

FRAPORT AG FRANKFURT AIRPORT
SERVICES WORLDWIDE

v.

REPUBLIC OF THE PHILIPPINES

(ICSID Case No. ARB/03/25)

(Annulment Proceeding)

DECISION ON APPLICATION FOR
DISQUALIFICATION OF COUNSEL

Members of the *ad hoc* Committee

Judge Peter Tomka

Judge Dominique Hascher

Professor Campbell McLachlan QC

Secretary of the Committee

Ms Eloise Obadia

A. The Annulment Proceedings

1. On 6 December 2007, Fraport AG Frankfurt Airport Services Worldwide ('Fraport' or 'the Applicant') filed with the Secretary-General of the International Centre for the Settlement of Investment Disputes ('ICSID' or 'the Centre') an application requesting the annulment of an Award ('the Award') dated 16 August 2007 rendered by the Arbitral Tribunal in ICSID Case No ARB/03/25 commenced by Fraport against the Republic of the Philippines ('the Republic' or 'the Respondent').

2. The Application was made within the time period provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the 'ICSID Convention'). In it, Fraport sought annulment of the Award on three grounds specified in Article 52(1),

namely that the Tribunal manifestly exceeded its powers (Article 52(1) (b)); that there was a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and that the Award failed to state the reasons on which it is based (Article 52(1)(e)).

3. The Acting Secretary-General of ICSID registered the application on 8 January 2008 and on that date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, transmitted a Notice of Registration to the parties. Copies of the Application and accompanying documentation had been forwarded to the Respondent on 6 December 2007, when the ICSID Secretariat acknowledged receipt of the Application.

4. By letter dated 14 April 2008, in accordance with Rule 52(2) of the Arbitration Rules, the parties were notified that the *ad hoc* Committee had been constituted, and was composed of Judge Peter Tomka, Judge Dominique Hascher, and Professor Campbell McLachlan QC ('the Committee'). The parties were further notified by letter of 18 April 2008 that Judge Peter Tomka had been designated President of the Committee, and on 27 May 2008, the Centre sent to the parties copies of Declarations signed by Members of the Committee pursuant to ICSID Arbitration Rule 52(2).

5. The Committee held its first session on 11 June 2008 at the Permanent Court of Arbitration in The Hague and several procedural issues were agreed and decided, as more fully recorded in the Minutes of the First Session. The parties confirmed that they did not have any objections to the proper constitution of the Committee or to any of the Members of the Committee.

B. Background to the application to disqualify counsel

6. Fraport's Application for Annulment dated 6 December 2007 was signed by Jeffrey Barist, Michael D Nolan and Lesley A Benn of Milbank, Tweed, Hadley & McCloy LLP ('Milbank Tweed') and by Eric Schwartz and Sabine Konrad of Dewey & Leboeuf ('Dewey & Leboeuf'), as Counsel for Fraport. The firm of Milbank Tweed had represented Fraport as counsel of record before the Arbitral Tribunal in the original arbitration proceeding. Dewey & Leboeuf, and Mr Schwartz, first appeared in the annulment proceeding instituted by Fraport.

7. In her letter of 19 May 2008 to the Committee, Ms Lamm of White & Case on behalf of the Respondent objected to Mr Schwartz's representation of the Applicant in this proceeding on the ground of conflict of interest. She stated that this arose from Mr Schwartz's prior representation of the Respondent in related proceeding. She stated:

During the time that he represented Respondent, however, Mr Schwartz received the case file and discussed case strategy with representatives of Respondent.

She concluded:

If Mr Schwartz does not voluntarily resign his representation of Fraport, Respondent reserves its rights to take any appropriate action in light of his disqualifying representation of Fraport in this proceeding, including raising a due process objection on the grounds that it must participate in an arbitration where opposing counsel has had access to, and may make use of, confidential information that was obtained from the opposing party.

