



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

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Award Name and Date:

BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea (ICSID Case No. ARB/14/22) - Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal - 28 December 2016

Case report by:

Krystle M. Baptista**, Editor, Diego Luis Alonso Massa***

Summary:

In its Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, the Chairman of the ICSID Administrative Council (the “**Chairman**”) rejected Claimant’s proposal to disqualify all the members of the Arbitral Tribunal (the “**Proposal**”). The Proposal was based on the Tribunal’s alleged prejudgment of central issues in the arbitration, which raised reasonable doubts as to the impartiality of the Tribunal, and the Tribunal’s alleged denial of due process and violation of Claimants’ rights.

The Chairman found that the mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality, as required by Articles 14 and 57 of the ICSID Convention. The Chairman further concluded that a third-party undertaking a reasonable evaluation of the Tribunal’s decision and surrounding facts would not find a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Hence Claimants’ Proposal was rejected.

Main issues: document production, disqualification of arbitrators, impartiality and independence of the arbitral tribunal, legal standard to disqualify arbitrators under the ICSID Convention.

Tribunal: Ms. Gabrielle Kaufmann-Kohler (President), Mr. Albert Jan van den Berg (Co-arbitrator), Mr. Pierre Mayer (Co-arbitrator)

Claimants’ Counsel: Mr. Karel Daele, London, UK; Mr. James Libson; London, UK.

Respondent’s Counsel: Mr. Laurent Jaeger, Paris, France; Mr. Noël Chahid-Nourai, Paris, France; Mr. Yann Schneller, Paris, France; Mr. Quirec de Kersauson, Paris, France; Mr. Michael Ostrove, Paris, France; Mr. Scott Horton, Paris, France; Mr. Théobald Naud, Paris, France; Ms. Sârra-Tilila Bounfour, Paris, France.

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Digest:

1. Facts of the Case/ Procedural Background

Claimants are BSG Resources Limited, a British company (“BSG UK”), and BSG Resources Limited (“BSG Ltd. Guinea”) and BSG Resources SARL (“BSG Guinea”), companies incorporated in Guinea (jointly “Claimants”). Respondent is the Republic of Guinea (“Guinea” or “Respondent”)(¶¶1, 4).

At the Parties’ request, on 14 February 2016, the initial claim brought by BSG UK against Respondent in August 2014(¶1) was consolidated with the claim brought by BSG Ltd. Guinea and BSG Guinea against Guinea in October 2015(¶6), under ICSID Case No. ARB/14/22 (¶8).

On 5 September 2016, the Tribunal issued Procedural Order No. 7 (“PO7”) ruling on the Parties’ request for document production (¶10). In early October the Parties produced documents pursuant to PO7 (¶11).

However, by letter dated 15 October 2016, Claimants alleged that Respondent was withholding certain relevant and material documents that the Tribunal had ordered it to produce in PO7 (¶12). By letter of 22 October 2016, Respondent denied having withheld responsive documents and explained the steps taken to comply with PO7 (¶13).

By letter dated 27 October 2016, the Tribunal addressed the Parties in the following terms (¶15) (the “**Decision**”):

“Having reviewed the positions of the Parties, including the Respondent’s responses to Annex 1, the Tribunal is of the view that pursuing these issues of document production at this stage of the proceedings will make no meaningful contribution to the resolution of this dispute. This said, it notes that, to the extent the Claimants wish to claim that non-compliance with Procedural Order No. 7 entails legal consequences, such as for instance adverse inferences, they may do so in the further course of the arbitration, specifically in their further scheduled written submissions and at the hearing. In addition, the Tribunal reminds the Parties that they are under a

continuing duty to produce responsive documents as and when they become available. All other requests are denied”.

On 4 November 2016, Claimants proposed the disqualification of all three members of the Tribunal pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (Proposal) (¶16).

Claimants submitted that the legal standard that applies to the disqualification of arbitrators under ICSID proceedings is “*whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that the arbitrator possessed the required qualities of impartiality and or independence*” (¶40), and made three main arguments in support of its Proposal:

First, Claimants argued that in PO7 the Tribunal had acknowledged certain Emails and Deliberations were relevant and material to the outcome of the case (¶22). However, it allowed Respondent to withhold such potentially relevant documents when it came to the conclusion in its Decision “*that pursuing these issues of document production at this stage of the proceedings will make no meaningful contribution to the resolution of this dispute*” (¶23). Hence, according to the Claimants, by issuing the Decision the Tribunal prejudged central issues in the arbitration that raised reasonable doubts as to the impartiality of the Tribunal and revealed an underlying bias against Claimants (¶¶21, 24).

