

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc.

v.

Republic of Panama

(ICSID Case No. ARB/16/34)

**RULING ON CLAIMANTS' APPLICATION TO REMOVE THE RESPONDENT'S
EXPERT WITNESS AS TO PANAMANIAN LAW**

Members of the Tribunal

Lord Nicholas Phillips Baron of Worth Matravers, President of the Tribunal
Mr. Horacio A. Grigera Naón, Arbitrator
Mr. J. Christopher Thomas, QC, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

13 December 2018

I. INTRODUCTION

1. On 14 September 2018 the Respondent filed an Expert Report on Panamanian Law produced by Mr. Jorge Federico Lee.
2. On 29 October 2018 the Claimants made a written application that the Tribunal order pursuant to Rule 34(1) of the ICSID Arbitration Rules, Article 44 of the ICSID Convention and Article 9.2(b) of the IBA Rules on the Taking of Evidence in International Arbitration (“**the IBA Rules**”) that (a) Mr. Lee be removed as an expert witness for the Respondent in respect of Panamanian law; (b) that the Respondent be permitted to file a report from a replacement independent expert in Panamanian law within 30 days of the Tribunal’s Order; and (c) that the procedural calendar be adjusted accordingly (the “**Application**”). The Claimants indicated that they were content for their application to be dealt with on the papers and the Respondent has not requested an oral hearing.
3. On 9 November 2018 the Respondent filed a Response to the Claimants’ Application (“**Response**”).
4. On 16 November 2018 the Claimants filed a Reply to the Respondent’s Response (“**Reply**”).
5. On 27 November 2018 the Respondent filed a Rejoinder to the Claimants’ response (“**Rejoinder**”).

II. THE GROUNDS FOR THE APPLICATION

6. The Claimants’ application summarised the grounds upon which it was made as follows:

“2. [...] between November 2017 and March 2018, Mr. Lee had been in discussions with the Claimants’ counsel about him being engaged by the Claimants to advise on Panamanian law and to provide expert evidence on behalf of the Claimants. In the course of those discussions, confidential and privileged information was provided to Mr. Lee, the merits of the case were discussed and Mr. Lee in turn expressed his own opinion on the merits. In his report, Mr. Lee certifies that he has no relationship with the parties or the tribunal, but he does not mention his prior contacts and dialogue with the Claimants’ counsel.

3. The above matters give rise to serious concerns: (a) Mr. Lee has a substantial conflict of interest, (b) Mr. Lee has failed to disclose in his report his prior relationship with the Claimants’ counsel and his receipt of confidential and privileged information, and (c) Mr. Lee has given certification of two of the elements of independence specified under the IBA Rules on the Taking of Evidence (the “**IBA Rules**”) (i.e. no relationship with the parties or the tribunal) but has stayed silent on the third (i.e. no relationship with the parties’

counsel) for which he would have been unable to give a clear certification. [...].”¹

7. In the subsequent exchange of pleadings on this issue, supported as these were by witness statements, the Claimants’ case became clearer. Between November 2017 and March 2018 a considerable number of emails passed between Mr. Lee and the Claimants’ counsel, but almost all of these were of an administrative character. There were only two communications of substance.
8. The first of these was a telephone conversation on 7 February 2018 between Mr. Lee on the one hand and, on the other hand, two lawyers from Akin Gump, Katie Hyman and Johann Strauss, and two lawyers from the Claimants’ Panamanian law firm Morgan & Morgan, these being Jose Carrizo and Inocencio Galindo.
9. The second communication of substance was an email from Mr. Lee to Katie Hyman on 6 March 2018 which stated:

“I apologize for not being able to respond earlier, as I was not able to discuss this matter with my partners until yesterday.

