Challenging Challenges

Kluwer Arbitration Blog
February 9, 2009

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Please refer to this post as: Shai Wade, 'Challenging Challenges', Kluwer Arbitration Blog, February 9 2009, http://arbitrationblog.kluwerarbitration.com/2009/02/09/challenging-challenges/

In recent years the international arbitration community seems to be obsessed with the issue of arbitrator impartiality, independence and bias. The 2004 IBA Guidelines were followed by the LCIA's 2006 Special Report and Decision to Publish challenge determinations, followed in 2007 by the ICC Bulletin Special Supplement, and most recently by TDM's 2008 Special Issue on Arbitrator Bias.

Some fear that our preoccupation with arbitrator bias overstates the problem and could become a self-fulfilling prophesy. As Mr Veeder QC pointed out, the IBA Guidelines could provide a "well sprung platform" from which parties may launch tactical challenges to arbitrators. Tactical challenges are of course challenges motivated by a desire to delay, frustrate or otherwise manipulate the arbitral process, rather than by a genuine concern over the impartiality of an arbitrator.

All the evidence from published and other challenge decisions shows that the IBA Guidelines (in particular) and other publications are increasingly being referred to by counsel in challenge submissions, as well as by the challenge courts in their decisions. But while academic work and soft law codes might have illuminated the pegs on which challenges to arbitrators might be hung, interestingly (even ironically perhaps) it is the increased "transparency" and access to information about arbitral proceedings and arbitrators that appears to be providing the material for clothes to hang on those pegs. This trend is perhaps most evident in the context of investment treaty arbitration (see for example cases commented on by C Mouawad in the TDM Special Issue) where the confidentiality of proceedings is least strictly maintained, but is apparent in other fields of international arbitration as well. Information about arbitrators' previous dealings, appointments, public statements, professional engagements, judgments, awards, academic publications, and even in some countries transcripts of oral submissions is readily available on the internet. All of these are being seized upon by imaginative lawyers as improbable evidence of unlikely bias.

But the perceived growth in tactical challenges does not stem from the publication of codes, academic research, or challenge decisions. Nor can greater transparency be blamed for the use to which newly available information is put. Nor indeed was there ever a golden age in which commercial parties nobly agreed to forgo opportunities to delay an arbitration leading to an anticipated liability. A detectable change may however lie in the attitudes held by an increasing number of arbitration lawyers. Ten years ago it would have been self evident and obvious to most if not all international arbitration lawyers that delaying an arbitration and increasing its cost with a spurious or tactical challenge to an arbitrator would only serve to alienate the entire tribunal. Recently, however, more and more counsel appear to be willing to overlook the systemic difficulties and substantive disadvantages associated with ill-conceived challenges.

Is there anything that can or should be done? Obvious public policy considerations require that there should be no bar to the admissibility of challenges to arbitrators. In the absence of an effective sanction against parties or counsel (who in some cases are known to be blatantly pushing the

envelope of tactical challenges) new solutions might be required to address the issue of tactical challenges should the problem continue to grow. The 2008 Ruling in HEP v. Slovenia (ICSID Case No. ARB/05/24), is an example of how a tribunal overcame a potential threat to the arbitral process, by exercising its cases management powers in a novel fashion. The Ruling in question did not involve a tactical challenge and might not be easily exportable to other circumstances, but the willingness of the tribunal to exercise its procedural powers in a flexible and novel manner suggests that there is sufficient flexibility within the existing frameworks to address this issue.

The aspects of the HEP Ruling relating to the cases management powers of Tribunals in international arbitration deserve and will no doubt receive scrutiny from practitioners and academics alike. In the meanwhile, many English lawyers will focus on the exclusion from the proceedings of a party's barrister-counsel because he was a member in the same chambers as the chairman of the tribunal. The Ruling does not of course create a precedent and the reasoning emphasises the international law context of those proceedings. Nevertheless, many will not be able to help but wonder whether the logic of the decision might, over time, percolate into the world of international commercial arbitration. The House of Lords' acknowledgement in *Lawal v. Northern Spirit,* that "*the administration of justice requires higher standards today than was the case even a decade or two ago*" might also contribute to such speculation. Challenges to arbitrators on the basis of common membership in barristers' chambers have been rejected by the LCIA and the ICC and some national courts. Nevertheless, even if the law in the most popular arbitral seats remains unchanged, the fear of changes in other jurisdictions might yet present English lawyers with some challenging challenges indeed.