8. Mr Schwartz replied to Ms Lamm on 26 May 2008 (with a copy to the Committee) rejecting the objection to his representation. He denied having represented the Republic or having had access to confidential information relevant to the present proceeding from the Republic or its representatives. He requested that the Republic withdraw its objection. Ms Lamm replied on 6 June 2008 maintaining the objection, concluding that the Respondent was ready to discuss the matter in greater detail at the First Session of the Committee. Mr Schwartz responded on 9 June 2008 stating that he was unavailable to attend the First Session of the Committee and inviting Ms Lamm to submit the matter to the appropriate bar authorities. Both of these letters were copied to the Committee by their authors.

9. At its First Session on June 11, 2008, the *ad hoc* Committee recorded that the Applicant was represented by Mr Barist, Mr Nolan and Ms Benn of Milbank Tweed Hadley & McCloy LLP, and by Mr Schwartz and Ms Konrad of Dewey & Leboeuf: Minutes of First Session, [2]. As noted above, Mr Schwartz did not attend the First Session. The Committee noted that the Respondent had raised an objection to Mr Schwartz's representation of the Applicant. It was confirmed at that stage that no request on this subject was pending before the Committee. It was also confirmed that the Respondent's objection did not concern the Applicant's representation by Dewey & Leboeuf, but only its representation by Mr Schwartz.

C. The Application

10. By letter dated 9 July 2008, White & Case on behalf of the Respondent applied to the Committee for 'an order disqualifying Mr Schwartz from appearing or acting in any way for Fraport in this arbitration' (page 7). White & Case submitted that the Committee should do so:

[T]o safeguard the legitimacy of the arbitral process, to grant procedural due process to both parties during the proceedings, and to ensure that an eventual decision is not tainted by any procedural irregularities. (page 1)

11. By letters dated 11 & 16 July 2008, the Committee invited the Applicant, and Mr Schwartz, in his capacity as the subject of the request for disqualification, to file submissions in reply, if they so wished, by 24 July 2008. No separate submission was received from the Applicant. Mr Schwartz, however, replied by

letter dated 23 July 2008.

12. Mr Schwartz submitted that the Committee should reject this request. He accepted that the Applicant had invited the Respondent to submit its request to the Committee, noting the Applicant's intention that:

[T]he Committee's decision would finally resolve the matter, without regard to whether the Committee would, in the absence of the parties' agreement, possess the authority to rule on the Republic's objection. (page 10)

13. On 25 July 2008, the Committee wrote to the parties, and stated:

[T]he Committee invites the Respondent to clarify whether it contends that Mr Schwartz received confidential information from the Republic of the Philippines. This request is made without prejudice to any decision the Committee may take. In addition, the Committee invites the Respondent to comment on the Rules of the Paris Bar referred to by Mr Schwartz in his letter of July 23, 2008.

The Committee also invited both parties to provide observations on the Respondent's request in light of the Code of Conduct for Lawyers issued by the Council of the Bars and Law Societies of the European Union, all such submissions to be filed by 15 August 2008.

14. Mr Schwartz replied briefly on 12 August 2008. On 15 August 2008, White & Case filed a further submission, together with a Report of Lawrence Fox of the same date, and 15 exhibits. On 19 August 2008, Mr Schwartz filed his further comments.

15. The Respondent and Mr Schwartz have each exhibited a number of documents to their respective submissions, including some contemporaneous documents. Neither party nor Mr Schwartz requested that the Committee hold a hearing on the application, which has been decided on the basis of the written pleadings set out above.

D. Grounds for Application

16. The Respondent's application relates to Mr Schwartz's appearance as counsel of record in ICC Case No 12610: *Philippine International Air Terminals Co Inc* ('PIATCO') v *The Government of the Republic of the Philippines (acting through the Department of Transportation and Communications ('DOTC') and the Manila International Airport Authority*) ('MIAA') ('the ICC Arbitration').

17. The basis which the Respondent advances for its application is that:

Mr Schwartz has a disqualifying conflict of interest stemming from his prior representation of the Republic in the related and still pending ICC arbitration.

Basis for Disqualification Request

It is uncontested that, in 2003, Mr Schwartz was retained by the Respondent in the ICC case filed by PIATCO against the Republic of the Philippines. He and his firm later withdrew after PIATCO complained that the firm had a conflict of interest stemming from its prior representation of the Asian Development Bank (“ADB”) in connection with potential financing for the Terminal 3 project. The Republic respectfully submits that representing a party adverse to a former client in a substantially related dispute constitutes a conflict of interest that disqualifies Mr Schwartz from representing Fraport in this annulment proceeding.¹

The Respondent requests a disqualification order from the Committee ‘[i]n the interest of safeguarding the integrity of these proceedings.’