Unfortunately, after careful consideration of the characteristics of this matter, we have concluded that it would be extremely difficult to issue any opinion which may put in doubt the integrity of sitting justices of the Supreme Court. For this reason, I will not be able to assist you as expert witness.”²

10. The Claimants’ case is founded on the telephone conversation that took place on 7 February 2018. They allege that the subject matter of this conversation was both confidential and subject to legal professional privilege. Because of this they submit that Mr. Lee was disqualified from subsequently acting as an expert witness for the Respondent.

III. THE TRIBUNAL’S JURISDICTION

11. There is a dearth of jurisprudence on the jurisdiction of an ICSID arbitral tribunal to disqualify an expert witness from giving evidence in an arbitration. The Respondent has not challenged our jurisdiction to accede to the Claimants’ application. It has, however, submitted that:

“[...] Claimants have not come anywhere close to demonstrating the type of impropriety that an investment tribunal must require before it takes the extreme and unusual step of publicly denouncing a

¹ Application, ¶¶ 2-3.

² **R-0093**, Email from Mr. Jose Carrizo to Jorge Federico Lee to Ms. Katie Hyman (6 March 2018).

person's integrity by denying a party its right to put an individual forward as an expert.”³

12. The Claimants have referred us to the following overriding provision in the ICSID Convention:

“If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”⁴

The Claimants have, however, relied on provisions of the IBA Rules that require the Tribunal to exclude any document, statement or oral testimony where this is necessary to give effect to any legal impediment or privilege under the legal or ethical rules that are determined by the Tribunal to be applicable.⁵

13. We are in no doubt that, if Mr. Lee is disqualified from acting as an expert witness or his participation in these proceedings in that capacity will involve a breach of confidence, legal professional privilege or other legal impropriety, it falls within our competence to rule that his evidence is not to be admitted – see the approach of the tribunal to the participation of counsel in *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*,⁶ and of the tribunal in *Flughafen Zurich A.G. and Gestión Ingeniería IDC S.A. v. Republic of Venezuela* to a challenge to the participation of an expert witness, albeit that this challenge was unsuccessful.⁷

IV. THE LEGAL PRINCIPLES APPLICABLE IN RELATION TO INDEPENDENCE

14. The Claimants have sought to draw an analogy between the principles that apply where the independence of an arbitrator is in issue and those that apply to the independence of an expert witness. We do not consider this analogy is apt. The role of an arbitrator is to reach a determination of the dispute between the parties that is fair, objective and unbiased. At the outset of proceedings it is vital that the Arbitrator should have no reason to favour the case of one party rather than the other. An arbitrator must be both independent and impartial. Thus if an arbitrator has some personal or professional connection to one of the parties, or to the lawyers acting for one of the parties, this may be ground for disqualification. Equally, if an

³ Response, ¶ 1.

⁴ ICSID Convention, Article 44.

⁵ Article 9.2(b) and 9.3 of the IBA Rules.

⁶ **CLA-135**, *Hrvatska Elektroprivreda d.d. 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.

⁷ **CLA-133**, *Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v Republic of Venezuela* (ICSID Case No. ARB/10/19), Decisión sobre la Inhabilitación del Sr. Ricover como Experto en este Procedimiento, Sobre la Exclusión del Informe Ricover-Winograd y Sobre la Petición Documental, 29 August 2012.

arbitrator has expressed an opinion on the merits of the dispute, this may, of itself, be a ground for disqualification.

