



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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**GETMA INTERNATIONAL, NCT NECOTRANS, GETMA
INTERNATIONAL INVESTISSEMENTS & NCT INFRASTRUCTURE &
LOGISTIQUE
VS.
THE REPUBLIC OF GUINEA**

Case Report by Orlando F. Cabrera C.**
Edited by Ignacio Torterola***

A decision on the Proposal to Disqualify Mister Bernardo M. Cremades, Arbitrator, rendered on June 28, 2012 by Mr. Rober B. Zoellick, Chairman of the ICSID Administrative Council in accordance with the ICSID Convention and the Arbitration Rules.

Claimant's Counsel: José Miguel Júdece, Esq., Tiago Duarte, Esq., *PLMJ Sociedade de Advogados RL*; Cédric Fischer, Esq., Elisabeth Mahé, *Fisher, Tandeau de Marsac, Sur & Ass.*

Defendant's Counsel: Laurent Jaeger, Esq., Pascal Agboyibor, Esq., Romain Sellem, Esq., *Orrick Rambaud Martel, Société d'avocats*; Mamadou Traoré, Esq., Edasso Bayala, Esq., *Cabinet Mamadou S. Traoré*

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Digest

1. *Facts*

On September 29, 2011, Getma International, NCT Necontrans, Getma International Investissements and NCT Infrastructure & Logistique ("Claimants") instituted a Request for Arbitration (the "Request") against the Republic of Guinea (the "Respondent"). The Request is in accordance with the ICSID Convention and Order No. 00/PRG/87 of January 3, 1987 amended by Law No. L/95/029/CTRN of June 30, 1995, concerning the Code of Investments of the Republic of Guinea.

The Secretary-General of ICSID registered the Request on November 3, 2011. Claimants proposed that the dispute be decided by a three member tribunal, an arbitrator appointed by each of the parties and the third appointed by common agreement. Claimants also confirmed the appointment of Mr. Cremades, as arbitrator, to whom they had already announced in the Request. By letter of December 12, 2011, the Respondent accepted the Claimant's proposal as regards the method of constitution of the Arbitral Tribunal and appointed Professor Pierre Tercier, as arbitrator.

On December 20, 2011, ICSID Secretariat informed the parties that both arbitrators had accepted their appointments, and transmitted the declarations of acceptance and independence respectively signed by them.¹ On January 20, 2012, the parties jointly appointed Ms. Vera Van Houtte, as President of the Tribunal, who accepted her appointment.

On March 15, 2012, parties provided their comments on a draft agenda for the first session of the Tribunal. Concerning the constitution of the Tribunal, the Respondent stated that it "*intended to file an application for disqualification of Mr Bernardo Cremades, arbitrator appointed by Getma in the proceedings, because of his kinship with Mr. Juan Antonio Cremades, arbitrator also appointed by Getma in the CCJA proceedings on the same facts and taking place at the same time.*"

At the first session of the Tribunal, the Respondent considered that the Tribunal was improperly constituted. On April 16, 2012 the Respondent filed its Proposal to Disqualify Mr. Bernardo Cremades.² The Claimants submitted their response on April 26, 2012. The Respondent replied on May 7, 2012 and the Respondent filed its rejoinder on May 11, 2012. Mr. Bernardo Cremades also submitted his comments.

¹ In accordance with Art 6(2) of the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules)

² In accordance with Art. 57 of the ICSID Convention.

2. *Legal issues discussed in the decision*

2.1 Applicable Provisions (¶¶ 53-62)

Arts. 14(1) and 57 of the ICSID Convention, as well as Art. 6(2) of the Arbitration Rules establish the test to institute a proposal to disqualify an arbitrator. The applicable procedure to the proposal to disqualify is governed by Art. 58 of the ICSID Convention and Art. 9 of the Arbitration Rules.

It is clear from these provisions that, in order to succeed, a proposal to disqualify based on a lack of independence, as invoked in this case, (1) shall establish the facts at the origin of the proposal, (2) evidence that these facts establish a manifest lack of independence, and (3) be promptly filed to the Secretary-General.

The concept of independence of Art. 14(1) of the ICSID Convention refers to a duty of independence and impartiality. The duty of independence refers to the absence of relations with the parties to influence the decision of an arbitrator. The duty of impartiality refers to the absence of bias towards one of the parties. These are objective criterion.

The concept of "*manifest lack*" of Art. 57 of the ICSID Convention refers to a "clear" or "certain" lack. In addition, it imposes a relatively high onus on the Claimant to disqualify. The facts shall be proven by objective evidence, and a proposal cannot prosper on the basis of mere speculation, presumption, belief, opinion or interpretation of the requesting party.

2.2 Review of the grounds (¶¶ 63-86)

The skills, qualifications and the probity of the concerned arbitrator were not questioned. The Respondent considered unacceptable the situation created by Getma International, which would result in a "*deliberate strategy*" by Claimants to create a link between two arbitral tribunals and consequently, receive a benefit at the expense of the Respondent. In addition, the Respondent considered that this situation would create legitimate and reasonable doubts about the reliability of independence and impartiality of the arbitrator.

The decision of the Claimants to designate two brothers as arbitrators in two parallel arbitration proceedings may raise questions. Nevertheless, the ICSID disqualification proceedings aim to ensure that the dispute be decided by persons with the qualifications of the arbitrator. Thus, it is needed to determine whether the Respondent has proved on the basis of objective evidence that Mr. Bernardo Cremades sitting as an arbitrator in this case, and his brother, Mr. Juan Antonio Cremades, sitting as an arbitrator in the OHADA arbitration, is sufficient to conclude a manifest lack of independence on the part of the first in the light of the ICSID Convention criterion.

The Respondent did not establish how the existence of a family relationship between the arbitrators designated by Getma International in the ICSID proceedings and OHADA arbitration creates an alleged failure of equality between the parties that Mr. Cremades would not be able to provide, any manifest reliability of independence.

The Respondent argued to fear that Mr. Cremades would be in possession of inside information on the dispute submitted to ICSID Tribunal that will not have the other two arbitrators. The Respondent explained that the appointment of the two arbitrators creates, between them, the possibility to exchange privileged information and personal opinions discussed during the deliberations of the two Tribunals.

Nevertheless, the Respondent did not provide any objective evidence to infer that the two arbitrators, or even one of them, would not fulfill the commitments made at the acceptance of their appointments. Furthermore, the Respondent did not prove a change of situation due to the fact that two arbitrators eventually decide the same questions of law or fact.

The President considered that it is not clear, nor certain that the arbitrator at issue can be influenced by a decision taken in the OHADA arbitration. Additionally, Mr. Cremades emphasized that he has no professional or pecuniary relationship with his brother for 13 years.

The absence of a statement cannot in itself prove the lack of independence; only the facts and circumstances that were not revealed may call into question the reliability of independence of an arbitrator, not a lack of statement to that effect.³

In addition, the Respondent noticed the designation of Mr. Juan Antonio Cremades by Getma International in the OHADA arbitration even before Mr. Bernardo Cremades had submitted his declaration. Moreover, the family relationship between the two arbitrators is well known in the world of international arbitration. The public nature of that information may be taken into account to determine whether the lack of revelation is likely to constitute a manifest lack of independence and impartiality of an arbitrator.

3. *Decision*

The proposal for disqualification by the Respondent against Mr. Bernardo M. Cremades was dismissed. The costs incurred will be subject to a subsequent decision of the Tribunal.

³ Tidewater Inc. vs. Venezuela and ConocoPhillips vs. Venezuela