ICSID Review, Vol. 28, No. 1 (2013), pp. 21–26
doi:10.1093/icsidreview/sit009 Published Advance Access April 5, 2013

CASE COMMENT

Flughafen Zürich AG v Venezuela[1]

A Catch-22 on the Protection of Procedural Fairness

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On 29 August 2012 the ICSID Tribunal in *Flughafen Zürich AG y Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela* rejected an application by the Claimants to disqualify the appointed expert of Venezuela (the Respondent), and to exclude his report from the record.

The central issue that the Tribunal had to consider was whether, in the absence of an express rule, it had the power to disqualify a party-appointed expert. The reason why the Respondent's expert was to be disqualified, according to the Claimants, was that he had important information concerning the Claimants and this information had in fact been given to him by the Claimants in the first place. The Tribunal's decision is of importance beyond the specific circumstances of the case at hand. With echoes of *Hrvatska Elektroprivreda dd v Republic of Slovenia*, it has potential ramifications for the protection of procedural fairness as regards the exclusion of party-appointed experts (and possibly counsel) from arbitration proceedings. In highly specialized areas where there is a limited number of qualified experts and counsels, an order disqualifying an expert or counsel from participating in a case could have the adverse effect of hampering a party's right to choose its own expert and evidence which the party may need to present its case fully, offending basic principles of fairness in the arbitration process. The *Flughafen* decision will result in many consultants and lawyers rethinking the manner in which they will approach potential investment arbitration engagements.

I. THE BACKGROUND OF THE DECISION

The facts of the case are highly unusual.[3] On 9 August 2010, the Claimants initiated an ICSID claim against the Respondent under the bilateral investment treaty between Switzerland and Venezuela. In 2010—but sometime after the request for arbitration had been filed—Mr Ricover, in his capacity as an expert on air transport and as a member of the LECG Group, contacted the Claimants' counsel to offer his consultancy services in the arbitration against the Respondent.

[1] *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/19, Decision on Claimants' proposal for disqualification of one of Respondent's expert witnesses, and request for inadmissibility of evidence (29 August 2012) (Juan Fernández-Armesto, President; Henri C Álvarez; Raúl E Vinuesa).

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[3] *Flughafen* (n 1) para 30. The Tribunal noted it is highly unusual that a potential expert for one party will end up being an expert for the other party after already having received confidential information from the first party.

The Claimants considered Mr Ricover as a potential expert and sent him several documents. These included: (i) the contract; (ii) the Claimants' business plan and damages calculation; (iii) a PowerPoint presentation; and (iv) the request for arbitration. None of these documents were marked as confidential or privileged. Later on, the Claimants decided not to retain Mr Ricover. In June 2012 Mr Ricover accepted an invitation by the Respondent to participate as one of their experts.

Following the Respondent's Reply on Jurisdiction, the Claimants filed an application to disqualify Mr Ricover and a request for the inadmissibility of further evidence. They claimed that there was a risk that the expert's knowledge of the Claimants' allegedly confidential information could be revealed to the Respondent and used in his report. For this reason, they argued, the expert should be disqualified and his report should be excluded from the proceedings. The Claimants submitted that ICSID tribunals have the obligation to preserve the integrity of the proceedings.[4] The Claimants relied on *Hrvatska Elektroprivreda v Republic of Slovenia*,[5] in which Mr David Mildon QC, co-counsel for Slovenia, and Mr David Williams QC, the President of the Tribunal, were both members of Essex Court Chambers. The Claimants in *Hrvatska* had raised concerns about the existence of conflicts of interest and the Tribunal consequently excluded Mr Mildon QC from participating as counsel in the case.

The Claimants also relied on Rule 9 of the IBA Rules of Evidence which allows a tribunal to exclude evidence in case of a 'legal impediment or privilege under the legal or ethical rules' or by 'considerations of procedural economy, proportionality, fairness or equality'.[6]

The Respondent, however, argued that ICSID tribunals do not have competence to exclude party-appointed experts from arbitration proceedings. It contended that the cases cited by the Claimants, in particular the *Hrvatska* case, have been heavily criticized by the arbitration community[7] and that, in any event, the credibility or impartiality of an expert could be scrutinized in the course of cross-examination and by the Tribunal subsequently deciding on the materiality and weight of the evidence.

II. THE DECISION

The Decision concerns the issue of fairness in investor–State arbitration proceedings and the extent of the powers of ICSID tribunals. Does an ICSID tribunal have the power to exclude a party-appointed expert from an arbitration proceeding on issues of conflict of interest?