E. Mr Schwartz’s Reply

18. In summary, Mr Schwartz’s reply is that:

I never represented the Republic in the ICC arbitration, and the Republic has never been my client. Moreover, I never performed any work (or received any confidential information) in relation to the ICC arbitration. By assisting Fraport in the present proceeding against the Republic, I am therefore not violating any ethical duty.²

F. Facts as to Mr Schwartz’s involvement in the ICC Arbitration

19. The Committee finds the following undisputed facts as to Mr Schwartz’s involvement in the ICC Arbitration.

20. PIATCO commenced the ICC Arbitration by Request dated 26 February 2003.³

21. On 20 June 2003, the Philippines Office of the Government Corporate Counsel (‘OGCC’), represented by Mr Teehankee and Mr Vega wrote, on behalf of MIAA, to the ICC Court of Arbitration Secretariat (with copies to counsel for PIATCO, Messrs Paulsson and Schwartz of Freshfields and the Philippines Solicitor-General) ‘in response to your letter dated 12 June 2003 giving Respondent MIAA until 27 June 2003 to file its answer to the Request for Arbitration and to nominate an Arbitrator.’ The

¹ White & Case letter 9 July 2008, p 2

² Dewey & Leboeuf letter 23 July 2008, pp 1–2

³ Terms of Reference 24 July 2004, [5.49]

letter stated, *inter alia*:

...please be informed that Respondent MIAA is retaining Freshfields ... to assist the Office of Government Corporate Counsel in its objection to the violations of MIAA's procedural rights under ICC Rules.

...

We will instruct our ICC counsel to file the necessary papers with the Secretariat and please take this as authority for Freshfields to have complete access to the file and to be added as a party to receive all notices and communications.

22. On 24 June 2003, a facsimile letter was sent in the name of Mr Schwartz to the ICC Secretariat (copied to the same parties as above) which stated:

Further to Undersecretary Teehankee's letter dated 20 June 2003, the Manila International Airport Authority has retained the law firm of Freshfields Bruckhaus Deringer as its counsel in the present proceedings.

Further to my colleague, Reza Mohtashami's telephone conversation with Ms Pui-Ki Ta yesterday, we would be grateful if you could provide us with copies of the correspondence, including the Request for Arbitration, filed to date by the parties. We will of course be happy to bear any costs incurred in this respect.

23. Shortly thereafter PIATCO wrote to Freshfields objecting to its representation of MIAA on the grounds of Freshfields' prior representation of the Asian Development Bank in connection with the project, and, after deliberation, Freshfields withdrew from its representation. According to Mr Schwartz, the letter from PIATCO was written on 25 June 2003 (and received by Freshfields on 27 June 2003), and:

[U]pon receipt of PIATCO's letter, Freshfields immediately suspended all work for MIAA and began investigating the alleged conflict. Freshfields informed the ICC that it was withdrawing from the case on July 16, 2003.⁴

This account has not been disputed by the Respondent. The Respondent accepts that Freshfields did resign their representation in response to that objection, and that it was only after their withdrawal that White & Case was retained to represent the Republic in the ICC Arbitration.⁵

24. By the time the Terms of Reference were signed (24 July 2004), there was a single Respondent: the Government of the Philippines described as set out in [16] above. It was represented by the Solicitor-General, Justice Feliciano and White & Case. MIAA was not named as a separate party or separately

⁴ Dewey & Leboeuf letter 26 May 2008

represented.

25. Mr Schwartz subsequently ceased to be a member of Freshfields and joined the firm of Dewey & Leboeuf.

G. Receipt of confidential information

26. Mr Schwartz has stated that he received no confidential information from MIAA; that he had no meeting with MIAA and did not discuss the case with MIAA. In his letter to Ms Lamm of 26 May 2008, he stated:

During the brief period between Freshfields' receipt of the ICC file and its suspension of work (less than three working days), Freshfields did little more than read the ICC file. It did not receive any documents concerning the case from MIAA. It also did not meet with MIAA, discuss the substance of the case with MIAA or give any advice to MIAA. A letter of engagement was never prepared or executed, a power of attorney was never received (or, to my knowledge, issued), and Freshfields never raised an invoice or received payment for any work.