15. Similar considerations apply to an expert who is appointed by the arbitrators to assist them. His role forms part of the adjudicative process. It is essential that he should be both independent and impartial.
16. The role of a party-appointed expert witness is quite different. Such an expert is paid by one of the parties to give evidence in support of that party's case. A party-appointed expert witness will normally be, and be expected to be, independent of the party calling him. The best expert witnesses will also be impartial. They will give their evidence honestly and objectively in accordance with their sincere beliefs and experience. Judges and arbitrators are familiar, however, with the expert witness whose evidence manifestly lacks objectivity and favours the party paying his fees. An appearance of partiality does not result in the disqualification of an expert witness. It detracts from the weight that the Tribunal will accord to his evidence.
17. A party will only instruct an expert witness if the opinion of the expert supports that party's case. The witness statement of the expert will make it clear that the expert's opinion supports the case of the party appointing the expert. Contrast the position of an arbitrator, who should normally express no view on the outcome of any issue raised in the arbitration before the arbitration has commenced.
18. Rule 9 of the ICSID Arbitration Rules, which deals with the disqualification of Arbitrators does not apply to party-appointed expert witnesses. Equally, the IBA Guidelines on Conflict of Interest that apply to arbitrators cannot be applied to party-appointed expert witnesses.
19. Article 5.2(c) of the IBA Rules require that the Expert Report of a party-appointed expert shall contain "*a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal.*" Article 6.2 imposes the same requirement in respect of Tribunal-appointed experts. Article 6.2 goes on to make provision for the parties to object as to the Tribunal-appointed expert's independence. Significantly this is not mirrored by a similar provision in Article 5.2. This perhaps reflects the different role played by the Tribunal-appointed expert and the party-appointed expert witness. The former assists the Tribunal to resolve the dispute between the parties. Independence and impartiality are essential in performing this role. An expert who does not have these qualities will not be qualified properly to perform his task. The party-appointed expert witness assists the party that has appointed him to present its case. It is quite common for lawyers to have their preferred experts whom they regularly instruct to act in litigation or arbitration and we are not aware that it has ever been suggested that such a relationship disqualifies the expert from acting.
20. The Claimants invite us to attach significance to the fact that Mr. Lee did not in his witness statement disclose his "*relationship*" to the Claimants' legal representatives in his Report. They suggest that this was in conflict with the requirement in Article 5.2 of the IBA Rules. Mr. Lee's response is that he did not have this requirement of the Rules in mind and, more

significantly, that he did not have a “*relationship*” with the Claimants that required disclosure.

21. The Claimants submit that Mr. Lee’s stance reflects a lack of candour. We do not agree. We do not consider that his communications with the Claimants would have rendered it impossible for him to declare that he was “*independent*” of them. We accept that he did not so declare in his Report simply because he was not aware that the IBA Rules required this. More pertinently we do not follow whom it is that the Claimants suggest that Mr. Lee was attempting to deceive. The Claimants were presumably aware of the approach made to Mr. Lee by their own lawyers and we imagine that Mr. Lee informed the Respondent of this. It is not a matter to which we, as Arbitrators, attach significance.

V. THE GROUND FOR THE CHALLENGE IN THIS CASE

22. The above discussion relates to the type of “*conflict of interest*” that is more accurately described as “*bias*” or “*apparent bias*.” We do not believe, however, that it is this type of “*conflict of interest*” that the Claimants allege in this case. We cannot see any basis on which it could be asserted that Mr. Lee has given an indication of being biased in favour of one party rather than the other. The Claimants’ challenge is predicated on an assertion that Mr. Lee entered into a relationship of confidence with the Claimants, or their lawyers, under which he received information that precluded him thereafter from acting for the Respondent. The critical issue is whether this is correct.
23. One person cannot impose a duty of confidence on another simply by giving him information. The recipient of the information must expressly or impliedly agree that it will be treated as confidential. An implied agreement may be inferred from the circumstances in which the information is imparted or the relationship between the parties.
24. The Claimants do not allege that the lawyers who spoke to Mr. Lee on 7 February 2018 expressly stipulated that the conversation was confidential. They allege that this was implicit from the circumstances in which the conversation took place and from the fact that the conversation consisted of an exchange of information of a type that each party would naturally expect to be treated as confidential.

A. The Circumstances in Which the Conversation Took Place

25. Before turning to the evidence as to what was actually said on 7 February 2018, we will deal with the Claimants’ assertion that the circumstances in which the conversation took place were implicitly confidential. The first reason advanced by the Claimants in support of the alleged confidentiality was that “*the discussion was expressly for the purpose of engaging Mr. Lee to advise and for the Claimants to obtain evidence for use in adversarial legal proceedings.*”⁸

⁸ Application, ¶ 10.

