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Advance Waivers of Conflicts of Interest – Changing the Dimensions of Arbitrator Challenges

Alefiyah M Shipchandler (ILS Law College) · Thursday, September 27th, 2018

Arbitrator neutrality remains an imperative prerequisite in international commercial arbitration. After all, the primary advantage of arbitration is that parties have the ability to choose their own decision-makers. The issue of advance waivers typically arises at the time of appointment, when the arbitrator reserves the right to continue as an arbitrator despite the occurrence of certain potential conflicts, that would normally give rise to justifiable doubts about the arbitrator's impartiality and independence. Thus, what the parties end up 'waiving' is their future right to challenge the arbitrator on the basis of the previously disclosed potential conflict.

However, can such advance waivers of conflicts of interest supersede the mandatory right of challenging an arbitrator? There exists limited guidance in terms of the validity and enforceability of such waivers and its ultimate impact on the right to have an impartial and independent tribunal. Given that there do not exist any formal Rules or Guidelines on the same, this article aims at pointing out certain practices that have begun to gradually emerge amongst arbitral institutions, in their treatment of advance waivers.

Advance Waivers of Potential Conflict of Interests

In recent times, two kinds of advance waivers are generally used by arbitrators in their declarations of independence and impartiality,

1. Arbitrators may seek an advance waiver by which parties to the dispute 'waive' their right to challenge the said arbitrator at a future time, on the basis of certain potential conflicts. For example,

   "… I would however make a reservation that the other partners of my law firm may be free to continue with current or take up new instructions, involving the parties to this dispute or their affiliates."

2. Arbitrators may also seek a 'waiver' by the parties, by which the arbitrator is no longer bound by his duty to make continuous disclosure of conflicts. For example,

   "The parties are requested to accept that current or future member firms of [the prospective arbitrator's group of firms] are free … to accept instructions from or against any of the parties to this arbitration … without any duty on my part to make any disclosure in connection with any such instructions."

Interestingly, the *IBA Guidelines on Conflicts of Interest, 2014* ("**IBA Guidelines**") only recognizes the use of advance waivers. It does not take any conclusive position on their validity, and leaves this question to be determined by "the specific text" of the waiver, the applicable rules and law. Similarly, even the *Report of the International Commercial Disputes Committee of the New York City Bar Association* simply states that, "the Committee neither endorses nor rejects the use of advance waivers, but rather seeks to encourage further dialogue and consideration of an existing trend".

Due to a lack of uniformity on the issue, different arbitral institutions seem to follow different procedures when it comes to advance waivers. A question that needs to be answered is whether parties can in exercise of their autonomy, do away with the arbitrators' continuous duty of disclosure, which under most procedural rules is mandatory. The UNCITRAL Model Law, for example, omits any grounds for parties to contract out of Article 12's impartiality standards.

In fact, the IBA Guidelines specifically mandate in General Standard 3(b) that, "advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure". Given the soft law status of the IBA Guidelines it only remains to be seen whether notwithstanding such advance waiver, an arbitrator shall nevertheless be required to disclose conflicts of interest that may arise in the future.

A practice in point, followed by the ICC is rooted in the supervisory role the Secretariat plays in arbitrations administered by it. According to the current practice, the Court is not bound by the arbitrator's statement relating to future conflicts of interest. This essentially means that the parties are not precluded from challenging an arbitrator. The Court consequently allows challenges against arbitrators notwithstanding advance waivers. Further, the arbitrator's duty of continuous disclosure is also not discharged.

There is also a growing tendency of arbitral institutions to refuse the appointment of an arbitrator who requires an advance waiver. For example, when an arbitrator is to be proposed by an ICC National Committee pursuant to Article 13(3) of the ICC Rules, the Court ordinarily does not appoint arbitrators who request advance waivers. A similar practice is also followed by the SCC, where the arbitrator requesting a waiver is required to revise his/her declaration before sending it to the parties.

Proposed Practice

In consonance with the IBA Guidelines and the practice of the ICC Secretariat, the validity of an advance waiver may be evaluated on the basis of the following:

1. Limited scope of the waiver.

An overly broad waiver covering a variety of potential conflicts, is incompatible with the fundamental principle, that parties to an arbitration have a legitimate interest in being fully informed of all circumstances that ensure that an arbitrator is and remains independent and impartial. Therefore, arbitral institutions such as LCIA do not accept waivers that are overly broad.

2. Informed consent of the parties and constructive knowledge.

For a waiver to be valid, it must be necessary that the parties are aware of the exact nature of the

potential conflict and the implications that that waiver could have on proceedings. The validity of waivers must thus be evaluated on the touchstone of 'you cannot waive what you do not know'.

3. Continuing obligation of the arbitrator to disclose conflicts.

Waivers by which an arbitrator attempts to do away with his continuing duty of disclosure should not be accepted at all.

4. Possibility of challenging the arbitrator despite the advance waiver.

In unison with the mandatory right to challenge an arbitrator, parties should be permitted to challenge an arbitrator despite an advance waiver, in exceptional circumstances. Such leave may be given by the supervisory institution or the arbitral tribunal as the case may be.

5. Effect on the enforcement of the award vis-à-vis the advance waiver.

Since an arbitral award can be set aside by national courts on the grounds of partiality of an arbitrator, the validity of advance waivers may also be determined on the basis of its general treatment in the jurisdictions from which the parties to the dispute belong. For example, according to the dictum of Justice White in *Commonwealth Coatings Corp. v. Continental Cas. Co*, arbitrators are not automatically disqualified by a business relationship with the parties before them *if both parties are informed of the relationship in advance*. Thus, the United States appears amenable to enforce advance waivers.

Path Ahead

Another question that must also be answered is as to what impact the advance waiver might have on a challenge to the arbitrator. Could an arbitrator rely on the advance waiver as a defence in such case? And to that extent, can the advance waiver be used to draw conclusions on some form of acquiescence or can it be used to increase the objective standard necessary to uphold a challenge against an arbitrator?

Advance waivers thus affect various elements which are at play in commercial arbitration, including party autonomy, standards of impartiality and independence, duty of disclosure and even enforceability. In light of the uncertainty surrounding them, it is necessary to formulate a set of rules, even if in the form of soft law, to regulate the use and ensure uniformity in the enforcement of advance waivers and address the effect they have on arbitral proceedings.

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