27. In his submission to the Committee of 23 July 2008 (page 9) he further confirmed, as to Freshfields' involvement:

It did not receive any documents from MIAA or anyone else in the Philippines, apart from the letter sent by MIAA's counsel to the ICC on June 20, 2003. It did not meet with MIAA or discuss the case with MIAA, either before or after June 20, 2003. The only information provided to Freshfields about the case was the information contained in the June 20, 2003 letter, which was also sent to PIATCO, and Freshfields never gave MIAA any legal advice. I have also checked my diary for the period concerned and found that I was in a hearing in Brussels in another matter on June 24–25, 2003 and preparing on June 26–29 for yet a further hearing scheduled to commence on June 30, 2003. I have no recollection of seeing the ICC file received by Freshfields, which is doubtful, and no record of any meeting or discussion during that period with any representative of MIAA.

28. In his further submission of 19 August 2008, Mr Schwartz added the following further information as to the letter of 20 June 2003:

Prior to sending that letter, Mr Teehankee contacted Freshfields in order to determine whether it would be willing to provide the assistance described in that letter. Freshfields was advised by Mr Teehankee that he was concerned about the matters described in that letter. Freshfields agreed to review those matters upon receipt of the ICC file. Following receipt and review of the file, it was intended that Freshfields would discuss with Mr Teehankee MIAA's rights under the ICC Rules and assist MIAA in taking appropriate actions in the proceedings. For the reasons already described in my previous letters, no

⁵ White & Case letter 9 July 2008, p 5

such discussion ever occurred, and Freshfields withdrew without providing any advice or receiving any further information about the arbitration.

29. In response to the Committee's specific request of 25 July 2008 that the Respondent inform the Committee whether it contends that Mr Schwartz received confidential information from it, the Respondent has not advanced evidence of such receipt. Rather, its position is that:

The passage of more than five years and changes of personnel in the government of the Republic make it impossible to state with specificity the full range of information that Mr Schwartz acquired during his representation of the Republic in the ICC arbitration.⁶

Its submission is that there is an irrebuttable presumption of Californian law (which it submits is binding upon Mr Schwartz as a member of the Californian Bar) that Mr Schwartz acquired confidential information.⁷

H. Relationship between the ICC Arbitration and these proceedings

30. For reasons which will be developed below, the Committee does not need to make detailed findings as to the extent of the connection between the parties and the subject-matter of the ICC Arbitration and of the present proceedings. Indeed, given the very early stage of this annulment proceeding, and the fact that the only document submitted to the Committee from the ICC Arbitration is the 2004 Terms of Reference, it would not be in a position to do so.

31. For the purpose of the present application, it will be sufficient to proceed on the basis that there is a substantial overlap between the subject-matter of the ICC Arbitration and the matters which were the subject of the ICSID Arbitration. Both proceedings concern the project for the construction of Manila Airport Terminal 3, and the actions of the Philippines Government in relation to that project.⁸ The Committee has been informed by the Respondent that the ICC Arbitration is still ongoing.⁹

32. Fraport accepts that PIATCO is the company through which Fraport made its investment in the construction of the Terminal.¹⁰

33. The Respondent in each of the arbitrations is the Republic. In the case of the ICC Arbitration, the

⁶ White & Case letter 15 August 2008, p 4

⁷ Ibid, p 5

⁸ ICC Arbitration Terms of Reference; Fraport Application for Annulment [6] – [10]

⁹ White & Case letter 15 August 2008, pp 9–10, exhibiting a letter from PIATCO's counsel 7 August 2008 (Exh 15)