26. We accept that this was the purpose of the telephone conversation but do not agree that this purpose carried with it an implication that the conversation was confidential. The telephone call was arranged through the offices of Mr. Carruzo. He had already put Akin Gump in contact with one potential expert on the law of Panama – a Mr. Hoyos. He was then asked by them for the names of other potential experts because “*we would like to make sure that we’ve considered multiple options.*”⁹ Mr. Carruzo recommended two further potential experts, one of whom was Mr. Lee. He was asked whether they would be available for “*a quick call about their capabilities to serve as an expert.*”¹⁰ The call with Mr. Lee was ultimately arranged for 7 February 2018.
27. Lawyers acting for a party to litigation or arbitration who are seeking the services of an expert witness will inevitably wish to discuss the case with the proposed expert before engaging him or her. The reason for this is that, before engaging an expert, it is sensible to check that the expert’s opinion will support the party’s case. Thus it is necessary at the outset to explain to the expert the nature of the case and the relevant issue or issues. This will normally be done by reference to facts that are within the common knowledge of both parties. No implication will arise that the proposed expert will keep the subject matter of the conversation confidential. In the present case the Claimants approached three different potential witnesses of Panamanian Law. It cannot sensibly be suggested that in each case the potential witness became impressed with a duty of confidence that prevented him from offering his services to the other side. There is, in our view, no merit in the assertion that, because the object of the conversation was to explore whether Mr. Lee should act for the Claimants, the subject matter of the conversation was confidential.

B. The Subject Matter of the Conversation

28. We turn to consider whether the subject matter of the telephone conversation on 7 February 2018 was such as to impose a duty of confidence on those who were party to it that precluded Mr. Lee from thereafter providing his services to the Respondent. Evidence as to this has been provided in witness statements from Ms. Hyman and Mr. Lee.
29. There is no dispute about the first part of the conversation. Ms. Hyman stated in her first statement:¹¹

“I provided a description of the background to these proceedings and the claims. That information was either public and/or was in any event known to the Respondent.”¹²

⁹ R-087, Email from Mr. Strauss to Mr. Carrizo, 30 October 2017. *See also*, Appendix A to Respondent’s Reply

¹⁰ R-087, Email from Mr. Strauss to Mr. Carrizo, 16 November 2017.

¹¹ Witness Statement of Katie Hyman, 29 October 2018 (“**Hyman First WS**”).

¹² Hyman First WS, ¶ 8.

This accords with Mr. Lee's evidence.

30. As to the second part of the conversation, Ms. Hyman stated in her first statement:

“I described to Mr. Lee certain of the fact evidence that the Claimants had at that stage obtained and we discussed what facts and evidence each of us was aware of as to judicial corruption in the Panama Supreme Court and possible further lines of enquiry. [...] Some of the factual matters to which Mr. Lee referred were public and some concerned his work on behalf of clients in Panamanian litigation and was not public and I understood was confidential.”¹³

31. In his first statement Mr. Lee denied that any confidential matters had been discussed. He said that in the last part of the conversation the participants had conversed informally about the administration of justice in Panama, which involved some hearsay discussion about judicial corruption.

32. In her first statement Ms. Hyman also stated that there was discussion about the merits of the Claimants' claims in the present arbitration and that Mr. Lee gave his own initial view on the merits of those claims, based on his knowledge of the Panamanian proceedings and the Panamanian Supreme Court. Mr. Lee denied this, stating that he was not in a position to give any view of the merits.

33. In her second witness statement,¹⁴ Ms. Hyman referred to some contemporary notes made by Mr. Strauss, one of the other lawyers who took part in the conversation, in which his own comments were largely redacted but which set out comments made by Mr. Lee. These recorded that there was a discussion about judicial corruption in Panama that focused in particular on Mr. Ortega, one of the Justices responsible for the decision that lies at the heart of the present arbitration. In his second witness statement Mr. Lee says that he now recollects this discussion. He says that it formed part of a very general discussion about corruption in the Panama judiciary. He comments that this was not confidential information as the rumors were public knowledge and had been the subject of an article in the press.

