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Arbitrations in the Freezer — Are Arbitrators expected to wait just like Penelope?

Salvador Fonseca (Chadbourne & Parke LLP) · Thursday, September 22nd, 2011 · Institute for Transnational Arbitration (ITA), Academic Council

In keeping with the popular saying that 'a bad settlement is better than a good lawsuit,' it is not unusual for parties in an arbitration to suspend the proceedings and explore a settlement.

Any arbitrator will understand such a move and assume that the parties know best what works for them to achieve a satisfying resolution of their dispute. Amicable negotiations should always be an option. The period for which the proceedings were originally suspended may turn out to be too short, so the parties extend the timeframe, sometimes more than once. But what if the parties keep suspending the proceedings beyond what is considered to be reasonable? Are arbitrators expected to remain available for the parties for the duration of the suspension, no matter how long the suspension lasts? These questions go to the very heart of the arbitrators' duties after their appointment.

As reflected in the IBA Rules of Ethics for International Arbitrators, it is widely accepted that arbitrators commit themselves, not only to be and remain independent, but also to devote their time and efforts to the case, in order for the arbitration to run efficiently and expeditiously. Furthermore, a fairly uncluttered agenda has become a commonplace requirement in the selection of arbitrators. Parties looking for a suitable arbitrator consider it standard practice to ask candidates questions about their agenda and upcoming commitments.

Remaining independent and available is essential for arbitrators. This implies that arbitrators need to manage their agendas in order to avoid compromising their availability and to refrain from taking on conflicting engagements until the conclusion of the arbitration. Not honoring these principles would constitute a breach of the arbitrator's contractual and ethical duties.

Also, it is generally expected that arbitrators, after their appointment, remain committed to the case until its conclusion and not withdraw without good reason. This is reflected in some of the most well known arbitrators' codes of ethics.

For instance, according to the ABA-AAA Code of Ethics for Arbitrators in Commercial

Disputes, once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable for him or her to continue. The arbitrator may also withdraw if the parties fail or refuse to compensate him or her as agreed.

Similarly, the JAMS Arbitrators Ethics Guidelines establish that an arbitrator should withdraw from the process if she or he has insufficient knowledge of the relevant procedural or substantive issues, if she or he is unable to maintain impartiality, or if she or he suffers a physical or mental disability. Also, an arbitrator should withdraw if there is a conflict of interest that has not been or cannot be waived or if the arbitration is being used to further criminal conduct. In addition, an arbitrator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have irrevocably undermined the integrity of the arbitration process. In any case, the JAMS guidelines make it clear that, except where an arbitrator is compelled to withdraw or where all parties request withdrawal, an arbitrator should continue to serve.

The duty to continue service absent an overriding ethical reason to the contrary, was confirmed in a 2006 California case, *Morgan Phillips, Inc., v. JAMS/Endispute*, 40 Cal. App. 4th 795, 802 (Ct. App. 2006). In *Morgan Phillips, Inc.*, an arbitrator and the arbitral institution were sued for damages because the arbitrator withdrew from the case without stating an ethical reason and refused to issue an award. The California Court of Appeals, while considering that an arbitrator's decision to withdraw based on ethical standards (e.g., because of substantial doubt of the arbitrator's ability to be fair and impartial, or because of a conflict of interest) is essential to the arbitral function and covered by arbitral immunity, rejected the defense of arbitral immunity when no ethical reason for the withdrawal was stated by the arbitrator. The court reasoned that, under these circumstances,

> 'withdrawal (and the resultant refusal to render an award) is not immunized as a decision necessitated by ethical strictures. Rather, it is conduct inconsistent with those strictures and with his quasi-judicial role as an arbitrator. It amounts to a breach of his contractual duty to conduct a binding arbitration.'

Is the arbitrator's duty not to abandon his or her post without the parties' consent or without a good cause, similar to what is required from a soldier? If so, can a long or indefinite suspension of the arbitral proceedings constitute good cause for withdrawal?

Considering that there is no arbitral or ethical rule under which the suspension of the arbitral proceedings is a reason for withdrawal, there is no easy answer to this question. Only because Penelope waited 20 years for Odysseus's return, should we expect arbitrators to wait for the same amount of time?

The key issue here seems to be reasonableness. How long is it reasonable to wait for

the parties in the case at hand? Related questions arise concerning ethical duties of arbitrators. For example, are arbitrators ethically required to follow the parties' negotiations in order to be ready to return to perform their duties? Should arbitrators remain in contact with the parties in order to react promptly and properly to the development of negotiations?

The reverse question should be asked as well: Is there an ethical duty for the parties — and more importantly, for legal counsel — to discharge the arbitrators if the parties decide to pursue settlement negotiations? It would be unfair to expect arbitrators to wait indefinitely for the parties to return and keep themselves available for proceedings that might never restart, while not getting compensated for their time.

There are no correct or wrong answers to the questions raised above. As with many thorny issues, the solution is to be found in the particular circumstances of each individual case, balancing the interests of the parties and the arbitrators.

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