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Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure?

Alexis Mourre (Castaldi Mourre & Partners) · Tuesday, May 19th, 2009

The already much debated Paris Court of appeal judgment in *Tecnimont*, rendered on 12 February 2009, has put into light the dangers arising from the lack of uniformity in the field of conflict disclosure. The Paris Court of appeal has quashed a partial award because the chairman of the arbitral tribunal, a well-known international arbitrator who is part of one of the world's largest law firms, had failed to disclose circumstances that did not exist at the time of his appointment and which he subsequently had not been aware of. No one in the arbitration community can seriously doubt of the total impartiality of that arbitrator. Yet, the award has been annulled, with the consequence of throwing in the garbage a carefully drafted 400 pages award, years of efforts and millions of Dollars in legal costs. Such an outcome would seem absurd, however, the reverse situation would have been equally questionable, leading to admit that an arbitrator can at the same time be judge and member of a law firm providing legal assistance to one of the parties.

The issue of conflict disclosure in international arbitration cannot be addressed from the narrow perspective of a particular national litigation culture. Has the time now come to meet that goal from a truly international perspective? And, if yes, is there on the marketplace a better instrument to achieve that objective than the IBA Guidelines? Institutional decisions on challenges should at the same time be dealt with in such a manner that they be transparent and final, and that parties are not left to re-litigate before courts an issue that they believed was addressed by the institution years before. The harsh consequences of the Paris Court of appeal decision in *Tecnimont* tells us that the fate of awards having requested years of work and millions of Dollars cannot any longer be left to the hazards of a party becoming aware by chance, in a press release or by attending a conference, of a circumstance that the arbitrator did not disclose when accepting its appointment.

The already much debated Paris Court of appeal judgment in *Tecnimont* (*SA J&P Avax SA v. Société Tecnimont SPA*, court of appeal of Paris, 12 February 2009, Rev. Arb. 2009.186, note Clay) has put into light the dangers arising from the lack of uniformity in the field of conflict disclosure. The Paris Court of appeal has quashed a partial award because the chairman of the arbitral tribunal, a well-known international arbitrator who is part of one of the world's largest law firms, had failed to disclose circumstances that did not exist at the time of his appointment and which he subsequently had not been aware of. No one in the arbitration community can seriously doubt of the total impartiality of that arbitrator. No one, either, can doubt of his good faith and his generally acknowledged high moral standards. Yet, the award has been annulled, with the consequence of throwing in the garbage a carefully drafted 400 pages award, years of efforts and millions of Dollars in legal costs. Such an outcome would seem absurd at first glance to anyone.

The reverse situation, however, would have been equally questionable, leading to admit that an arbitrator can at the same time be the judge and a member of a law firm providing legal assistance to one of the parties, its parent company or subsidiaries. At a time when transparency and ethics are – rightly – one of the main concerns of the arbitral community, leaving such situations unsanctioned could have devastating consequences. If the recent financial crisis tells us something, it is that trust is a volatile commodity: it is built in decades of efforts, but it can also vanish overnight.

At the core of the problem is the obligation to disclose. The issue is well known to all arbitrators. Disclosures are needed to enable the parties to exercise their right to challenge. In the absence of a proper level of disclosure, the tribunal's impartiality and independence would solely rest on the appointee's discretion, with no possible form of control of circumstances that are and will most of the time remain unknown to the parties. The parties would be left to rely on the arbitrator's impartiality and independence as an act of faith. But not all parties can be asked to share blind faith in the arbitral community, and more and more users of international arbitration are increasingly vocal to ask for more transparency. On the other side, over-disclosure should be avoided. As Molière showed us, excessive rigor can at times hide a deeply vicious soul. And, leaving aside the ridicule of requesting arbitrators to disclose whether they have twenty years ago shared the same college classroom with a relative of one of the parties, suspicion has never allowed building trust. Quite to the contrary, suspicion feeds suspicion. A balance thus needs to be found.

From this perspective, we submit that the IBA Guidelines were entirely right in their submission, ten years ago, that 'existing standards lack sufficient clarity and uniformity in their application' (IBA Guidelines, Introduction). The situation is no different today. And the problems remain unsolved. The active role of global law firms in arbitration is only one of them. The professionalization of many arbitrators, some of whom now practice in arbitration boutiques, is another. The need to protect professional liability and the increasingly adversarial behaviour of many counsels compounds the difficulties.

The facts in *Tecnimont* are telling. The arbitration was administered by the ICC. At the time of accepting his appointment, the arbitrator disclosed that his firm has represented the parent company of one of the parties in a concluded case in which he had never been involved. During the proceedings, apparently after attending a conference, one of the parties' counsel became aware that the law firm of the arbitrator was assisting on various projects a company which had since then been acquired by the other party's mother company. That party made a challenge against the arbitrator, which the ICC rejected for reasons which were not revealed. Meanwhile, the arbitral tribunal had rendered a partial award on the principle of responsibility, which was challenged and annulled pursuant to Article 1502-2 of the French Code of Civil Proceedings on the ground that the arbitrator had failed to comply with his duty of disclosure.