34. As to the allegation that Mr. Lee expressed a view on the merits of the claim, Mr. Strauss records him as commenting:

“Based on what you described, it sounds like there was a flaw in the process, denial of justice, no ability to defend ourselves.”¹⁵

¹³ Hyman First WS, ¶ 9.

¹⁴ Second Witness Statement of Katie Hyman, 16 November 2018 (“**Hyman Second WS**”).

¹⁵ C-266, Email from Mr. Strauss to himself, 7 February 2018.

Mr. Lee says in his second witness statement that he does not recollect making this comment but that, if he did, it did not amount to an opinion on the merits of the *Bridgestone* case.

C. The Significance of the Conversation

35. Some at least of the factual matters to which the Claimants' lawyers referred in the telephone conversation are now in the public domain, for they form part of the Claimants' pleaded case. We cannot be sure what, if any, other matters were referred to. On the information before us we have concluded that the conversation was not an occasion of confidentiality when it started and that the relationship of those taking part was not converted into one of confidentiality by the exchanges that followed. Mr. Lee had not been retained by the Claimants and their lawyers could not unilaterally impose a duty of confidentiality on him by giving him information about their case that was not in the public domain. Mr. Lee did not stipulate that the information that he provided was confidential, and he has stated that he did not consider it to be so. We do not consider that there was any implication that the Claimants could not, if they wished, make use of this information or convey it to third parties.
36. Furthermore, Mr. Lee's expert evidence in this arbitration is purely evidence of law. We do not see that the factual matters discussed in the 7th February conversation have any bearing on that evidence, albeit that they may provide the Claimants' lawyers with material for cross-examining Mr. Lee in support of their own case.
37. As to the allegation that Mr. Lee expressed an initial view on the merits, it seems to us that he did so, but only to the extent and in the terms of the recorded comment set out at paragraph 34 above. One of the objects of a telephone conversation such as that of the 7th February is to ascertain whether the expert under consideration is likely to support the case of the party that is considering retaining him. This will usually involve a provisional expression of view by the expert on the merits of the case that he may be invited to support.
38. In their Application¹⁶ the Claimants submit that Mr. Lee should be excluded because he expressed a view on the merits of the case, relying on the provisions of Article 760(5) of the Panamanian Judicial Code. This submission is misconceived. The provisions in question deal with judges not with expert witnesses. As we have explained,¹⁷ it is part of the role of an expert witness to express a view at the outset of the case on the merits of the issue or issues to which his evidence relates. This cannot constitute grounds for disqualifying him.
39. For all these reasons we have concluded that there is no merit in the Claimants' Application to remove Mr. Lee as an expert witness, and accordingly:

The Claimants' Application is dismissed.

¹⁶ Application, ¶ 32.

¹⁷ *Supra*, ¶ 17.

40. We have expressed the view¹⁸ that the factual matters discussed in the telephone conversation of 7 February 2018 have no bearing on the evidence of law given in Mr. Lee's Report. Should at any subsequent stage of the arbitration this view prove incorrect, it will be open to the Claimants to apply to us to re-open this decision or to grant such other relief as they may submit is appropriate.
41. Each Party has sought an order for the costs relating to this Application. We consider that they should follow the event and that the Claimants should pay the Respondent its reasonable costs in relation to the Application. We will in due course assess these costs if they cannot be agreed and will incorporate them as part of the award that we make at the conclusion of this Arbitration.

_____[Signed]_____
Lord Nicholas Phillips Baron of Worth Matravers
President of the Tribunal

_____[Signed]_____
Mr. Horacio A. Grigera Naón
Arbitrator

_____[Signed]_____
Mr. J. Christopher Thomas, QC
Arbitrator

¹⁸ *Supra*, ¶ 36.