There is both anecdotal and statistical evidence to suggest that challenges to party-appointed arbitrators are increasing. Of 26 published treaty decisions on challenges to arbitrators, 24 have been since 2007, and there have been a number of recent headlines concerning the resignations of prominent arbitrators in several ICSID cases. Arbitrator challenges also seem to be more common in non-treaty cases, although it is harder to find clear statistical evidence for this.[1]

In a number of recent treaty cases, parties have challenged arbitrators because of alleged "issue conflicts", i.e., allegations that prior positions taken by the arbitrator reflect a predetermined view on a central issue in dispute, or because of repeated appointment of an arbitrator by the same party or counsel. We discuss below some of these treaty cases, although these issues are coming up in other cases as well.

A number of factors contribute to the apparent rise in challenges. It may reflect cultural differences, and different understandings of the standard of impartiality and independence that applies to arbitrators. The increasing amount of public discourse about arbitration issues, including, in particular, that resulting from the availability of published decisions in treaty arbitration cases has also complicated the question as to what constitutes impermissible bias. At the same time, there appears to be little doubt that some parties use challenges as a tactic for disrupting proceedings and impeding the other side's right to choose an arbitrator.

There is a real cost to this. Even where it is bound to fail, a challenge can have significant consequences: challenged arbitrators frequently resign and a challenge inevitably adds delay and expense to a case. Moreover, the sense that such gamesmanship is routine encourages parties to bring challenges (and to bring retaliatory challenges), which makes the arbitral process look less efficient, less reliable, and more open to cynical manipulation.

Issues conflicts

A number of recent challenges have focused on claims that a party-appointed arbitrator had a pre-existing view on an issue in dispute. Several cases have involved well-known and experienced arbitrators who made fairly broad public statements that touched on the subject of the dispute and states involved. While the legal standards vary, the basic question asked in these cases is whether these statements could be interpreted as expressing bias against a particular party and/or prejudgment of the specific issues in the dispute.

One recent example is *Perenco v. Ecuador*, in which the Secretary General of the PCA upheld Ecuador's challenge to the very experienced arbitrator appointed by Perenco, based on an interview in which he referred to cases where Ecuador had not complied with provisional measures ordered by ICSID tribunals and also commented that "when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change."[2] Although there was no evidence of actual bias or prejudgment, the Secretary General found that a reasonable third party could interpret the arbitrator's comments to mean that he had a negative view of Ecuador's behavior vis-à-vis investors, and had prejudged the merits question of expropriation.

In *Perenco*, the Secretary General noted that simply making statements about a pending case was not a ground for challenge, but the reality is that any

In the article *It's My Party* in the November-December 2012 issue of *CDR*, **Steven Finizio** and **Claudio Salas** of **WilmerHale** addressed challenges to the widely-used practice of party appointment of arbitrators. Now they address another challenge to party-appointed arbitrators: the increasing number of applications to disqualify the other side's chosen arbitrator

sort of public comment may be seized upon as ammunition for a challenge. This is particularly true in the often highly-charged atmosphere of treaty cases, where there is an increasing tendency to label arbitrators as pro-investor or pro-state and to challenge arbitrators for purported "issue conflicts." Indeed, in recent cases, arbitrators have been challenged for having been on a previous tribunal that decided similar issues,[3] and based on the arbitrator's academic publications.

In *Urbaser v Argentina*, the claimant challenged a well-known law professor appointed by Argentina because his scholarly work discussed previous cases assessing most favoured nation clauses in investment treaties. Urbaser acknowledged that the arbitrator's writings "[did] not raise an issue of partiality shown towards a party or related to the outcome of the claims as to the merits," but argued that his writings nonetheless showed a "preference and partiality in favour of the position that the Respondent [would] undoubtedly assert in [the] arbitration."[4]

The other two tribunal members rejected the challenge, holding that "there must be a showing that the arbitrators' position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such a party), by direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator."[5] They also observed that any opinion previously expressed on the ICSID Convention could be said to be potentially relevant to an argument a party might make and "the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter, whether it may be procedural, jurisdictional, or touching upon the substantive rights deriving from BITS."[6]

Under this and similar articulations of the standard for arbitrator impartiality, most challenges will be unsuccessful, but it is not clear that this will deter parties from bringing such challenges, particularly given the fertile opportunity to allege "issue conflicts" presented by the rapid growth in commentary and scholarly writing on treaty cases.

Urbaser also provides a cautionary tale in another respect: following a series of disputes about the appointment of the tribunal in that case, the tribunal was only finally constituted three years after the case commenced. The facts of *Urbaser* are somewhat unusual; however, even in less complicated cases, unmeritorious challenges to a party-appointed arbitrator can still lead the challenged arbitrator to step aside, will add many months of delay and extra cost at the outset of a case, and may be exploited in subsequent annulment or challenge and enforcement proceedings.

