March 28, 2012

Do Global Law Firm Mergers Expand an Arbitrator's Continuing Obligation to Disclose Conflicts of Interest Under the *ICSID Arbitration Rules*?

By Elizabeth Whitsitt

Decision Considered:

ConocoPhillips Company et al. v The Bolivarian Republic of Venezuela

Two members of an ICSID arbitral tribunal – the Honourable Judge Kenneth J. Keith and Professor Georges Abi-Saab – have dismissed Venezuela's challenge to the tribunal's third member, Mr. L. Yves Fortier.

Venezuela filed a formal proposal to disqualify Mr. Fortier on October 5, 2011, one day after Mr. Fortier made a disclosure to the ICSID Secretary-General regarding the upcoming merger of Norton Rose OR LLP ("Norton Rose"), the firm in which he was a partner, and Macleod Dixon LLP ("Macleod Dixon"). Macleod Dixon was a Canadian-based law firm with international offices in, among other regions, South America. Venezuela's proposal to disqualify Mr. Fortier arose out of concerns related to Macleod Dixon's Caracas office. Specifically, Venezuela had concerns about "the extent and depth" of that office's representation of ConocoPhillips (the Claimant in this arbitration) and other clients in matters adverse to Venezuela, its state-owned petroleum company and/or affiliates.

Shortly after, Mr. Fortier informed his co-arbitrators and the parties to the dispute that he was leaving Norton Rose to pursue his career independently. Mr. Fortier's resignation took effect on 31 December 2011, one day prior to the effective date of his firm's merger with Macleod Dixon.

In spite of this announcement, Venezuela continued with its challenge to Mr. Fortier. Specifically, Venezuela claimed that Macleod Dixon's Caracas office was a material factor in Norton Rose's interest in the merger and that a significant part of the business of that office was representing clients, including international oil companies, in both litigation and pre-litigation dispute matters against the Venezuelan government, its state-owned petroleum company and/or its affiliates. As a result, Venezuela argued that Mr. Fortier's obligation to inform the ICSID Secretary-General and the parties about the merger crystalized "long before October 4, 2011, when Mr. Fortier knew or upon reasonable inquiry would have known…of Macleod Dixon's practice…".

For his part, Mr. Fortier maintained that: (i) he had no knowledge of the breadth and significance of the matters adverse to Venezuela being handled by Macleod Dixon, (ii) he had no involvement in the merger discussions, and (iii) that he was only apprised of the professional relationship between Macleod Dixon and ConocoPhillips late in the week of 26 September 2011. Mr. Fortier also confirmed that after his resignation he would neither have access to Norton

Rose's files nor its information systems and that for the remainder of his time at Norton Rose an ethical screen, put in place when the merger was announced, would be maintained.

Ultimately rejecting Venezuela's grounds for challenge, the tribunal's decision principally deals with the scope of disclosure required under the ICSID Convention and its Arbitration Rules.

Rule 6(2) of the ICSID Arbitration), requires an arbitrator, on appointment, to disclose "…(a) [their] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party." Once appointed, an arbitrator assumes a continuing obligation to promptly notify the ICSID Secretary-General of any such relationship or circumstance that subsequently arises during an arbitral proceeding.

Focusing on an arbitrator's continuing disclosure obligation, the two-person tribunal sided with their co-arbitrator. After considering the facts and circumstances of the case, the tribunal accepted that Mr. Fortier was not involved in the merger negotiations and had no knowledge of "the breadth and significance" of Macleod Dixon's adversarial relationship with Venezuela.

With respect to whether Mr. Fortier breached his duty to make reasonable enquiries into a possible conflict of interest arising from the merger discussions, the tribunal rejected arguments made by Venezuela about the protracted nature of law firm mergers. Specifically, the tribunal noted that while due diligence, including conflict checks, takes place before merger decisions are finalized, proposals for mergers also sometimes fail. Having so stated, the tribunal held that in the circumstances of this case there was no sufficient basis for it to find that Mr. Fortier had violated his disclosure obligations.

While it is clear that global law firm mergers inevitably result in potential conflict of interest situations for counsel with active arbitration practices, it is not certain if the ultimate remedy has to be resignation from the partnership. In this case, Mr. Fortier decided to answer that question, as have others in similar circumstances, by resigning from his long-time law firm. It remains to be seen if an arbitrator could sustain a disqualification challenge on the grounds that the arbitrator would maintain appropriate ethical screens, including restricted access to file and information systems, with lawyers in the same firm albeit located in different countries thousands of miles apart. Until this question is answered, it seems likely that a lawyer practicing principally as an arbitrator may find it safest to resign from his or her partnership prior to a pending merger. This will be a more difficult decision for those who try to maintain a practice both as an arbitrator and as counsel within the context of a global law firm.