Republic is stated by PIATCO in its Request to be ‘acting through’ the DOTC and MIAA, and the summary of its claims in the agreed Terms of Reference describes MIAA as a ‘government-owned and controlled corporation.’¹¹ However, the letter from OGCC of 20 June 2003, and Mr Schwartz’s letter of 24 June 2003, confine Freshfields’ retainer to acting as counsel for MIAA. Mr Teehankee thus informs the ICC (and the other parties, including the Solicitor-General of the Republic) that ‘Respondent MIAA is also presently consulting with its co-respondent DOTC’ and that ‘Respondent MIAA is retaining Freshfields.’¹²

34. The Respondent and Mr Schwartz disagree as to whether MIAA and the Republic are different persons. Mr Schwartz has submitted that his retainer was limited to acting for MIAA, and that he did not act for the Republic.¹³ He contends that, therefore, in accepting his present appointment to act against the Republic, he does not have a conflict of interest vis-à-vis a former client. The Republic, on the other hand, submits that MIAA is not a government-owned and controlled corporation. It is an instrumentality of the Republic. Thus it submits: ‘The distinction that Mr Schwartz attempts to draw is one without a difference.’¹⁴ It is not necessary for the Committee to resolve this question in order to decide the present application.

35. Finally on this aspect, however, the Committee notes that this annulment proceeding necessarily has a much narrower scope than the proceedings before the ICSID Arbitral Tribunal. The issues which may form the subject-matter of the proceedings before this Committee are strictly limited by the terms of Article 52 of the ICSID Convention. A request for annulment is not an appeal or rehearing of the merits of the underlying substantive allegations between the parties. Rather, by the express terms of Article 52, the grounds for any request for annulment must relate to the conduct of the Tribunal: its constitution (Art 52(1)(a)); its powers (Art 52(1)(b)); its members (Art 52(1)(c)); its procedure (Art 52(1)(d)); and the statement of the basis for its Award (Art 52(1)(e)).

I. Approach of the Committee

36. The ICSID Convention creates a self-contained system for the arbitration of investment disputes, which is not subject to national law. Rather, the ICSID Convention and Arbitration Rules provide their own *lex arbitri*, subject to international law. The Convention and the Arbitration Rules contain no specific rules as to the disqualification of counsel.¹⁵ Nevertheless, Article 44 of the ICSID Convention (applicable

¹⁰ Fraport Application for Annulment [8]

¹¹ ICC Arbitration Terms of Reference [5.26]

¹² OGCC letter 20 June 2003, p 4

¹³ Dewey & Leboeuf letter 26 May 2008, pp 2–3; Dewey & Leboeuf letter 23 July 2008, pp 3–5

¹⁴ White & Case letter 9 July 2008, p 4

¹⁵ In contrast to the specific rules as to the disqualification of arbitrators in Art 57 of the ICSID Convention

mutatis mutandis to the procedure before the Committee pursuant to Article 52(4)) provides, in relevant part:

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.

The parties have not submitted any prior jurisprudence of ICSID tribunals or committees, which deals with the issue presently before the Committee. Nor are any such decisions reported. Accordingly, the Committee must decide the matter in accordance with the power given to it under Article 44. It notes the agreement of the Respondent and Mr Schwartz that it should do so.¹⁶

37. The Committee considers that it has the power and duty to conduct the process before it in such a way that the parties are treated fairly and with equality and that at any stage of the proceedings each party is given the opportunity to present its case. This power and duty necessarily includes the power and obligation to make sure that generally recognized principles relating to conflict of interest and the protection of the confidentiality of information imparted by clients to their lawyers are complied with. Indeed, such principles are of fundamental importance to the fairness of the Committee's procedures, such that the Committee has the power and duty to ensure that there is no serious departure from them.

38. The Committee also observes that, where the issue involves legal representation, the rights of both parties are potentially affected, since a decision to disqualify counsel from acting for a party in proceedings before the Committee affects that party's freedom to rely upon advice and representation of counsel of its own free choosing.

39. However, the Committee does not have deontological responsibilities or jurisdiction over the parties' legal representatives in their own capacities. Despite the agreement of the parties to submit the present application to it, the Committee has no power to rule on an allegation of misconduct under any such professional rules as may apply. Its concern is therefore limited to the fair conduct of the proceedings before it.