Repeat appointments

Another ground for challenge in recent cases is the repeat appointment of an arbitrator by the same party or counsel. The IBA Guidelines address this issue by providing that an arbitrator should disclose if he or she has in the previous three years received two or more appointments by a party or more than three appointments by the same counsel or law firm.[7] In principle, however, nothing prevents an arbitrator receiving multiple appointments from a party or counsel, and a party that seeks to challenge an arbitrator on that basis needs to show that the appointments give rise to justifiable doubts as to the arbitrator's impartiality or independence, which has been interpreted as requiring a showing that the arbitrator is professionally dependent on the party or counsel.[8]

The issue of repeat appointments has received particular attention as a result of challenges to both arbitrators in an ICSID case involving claims against Venezuela, *Universal Compression International Holdings v Venezuela*. In that case, Venezuela's appointed arbitrator was challenged because, among other things, she had been appointed by Venezuela on three prior occasions. While the claimant relied heavily on the IBA Guidelines, the ICSID Chairman rejected the challenge because there was "no objective fact" showing that the arbitrator's independence or impartiality "would be manifestly impacted by the multiple appointments" and her appointment in more than twenty ICSID cases showed she was "not dependent – economically or otherwise – upon Respondent."[9]

In the same case, Venezuela challenged the arbitrator appointed by the investor because of his relationship with the investor's counsel (which included working together as co-counsel). Venezuela argued that this relationship created the risk the arbitrator might be biased in favour of his former co-counsel, and that counsel might have an unfair advantage in knowing his "stance on relevant legal issues."[10] The ICSID Chairman dismissed the challenge, noting that there was no existing co-counsel relationship and that the prior cases had involved different parties and different facts. The ICSID Chairman also noted that it was unclear that similar legal issues might arise in the current case and therefore "it is not evident that Claimant will be in a privileged position to anticipate" the arbitrator's views.[11]

This story does not end there, however. Both arbitrators were appointed by the parties in a different case, involving claims against Ecuador, *Murphy Oil v Ecuador.* In that case, both were

challenged on similar grounds to those rejected in the Venezuela case, but both arbitrators resigned.

Urbaser, *Universal Compressions* and *Murphy* provide ammunition for those who argue that party appointment of arbitrators damages the appeal of international arbitration. The unfortunate reality is that parties can gain advantages by bringing challenges, even when they have little chance to succeed, and recent decisions rejecting such challenges – and the LCIA's laudable efforts to publish its challenge decisions – do not seem likely to dissuade parties from bringing challenges or doing so tactically. ■

[1]Many arbitral institutions do not provide statistics on arbitrator challenges or do so in ways that do not fully reflect what is happening in practice. For example, the ICC's annual statistical reports appear to show only a small increase in the (relatively small) number of challenges and a very small number of successful challenges. In the past two years, the ICC Court upheld nine challenges in 73 cases; in addition, 70 arbitrators resigned (although the ICC does not make clear how many resignations followed challenges). 3The ICC also refused to confirm a party's nominated arbitrator in 56 cases, although the ICC does not disclose how many of those cases involved party challenges (45 involved qualified statements of independence). Importantly, the ICC does not disclose how often a nominated arbitrator was challenged before appointment and then declined nomination. Anecdotally at least, there appears to be a significant number of such pre-appointment challenges.

[2]*Perenco Ecuador Ltd. v Ecuador,* PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator (8 December 2009), at para. 27.

[3]See, e.g., *Tidewater Inc. v Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern (23 December 2010), at paras. 65-72 (rejecting a challenge based on arbitrator role in prior arbitration involving the same legal issue and citing authority). There have been some successful challenges in commercial cases where an arbitrator is sitting on parallel or related cases.

[4]*Urbaser S.A. v Argentina*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Prof. Campbell McLachlan, Arbitrator (12 August 2010), at para. 41.

[5]Id., at para. 45.

[6]Id., at para. 48.

[7]See IBA Guidelines on Conflicts of Interest in International Arbitration, "Orange List" 3.1.3 and 3.3.7.

[8]See, e.g., LCIA Reference No. 81224, Decision Rendered 15 March 2010; *OPIC Karimum Corp. v Venezuela*, ICSID Case No. ARB/10/14 (Decision on the Proposal to Disqualify Prof. Sands, 5 May 2011), at para. 55.

[9]See *Universal Compression International Holdings v the Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (May 20, 2011), at para. 77.

[10]Id. at para. 98.

[11]Id.

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