CHAPTER 12

The Approach of Counsel to Challenges in International Disputes

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1 Introduction

Of the many issues that confront counsel while representing parties in disputes before international courts and tribunals, few are as fraught as having to decide whether to seek the disqualification of a judge or arbitrator before whom one is appearing. Not only does challenging a judge or arbitrator’s fitness to sit as an adjudicator involve application of indeterminate rules to what are often sui generis factual circumstances, it inevitably requires counsel to navigate treacherous terrain. In the best of circumstances, counsel must argue that the actions of a judge or arbitrator have created the appearance that he or she lacks impartiality or independence; at worst, counsel has to make the case that a judge or arbitrator harbors actual bias and/or lacks independence. Counsel must handle these delicate matters with tact, sensitivity, and the full measure of respect that is due in international proceedings.

Seeking to disqualify a judge or arbitrator presents the further difficulty that it exposes the challenging party, and by extension, its counsel, to the charge—however unfounded it may be—that the disqualification proposal is being made for abusive, ulterior purposes, such as to delay the proceedings. The treatment of challenges in International Centre for Settlement of Investment Disputes (“ICSID”) arbitration, where ICSID Rule 9(6) requires the case to be suspended while the disqualification proposal is pending, makes the party seeking disqualification especially vulnerable to that charge.1 For this reason, challenge proposals often prompt vigorous objections, and sometimes even accusations of bad faith. In one ICSID case, the party opposing disqualification charged the other with engaging in a “transparent attempt to sabotage” the proceedings.2 To be sure, the leveling of unkind words against the opposing

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side is, regrettably, an all-too-common feature of international arbitration, but it is fair to say that initiating challenge proceedings can elicit responses that are laced with particular vitriol.

The most salient characteristic that distinguishes the decision to seek disqualification from other decisions that counsel may be called upon to make, and the one which renders the choice especially difficult, is that the subject of the request is the adjudicator him or herself. Put simply, it is not the other party who stands accused of wrongdoing, but the judge or arbitrator. This presents thorny tactical considerations for counsel to consider when deciding whether a challenge should be pursued.

To begin with, counsel must weigh the possibility that the challenge may be unsuccessful, and that the challenged judge or arbitrator, by virtue of having had his or her qualifications for sitting as an adjudicator called into question, may become disposed against the party who brought the unsuccessful challenge. The risk is not only that the challenged judge or arbitrator will develop a conscious bias, although the possibility of that happening certainly exists. (For instance, in Burlington Resources v. Ecuador, an arbitrator was disqualified, not for the reasons set out in the original disqualification proposal, but because the arbitrator’s observations on the challenge manifestly evidenced an appearance of lack of impartiality against the challenging party and its counsel).3 Should the challenge prove unsuccessful, counsel must also contemplate whether the arbitrator may come to view its client’s legal and factual submissions with less of an open mind than would have been the case had the challenge not been brought. It is, of course, impossible to determine whether this happens, but it is not fanciful to think that an arbitrator who believes he or she has been the subject of unfounded claims may become, even if unconsciously, more disposed to view the challenging party’s other arguments with a greater degree of skepticism.

The possible effects a challenge may have on the unchallenged members of the court or tribunal, who will likely have their own views regarding the circumstances under which a disqualification proposal is appropriate, and whether the facts giving rise to the challenge qualify, should also be taken into account when deciding whether disqualification should be pursued. It is not unlikely that the unchallenged members may themselves have been, are currently, or can envision being, the subject of challenges in other cases, and so may have pre-existing sensitivities about the matter that could cause them to sympathize with the challenged arbitrator and/or look askance upon the decision to bring the challenge.

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3 Id., ¶¶ 78–80.