Interestingly, the other party had argued that the challenge had not been made within the 30 days time-limit provided by Article 11 of the ICC Rules of arbitration, and the court of appeal held that this time-limit was only applicable before the institution and not before the court.

The first remark to be made at this juncture is that the distinction between institutional and judicial challenges is highly unsatisfactory. If the parties accepted institutional rules that set time-limits for challenges, why should such time-limits not be enforced by the judge? Let us go one step further: once the institution decides a challenge, why should the parties re-litigate the same issue years later before the judge? Would it not be more appropriate to treat challenge decisions rendered by arbitral

institutions *as if* they were awards?

This would of course suppose that such decisions be rendered by neutral third parties and that each party have a sufficient opportunity to present its case before the institution. It also supposes, in addition to those requirements of due process, that challenge decisions be reasoned and that the reasons be given to the parties. From this perspective, the LCIA made a step in the right direction when it decided to publish sanitised extracts of its challenge decisions. We hope that the publication will soon come out.

The second remark is that, as noted by the IBA ten years ago, there is remarkable uncertainty as to the level of disclosure that is required from arbitrators in each single case. The UNCITRAL Model Law, as most national laws, is mute on this important issue, with the result that each court builds its own requirements on a case-by-case basis, in a manner that necessarily lacks uniformity and fails from providing a satisfactory level of certainty to arbitrators and predictability to parties.

As for the rules of arbitral institutions, they present common features, but diverge on important aspects. It is of course widely accepted that an arbitrator must disclose all circumstance which can affect its appearance of independence and impartiality in the eyes of the parties, and that this duty is a continuous one. Most of the rules, however, adopt a purely subjective requirement, leaving the arbitrator to decide the circumstances to be disclosed, while others, like the ICDR Rules, provide for an objective test, with a list of questions for the arbitrators to answer in its declaration of acceptance. The result is that the same situation may be disclosed under some rules of arbitration but not pursuant others, which is not satisfactory.

From this standpoint, a remarkable exercise of balance and transparency is that undertaken by the IBA in its 1999 Guidelines on Conflict of Interest in International Arbitration. Of course, the Guidelines do not satisfactorily address all issues. Of course, they are imperfect in many respects. But they are unique in that they address at the same time the need for balance in the level of disclosure requirement, the requirement of legal certainty and the legitimate expectation of transparency of the users of international arbitration. The Guidelines also conciliate the subjective test, by requiring arbitrators to disclose “facts or circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrators’ impartiality or independence”, and the objective test by instating presumptions based on the well-known red, orange and green lists.

The IBA Guidelines are also adapted to the needs of international arbitration. The recent rejection by the American Bar Association Dispute Resolution Section of the widely circulated “Best Practices for Meeting Disclosure Requirements Under the RUAA and Similar Arbitrator Disclosure Standards” shows that the issue of conflict disclosure in international arbitration cannot be addressed from the narrow perspective of a particular national litigation culture. The proposed ABA guidelines were certainly driven by an overly judicial culture, and they have as such – and rightly – been rejected by the arbitral community, starting by the College of Commercial Arbitrators, the Chartered Institute of Arbitrators and other practitioners interested in preserving the United States as an attracting venue for international arbitrations. One leading figure ironically declared that the draft should be stamped BBR ‘Burn Before Reading’. This almost unanimous rejection of the text shows that any attempt to set international standards for conflict disclosure should take into account the transnational culture of international arbitration.

Has the time now come to meet that goal from a truly international perspective? And, if yes, is there on the marketplace a better instrument to achieve that objective than the IBA Guidelines?

Why not imagine that the main international arbitral institutions jointly decide to adopt the Guidelines by reference in their rules? And why not imagine that the UNCITRAL Arbitration Rules, which are currently under revision, also include a reference to the Guidelines? Of course, this would not be sufficient to address all issues. As said above, institutional decisions on challenges should also be dealt with in such a manner that they be transparent and final, and that the parties are not left to re-litigate before the court an issue that they believed was addressed by the institution years before.

The mere contention that every arbitration procedure is different and has its specificities should not hide that there is need for transparency, predictability and legal certainty in international arbitration. The harsh consequences of the Paris Court of appeal decision in *Tecnimont* tells us that the fate of awards having requested years of work and millions of Dollars in costs, and in which the interests involving nine or ten figures claims are disposed of, cannot any longer be left to the hazards of a party becoming aware by chance, in a press release or by attending a conference, of a circumstance that the arbitrator did not disclose when accepting its appointment.

Alexis Mourre/Alexandre Vagenheim

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