LESSONS TO BE LEARNED: IMPORTANCE OF IMPARTIAL AND INDEPENDENT ARBITRATORS

By Pierre Bienvenu

The independence and impartiality of arbitrators are crucial to the legitimacy of international arbitration. This article offers examples of arbitrators failing to comply with their disclosure obligations or, when challenged, commenting inappropriately on the merits of the challenge or the credentials of the challenging party.

Scope of disclosure

Every arbitrator must be and remain impartial and independent of the parties. As parties have a strong interest in being informed of facts and circumstances that may be relevant to assessing the independence and impartiality of the arbitral tribunal, prospective arbitrators are required to disclose any facts or circumstances that may, in the eyes of the parties, call into question their independence or give rise to doubts as to their impartiality.

Arbitrators are under a duty to make reasonable enquiries to identify such facts and circumstances, and their disclosure obligation remains in force for the entire duration of the proceedings.

Arbitration rules adopt a subjective standard for this obligation by requiring the disclosure of facts or circumstances that may call into question the arbitrator's independence in the eyes of the parties. However, the standard applicable to decide on an arbitrator's independence and impartiality is objective and focuses on whether:

> *a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.*

The arbitrator's failure to disclose facts or circumstances based on the subjective standard may still be relevant to assessing their independence and impartiality in the event of a challenge. As the International Chamber of Commerce's (ICC's) Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration explains, "[a]lthough failure to disclose is not in itself a ground for disqualification, it will however be considered by the [ICC] Court in assessing whether an objection to confirmation or a challenge is well founded."

National case law and challenge decisions by arbitral institutions offer too many examples of arbitrators, often unintentionally, failing to abide by these standards, thereby imposing significant costs on the parties and undermining public confidence in arbitration. For example, the Paris Court of Appeal recently annulled an arbitral award on the ground that one of the arbitrators had failed to disclose that his law firm had carried out work for an affiliate of one of the parties during the pendency of the case.[1]

Arbitrators must therefore take a liberal approach to disclosure and pay heed to the guideline that any doubt as to whether certain facts or circumstances should be disclosed must be resolved in favour of disclosure.

Scope of participation in challenge proceedings

The requirements of independence and impartiality have implications for the arbitrator in the event they are challenged. Arbitration rules typically afford challenged arbitrators the opportunity to comment on a challenge, but they are silent as to the scope of participation permitted.

It is appropriate in the context of a challenge for the arbitrator to ensure that all relevant facts are placed before the arbitral institution or court called

upon to determine the challenge. However, when commenting on a challenge, the arbitrator should exercise caution before deciding whether to respond to criticisms directed at the arbitrator's conduct advanced by the challenging party, or to argue the merits of the challenge (otherwise than by simply declining to resign). The challenged arbitrator must restrain from attacking the party raising the challenge lest that provides the decision maker with independent grounds to uphold the challenge.

For example, a recent case in Ecuador highlights the importance of not responding to a challenge as the chair disqualified the arbitrator because his "allegations about the ethics of counsel" for the party bringing the challenge demonstrated an apparent lack of impartiality.[2]

Similarly, a division of the London Court of International Arbitration concluded in a 2001 case that while the substantive grounds for the challenge did not give rise to justifiable doubts as to the arbitrator's impartiality or independence, the challenge ought to be upheld considering "the self-evident tension and ill-feeling" resulting from the challenge.[3] In that case, the challenged arbitrator had described the challenging party's submissions as "fictitious, false and malevolent".

More recently, the English Commercial Court upheld an application to remove an arbitrator based in part on the arbitrator's aggressive response to a party's enquiries regarding potential conflicts of interests.[4]

Comment

The lesson from these decisions is that a challenged arbitrator should cooperate with the decision maker by providing observations as to the factual bases for the challenge. However, the challenged arbitrator should be prudent in addressing the merits of the challenge. In no circumstances should the challenged arbitrator appear to descend into the fray or display animosity toward the challenging party.

Endnotes

[1] *Saad Buzwair Automotive Co v Audi Volkswagen Middle East FZE LLC.*

[2] *Burlington Resources inc v Republic of Ecuador (ICSID Case ARB/08/5).*

[3] LCIA Reference 1303, 22 November 2001.

[4] *Cofely v Bingham and Knowles* 2016 EWHC 240 (Comm).

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