40. Mr Schwartz is a member of the Californian and Paris Bars.¹⁷ The parties have made extensive reference in their submissions to the Californian law on legal ethics; and also to the ethical rules of the Paris Bar and, following the Committee's request, to the Code of Conduct for Lawyers issued by the Council of the Bars and Law Societies of the European Union.

and Rule 9 of the Arbitration Rules

¹⁶ See [10] & [12] above.

¹⁷ Dewey & Leboeuf letter 23 July 2008, p 2

41. This material is valuable to the extent that it reveals common general principles which may guide the Committee. But none of it directly binds the Committee, as an international tribunal. Accordingly, the Committee's consideration of the matter is not, and should not be, based upon a nice reading of any particular code of professional ethics, applicable in any particular national jurisdiction. Such codes may vary in their detailed application. Rather, the Committee must consider what general principles are plainly indispensable for the fair conduct of the proceedings.

42. The present application advances an allegation of prejudice to the fair conduct of these proceedings arising from Mr Schwartz's representation of a former client in related proceedings some five years ago. In the Committee's view, there is a distinction in principle between the conflict of interest which may arise from the concurrent representation of clients, and the issue which arises where a former client (or related party) objects to a lawyer acting against him. Where the allegation relates to the representation of a *former* client, the issue for the Committee is whether there is a real risk that the lawyer could have received confidential information from that client, which may be of significance in the subsequent proceedings, and which may accordingly prejudice the fair trial of the second proceedings.

43. The Committee is fortified in taking that approach as a matter of general principle by a number of the authorities referred to or relied upon by the Respondent. Thus, Professor Hazard observes in his authoritative commentary on American legal ethics in relation to disqualification of counsel based on conflicts of interest with a former client:

[The] substantial relationship test is not a formalistic inquiry into degrees of closeness, but is in large measure a judgment as to whether the former client's confidences are at risk of being turned against him. The modern understanding of the test is therefore a particularly good example of the convergence in the law of lawyering of loyalty or conflict of interest concerns, and confidentiality concerns.¹⁸

44. The Paris Bar Rules and the CCBE Code of Conduct also deal with the position in relation to former clients in terms of the protection of confidential information. The CCBE Code of Conduct, having provided in Article 3.2.1 and 3.2.2 for conflicts of interest in relation to two current clients, turns to the position in relation to former clients in Article 3.2.3, which provides:

A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidences entrusted to the lawyer by a former client, or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.¹⁹

¹⁸ Hazard, Hodes & Jarvis *The Law of Lawyering* (3 ed) S 13.5, p 13–13. This work is cited by the Respondent, White & Case letter 9 July 2008, p 2, and an extract is exhibited as Exh 5 to Dewey & Leboeuf letter 23 July 2008

¹⁹ CCBE Code of Conduct for Lawyers in the European Community Art 3.2.3, reproduced in Griffiths-

J. Application to the facts

45. Is there, then, in the present context, any real risk that Mr Schwartz could have received confidential information from MIAA which may be relevant to the current annulment application and give an undue advantage to Fraport, prejudicing the fair disposition of these proceedings?

46. Without deciding the question of the relationship between MIAA and the Respondent, the Committee proceeds for this purpose on the basis that the provision of confidential information to Mr Schwartz by MIAA in the ICC Arbitration could potentially prejudice the interests of the Respondent in the present proceedings.

47. However, the Respondent does not allege that Mr Schwartz received specific confidential information from MIAA or from the Respondent, and Mr Schwartz denies that he did. This element of the application is now put by the Respondent on the basis of a presumption (which is said to be irrebuttable under Californian law) that Mr Schwartz would have received confidential information.

48. The only two letters which have been submitted to the Committee (the letters of 20 and 24 June 2003) are both open correspondence, common to the parties and the ICC. The documents which Mr Schwartz requested from the ICC on 24 June 2003 were documents filed in the proceedings, which would also have been, of their nature, documents common to both parties. Indeed, it is clear from the OGCC letter of 20 June that no substantive written pleading had yet been filed in the ICC Arbitration, and nor had the Respondent appointed an arbitrator.