Second, Claimants alleged that the production of documents is an essential part of international arbitration and that the requested documents were crucial to meet their burden of proof. Thus, the Tribunal’s refusal to order the production of such documents was a denial of due process that violated Claimants’ rights and raised doubts as to the Tribunal’s impartiality (¶27).

Third, Claimants argued that the Tribunal had shown prior preferential treatment of Guinea in its decisions on prior application made to the Tribunal (¶32) and that factual developments occurring subsequent to the Tribunal’s Decision reinforced the relevance of the documents not produced by Respondent (¶31).

Finally, Claimants rejected Respondent’s arguments in response to the Proposal (¶¶34-38).

Guinea opposed Claimant’s Proposal and argued that Article 57 of the ICSID Convention requires the challenging party to bear the burden of proving that the lack of impartiality is “manifest” (¶49). Respondent made six arguments to reject Claimant’s Proposal:

First, Respondent contended that the Tribunal respected the rules applicable to document production and fulfilled its duties in that respect (¶43). Second, Guinea submitted that the Tribunal had not prejudged the merits of the dispute; rather the Tribunal had found that supplementary production of documents was unnecessary at that stage of the proceedings (¶44). Third, Respondent argued that PO7 and the Decision were not inconsistent, since the first decision concerned the production of documents and the second related to additional measures sought by Claimants in relation with document production (¶45). Fourth, Respondent submitted that the Proposal was based on a misleading description of the Tribunal’s Decision, because Respondent contended that the Tribunal reserved the possibility of amending its decision later in the proceeding if the requested measures became relevant (¶46). Fifth, Guinea considered that the Tribunal had respected Claimant’s due process rights,

because the Tribunal has discretion to decide on document production requests and therefore did not impair Claimant's ability to present their case by exercising such power (¶47). Finally, Respondent submitted that the Tribunal had not breached Claimant's right to equitable treatment by rejecting their requests for document production (¶48).

2. Analysis of Legal Issues by the Chairman

The Chairman addressed separately the issues of (1) the applicable legal standard (¶¶52-58), (2) the timeliness of the Proposal (¶¶59-61), and (3) the Merits (¶¶63- 70).

2.1. Applicable Legal Standard

Pursuant to Article 57 of the ICSID Convention, Claimant submitted that all members of the Arbitral Tribunal lacked the qualities required by Article 14(1) of the ICSID Convention.

The Chairman found that Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias (¶57). The Chairman further concluded that the legal standard applied to a proposal to disqualify an arbitrator is an “*objective standard based on a reasonable evaluation of the evidence by a third party*”. Hence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention (¶58).

2.2. Timeliness

The Respondent had not contended that the Proposal was untimely. However, the Chairman analysed the issue *mutu proprio* and found that the Proposal had been filed 7 days after the Tribunal's Decision. Accordingly, the Proposal was filed promptly for purposes of Arbitration Rules 9(1).

2.3. Merits

The Chairman carefully reviewed the Tribunal's Decision and the Parties' submissions, and found no evidence of either prejudgment of the disputed issues or violations of due process in the Tribunal's Decision (¶67).

The Chairman further clarified that, while the Claimants may not be satisfied with the Tribunal's Decision, the mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality, as required by Articles 14 and 57 of the ICSID Convention. Otherwise, proceedings could continuously be interrupted by a dissatisfied party, which would disrupt and prolong the arbitral process (¶68).

In the Chairman's view, a third party undertaking a reasonable evaluation of the Tribunal's Decision and the surrounding facts relied upon by Claimant's in their Proposal, would not find a manifest lack of qualities required by Article 14(1) of the ICSID Convention. Thus, the Proposal must be rejected (¶69).

3. Decision

Having considered all the facts and arguments submitted by the Parties, the Chairman rejected Claimant's Proposal to disqualify all members of the Tribunal.