In one paragraph the *Flughafen* Tribunal answered this question with an unequivocal yes. Applying Rule 34(1) of the ICSID Arbitration Rules, which allows the Tribunal to be the 'judge of the admissibility of any evidence adduced and of its probative value',[8] it held that 'there can be no doubt that the Tribunal

[4] ibid para 15.

[5] *Hrvatska Elektroprivreda dd v Republic of Slovenia*, ICSID Case No ARB/05/24, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings (6 May 2008).

[6] International Bar Association Rules on the Taking of Evidence in International Arbitration ('IBA Rules') (29 May 2010) art 9(2).

[7] *Flughafen* (n 1) para 25.

[8] ibid para 34.

has competence to accept or exclude any evidence submitted by one of the parties'. Having established that an ICSID tribunal had the authority to disqualify a party-appointed expert from the proceedings, the Tribunal went straight to the facts of the case.

The Tribunal accepted as true that: (i) the information sent to the expert was not marked as 'confidential'; (ii) the Claimants had not made any reservations as to the information sent to the expert; and (iii) the expert had contended that he had not opened or given to third parties any of the files which the Claimants alleged contained confidential information.

In relation to issue (i) the Tribunal found that the information disclosed was not confidential. The Tribunal was, however, very concerned about issue (iii)—the possibility that the expert had knowledge or could have divulged to third parties the information he received from the Claimants. The Tribunal dealt with this as follows:

> in any event, and regardless of the nature [confidential or privileged] of such information, Mr Ricover never had effective knowledge of the information above, since he contends to never have opened or transmitted the attachments in which such information was contained.[9]

In the Tribunal's view, these circumstances gave no reason 'at this procedural stage' to either exclude the expert report or 'the expert himself in generic form and *a priori*' from the proceedings.[10] It rejected the application, but it would review its decision in the future in case it was shown that the facts accepted by the Tribunal were false.

III. COMMENT

Expert witnesses are an important part of investment arbitration. The question of damages in investment disputes requires accounting and finance specialists. In some cases, specialists in certain industries such as oil and gas, infrastructure, construction, banking or telecommunications may be crucial in understanding the complex issues in dispute. The same applies to lawyers with special expertise. For this reason, counsel and their clients spend considerable time searching for the right specialists for their case. By the same token, experts themselves are aggressively pursuing engagements from both investors and respondent States. In the relatively small circle of investment arbitration this has generated allegations of conflicts of interest. This is problematic in ICSID arbitration proceedings where no explicit provision can be found that deals with conflicts of interest or ethical standards for party-appointed experts and counsels.

As a result, ICSID tribunals have to deal with these issues on a case-by-case basis. The problems faced by arbitrators, who cannot simply decide the question just by looking at an explicit rule to that effect, is obvious. This problem also arises in the context of the appointment of counsel. A tribunal disqualifying a party's counsel or expert where no explicit rules exist can create the problem of unfairness in the arbitral process, due to the limit it places on the party's choice of

[9] ibid.
[10] ibid para 38.

legal representation and its ability to present its case. Three ICSID tribunals have had to grapple with this particular issue.

The first one was the *Hrvatska v Slovenia* Tribunal. It held that it had an obligation to make every effort to ensure that the Award '[was] not affected by procedural imperfection'.[11] Although it acknowledged Slovenia's right to select its legal team as it saw fit, the Tribunal stated that Slovenia was not entitled to 'subsequently amend the composition of its legal team in such a fashion as to imperil the Tribunal's status or legitimacy'.[12] It concluded that it had the inherent powers to make orders necessary to preserve the integrity of the proceedings and that this inherent power included the power to disqualify counsel.[13]

In the case of *Rompetrol v Romania*[14] in a rather unusual move, the Respondent sought to exclude counsel for the Claimant rather than the arbitrator from the case. The first question for the Tribunal was whether it had such power. Given the limited authorities available on the question of the Tribunal's power to control the representation of a party, the Tribunal was charged with revisiting the *Hrvatska* Decision. The *Rompetrol* Tribunal started by observing that the *Hrvatska* Decision was not a binding precedent and that even if one was to accept the point that an ICSID tribunal had the power to exclude counsel, such authority should be exercised only in 'extraordinary circumstances'.[15] The Tribunal ruled that 'a power to exercise a control over the representation of the parties in proceedings before it is by definition a weighty instrument'.[16] It held '[a]bsent express provision, the only justification for the tribunal to award itself the power by extrapolation would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process'.[17] It also rejected the argument that the IBA Rules could be relied on in a challenge to counsel.

