DISQUALIFICATION EMPHASISES HIGH CONFLICTS OF INTEREST THRESHOLDS

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Lack of arbitrators leaves a closed market where conflicts are increasingly likely, although new Guidelines hope to clarify transparency and disclosure obligations

The recent International Centre for Settlement of Investment Disputes (ICSID) case upholding a challenge made by Venezuela disqualifying Spanish arbitrator José María Alonso highlights the increasing challenges of arbitration in an international marketplace where any connection can prove to be a conflict of interest. Only the second case in history, the connection was just in the fact that the firm, Baker & McKenzie, was involved in parallel ICSID proceedings.

“The problems with arbitrators coming from large law firms, is that they are acknowledged as a direct or non-direct conflict of interest even if they are not personally involved in the case,” says Bernado Cremades, Managing Partner of B Cremades & Asociados. “This has nothing to do with personal integrity – we just have the challenge of controlling the independence of the arbitrators.”

The fundamental defining feature of arbitration is that of 'independence'. However, the growth of international business is not only causing more disclosures, it is creating more complexity in determining conflict of interest issues, creating similar problems for independent arbitrators. "There are arbitrators that have decided to serve exclusively as arbitrators, not as advocates, to secure their independence," explains Jesús Almoguera, Founding Partner of recently-launched R&I, private equity and arbitration boutique J. Almoguera y Asociados. "However, one wonders whether this approach can also create problems of independence when the arbitrator is usually only appointed by clients of a few law firms."

As arbitration is a field where reputation and specialism is everything, companies using arbitrators don't necessarily close the door on newcomers, say lawyers, they just prefer to appoint the same ones in what is very much a 'meet and greet' industry. As a result, it is becoming a vicious circle, as these companies are complaining about the length of the arbitrator proceedings, while wanting the most prestigious, sought after arbitrators. "You might want the best but these are normally busy people who have potential facts that have to be disclosed," explains David Arias, Managing Partner at Arias SLP. "We need more suitable candidates – there just aren't enough newcomers."

There is currently a demand for increased transparency by arbitration users, and efforts to change the popular misconception that any disclosure is automatically seen as grounds for disqualification. "On the contrary, by disclosing something, you are saying that you remain impartial and independent and just want to let the people know something that may be relevant, for the sake of transparency," says Arias.

But while the fundamental rule is to inform the parties about personal circumstances, there is still the tension between the parties' right to disclose situations that may reasonably call into question an arbitrator's independence, and the parties' right to choose their own arbitrator. "Transparency is good," says Arias; "But we have to balance the duty to disclose with the right of the companies to appoint a person that they understand to be the most suitable candidate for a case. There are issues that are completely irrelevant and do not need to be disclosed."

2014 will see the enactment of new version of the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration, aimed at clarifying the thresholds for disclosure. The Guidelines are by no means exhaustive and are a colour-coded supplement to the official IBA rules of ethics offering guidance on present day potential conflicts of interest that are pertinent to today's business environment, where the reality of inter-locking corporate relationships is always more complex than the rules – such as whether being 'friends' on Facebook really requires full disclosure. "I believe in the way arbitration is conducted nowadays," says Arias, who is Chair of the Taskforce that reviewed the Guidelines. "But the arbitration world is very complex; there are multiple cases with difficult situations, and arbitration practitioners need some guidelines to assess whether there is a conflict of interest."

The Guidelines could help clarify things for this very closed arbitration market, but for the moment lawyers feel that conflicts will continue to rise in particular for the larger law firms or those that have or are consolidating. With high thresholds that show no signs of lowering, say lawyers, extra caution should be taken when accepting appointments.