49. The Respondent's expert, Mr Fox, opines that:

First, confidential information definitely was shared. In order for Mr Schwartz even to sign the letters in evidence before this Committee as the partner in charge of the matter, his professional duty required him to inform himself on any number of topics relating to the representation – his client's objectives, reasons for hiring him, the client's need for information – and all of that information was and remains confidential.²⁰

50. Mr Schwartz denies this.²¹ His account of the circumstances in which his firm was approached by OGCC to act for MIAA is to the effect that the information which OGCC gave to Freshfields did not go

Baker Serving *Two Masters: Conflicts of Interest in the Modern Law Firm* (2002), 91, Exh 1 to White & Case letter 15 August 2008. Art 4.1 (para 3) of the Paris Bar Rules states substantially the same principle: Exh 1 to Dewey & Leboeuf letter 23 July 2008. A similar principle has also been adopted in English law: *Bolkiah v KPMG* [1999] 2 AC 222, 234–5 (HL, per Lord Millett)

²⁰ Report of Lawrence Fox 15 August 2008, p 4

²¹ Dewey & Leboeuf letter 19 August 2008, p 3

beyond the substance of that set out in the open letter of 20 June 2003.²²

51. The Committee has no evidence of fact before it disputing this account. It does not find it inherently improbable that a law firm would agree to go on the record for a governmental entity, which it was thought urgently required representation in an existing international arbitration, before receiving confidential information about the matter. The request to the ICC for documentation from the arbitration file on 24 June 2003 is consistent with this.

52. The Respondent's submission that the receipt of confidential information may be presumed from the fact of the retainer is not compelling in the circumstances of this case. As the Committee has already observed, it is not bound by specific provisions of the laws or professional codes of any other jurisdiction, including Californian law, in arriving at its decision. It has nevertheless carefully considered the Opinion of Mr Fox, together with the other materials on this point filed by the Respondent and by Mr Schwartz.

53. Of course, if the lawyer is actively engaged in the course of a retainer, the client should not be required to prove communication of specific confidential information. By its nature, the lawyer-client relationship requires an ability to communicate in confidence. The very purpose of the protection may be lost if the client, in seeking protection, is required to disclose the very confidences which he seeks to protect. Thus a conclusion about the possession of such information may be based upon the nature of the services which the lawyer provided to the former client and the information which would in the ordinary course be learned by a lawyer providing such services.²³

54. But in this case, the retainer was still-born. The evidence before the Committee is that it did not proceed beyond the first communication, Freshfields having stopped work in order to investigate the allegation of conflict made by PIATCO on 27 June 2003. In the view of the Committee, the nature of the services provided by Freshfields from the date on which it accepted the retainer until when it ceased work seven days later was not such as necessarily to require the conclusion that confidential information was provided to it. On the contrary, the evidence from the record which has been produced is consistent with the conclusion that no such confidential information was provided. Despite a specific question from the Committee as to whether the Respondent contends that Mr Schwartz actually received confidential information, the Respondent has not met Mr Schwartz's denial on the facts.

55. The Committee cannot act in this regard simply on mere appearances since to prevent a party from having access to its chosen counsel cannot depend upon a nebulous foundation, but rather must flow from

²² Cited supra, [28]

²³ Accord Hazard et al, supra n 18, 13–16

clear evidence of prejudice. On the facts as adduced to the Committee, there is no real risk of prejudice to the current proceeding in allowing Fraport to continue to be represented by Mr Schwartz.

56. In these circumstances, therefore, the Committee has decided that the Respondent's application must be dismissed.

K. Decision

57. For the foregoing reasons, the Committee DECIDES:

- (1) The Respondent's application for the disqualification of Mr Schwartz from representing or advising the Applicant in this annulment proceeding is dismissed;
- (2) All questions concerning the costs and expenses of the Committee and of the parties in connection with this application are reserved for subsequent determination, together with the Application for Annulment.

[Signature]

JUDGE PETER TOMKA
President of the Committee
Date: September 18, 2008

[Signature]

JUDGE DOMINIQUE
HASCHER
Member
Date: September 18, 2008

[Signature]

PROFESSOR CAMPBELL
McLACHLAN QC
Member
Date: September 18, 2008