not require specific disclosure, compounded with the fact that the vast availability of the said information.

The Tribunal could not find that she harbor the intent of hiding the circumstances of appointment, and thus offered no threat to her independence or impartiality (*Tidewater* ¶*55*).

ii. Multiple Arbitral Appointments

The tribunal accepted that Section 3.1.3 of the IBA Guidelines, would be useful but this can be no more than a rule of thumb. Depending on the particular circumstances of the case, either fewer or more appointments might, in combination with other factors, be needed to call into question an arbitrator's impartiality. Hence, canonical and strict usage of Section 3.1.3 would be unnecessary, and degree of flexibility could be exercised (*Tidewater* ¶*59*).

While the Tribunal preliminarily asserts that the singular fact that an arbitrator sat in two different cases brought against the same State, or appointed multiple times by the same or affiliate parties are not situation manifestly against the independence and impartiality, such fact must also be asserted in conjunction with other objective circumstances (*Tidewater ¶63)*.

Additionally, the Tribunal held that there must be a rationale for the potential conflict of interest which may arise from multiple arbitral appointments by the same party if either: (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases (*Tidewater ¶62)*.

In this regard, the tribunal investigated Professor Stern's practice in her previous cases appointed by Respondent. Professor Stern shown degree of independence evident by its positions in *Vanessa and Brandes,* where she rejected preliminary application by Venezuela (*Tidewater ¶64)*. [14] Other than that, she had shown objectivity in those previous cases. Therefore, Professor Stern remained to be seated as an arbitrator in *Tidewaters Arbitration* case.

C. Conclusion

In conclusion, Section 3.1.3 have seen degrees of practice, and had indeed referred to directly and explicitly by both of the discussed cases.

The significant elements of Section 3.1.3 point to the notion of *Repeating Arbitrator* and its influence to independence and impartiality. Based on that, we could see the divergent views between the two aforementioned cases, which are: the Proximity of Connection test and *OPIC Karimum v. Venezuela*. These cases shed negative light on *Repeating Arbitrators*, asserting that such repeat appointment alone would indirectly foster certain influences towards the arbitrator.

In contrast, the case of *Tidewaters v. Venezuela* deemed the matter of *Repeating Arbitrator* alone as a neutral factor that does not give weight to either disqualification or to allow an arbitrator to remain to be appointed. Lastly, other factors must be considered for further assessments.

A consistent finding in both of the aforementioned cases, however, demonstrated that financial benefits that are materially significant would nonetheless plays a very large role in determining independence and impartiality.

As held in the case of *OPIC Karimum v. Venezuela*, financial dependence of an arbitrator to a party might create undue influence to the arbitrator in question. But of course, the threshold from which the standard of *financial dependencies* would be of high standard that would require more ***than*** singular, or sporadic remuneration. There must be indication that the arbitrator to receives substantial financial reliance, if not primary financial reliance to one of the alleged parties in question.

There are of course unexplored elements of Section 3.1.3 that requires more clarification, such as in the issues of defining the phraseology of "affiliate of one of the parties" that have seen little scholastic attention.

[14] See *Vannessa* (Decision on Jurisdiction) on 22 August 2008; *Brandes* (Decision on Preliminary Objection) on 2 February 2009.

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