By way of summary, the *Hrvatska* Tribunal clearly thought it had an inherent power to exclude counsel; the *Rompetrol* Tribunal was perhaps less sure. But what was at the heart of those cases was a balancing exercise. Both Tribunals struck a balance between the need to safeguard the integrity of the arbitral process and the right to be represented by the counsel of one's choice. The key difference between the two cases was the weight given to the right to choice of representation, but both, ultimately, turned on their own facts.

In *Flughafen*, the Tribunal's dilemma was not so much whether it had the authority to disqualify an expert from the proceedings. The Tribunal clearly thought it had such authority. Its determination was not guided by previous arbitral practice or even domestic court cases (not a single authority is cited in its reasoning or conclusions). It simply relied on Rule 34(1) of the ICSID Arbitration Rules. The actual dilemma was a practical one: it concerned the nature of the information that had been apparently shared with the expert. The Tribunal's suggestion was: if it can be demonstrated that a consultant establishes contact with one party and, after having received and looked at confidential information from

[11] *Hrvatska* (n 5) para 15.
[12] ibid para 26.
[13] ibid para 33.
[14] *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (14 January 2010).
[15] ibid para 15.
[16] ibid para 16.
[17] ibid.

that party, later becomes an expert for the other party, then such expert should be excluded from the case.

It is possible to see some areas of difficulties with this conclusion. The first concern is whether Rule 34(1) does in fact give authority to ICSID tribunals to exclude party-appointed experts from proceedings where the expert has received information concerning the other party. Rule 34(1) gives ICSID tribunals broad freedom to test the credibility and impartiality of experts, to assess the probative value of evidence (including the admissibility of documents) and to draw adverse inferences.[18] It is doubtful, however, whether this rule can be interpreted to give authority to an ICSID tribunal to exclude a party-appointed expert from proceedings in cases of conflict of interest. There is little or no authority for the view that Rule 34(1) provides a tribunal the authority to exclude experts.

It seems clear that under Rule 34(1) an ICSID tribunal may declare information from an expert report inadmissible or exclude from the hearing an expert who does not comply with the requirements laid down by rules or orders. But in a system where there are no ethical obligations for party-appointed experts, where there is no specific set of procedural rules on conflict of interest, or a confidentiality agreement binding the expert, the authority to disqualify a party-appointed expert from a case under Rule 34(1) is questionable. This does not mean that an expert cannot be disqualified under any circumstances. An expert could be disqualified from a case on the basis of improper conduct. The conduct would have to be contrary to an explicit norm or an order that guides such conduct in order to qualify as improper. But tribunals should act with caution. Expert disqualification is, after all, an exclusion of evidence with a negative effect upon the litigant. The impact of such disqualification is equal to a punitive order: a type of sanction for conduct in bad faith.[19]

For this reason, one would assume that a conflict-based disqualification of an expert must be based on an explicit rule, or if the issue is characterized as an abuse of the arbitral process, it could potentially be based—some will argue forcefully—on the tribunal's inherent authority to safeguard the integrity and fairness of the arbitral process. The question remains open whether or not it would be possible to rely on inherent powers to disqualify an expert. This point was not discussed by the *Flughafen* Tribunal, even though the Claimants relied explicitly upon this source of authority for disqualification.

The second possible difficulty relates to the realities of expert services as this decision could have potentially wide-reaching implications for the protection of procedural fairness. The criteria set out in the *Flughafen* Decision could leave the door open for litigants or clients to engage with potentially harmful experts, establishing a relationship in which the arbitration practitioner or client would pass confidential information to a potential expert simply to make him unavailable to the adversary. In an area where the circle of consultancy firms or independent experts is relatively small, this could adversely affect a party's fundamental procedural right to representation.

[18] It is widely accepted that ICSID tribunals should enjoy a measure of discretion with regards to the admission of evidence, but the exercise of such discretion must be based on stated criteria or guidelines, otherwise it would open the door for arbitrariness.

[19] Kendall Coffey, 'Inherent Judicial Authority and the Expert Disqualification Doctrine' (2004) 56 Fla L Rev 195.

If the intention of the *Flughafen* Tribunal was to bring clarity to the ethical principles that apply to party-appointed experts or set up expert disqualification criteria, then it did not achieve its purpose. It may have even made it more difficult for investors, respondent States, experts and arbitration practitioners to determine what would be improper in the engagement of experts in investment arbitration. For now, the solution will depend on the discretionary—or inherent—powers of ICSID tribunals. This is an issue that is crying out for normative intervention through the adoption of ethical standards for party-appointed experts and counsel in investment arbitration. But until that happens, investment tribunals will regrettably have to do the best they can with the rules they do—or do not—have.