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Institutions Need to Publish Arbitrator Challenge Decisions

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A defining characteristic of international arbitration is the ability to choose the decision-makers who determine the dispute. The parties' right to choose their arbitrator is qualified by the requirement that the arbitrator adhere to standards of independence and impartiality. Where the parties consider that the arbitrators do not meet these standards, they can bring a challenge. The challenge procedure is a fundamental element of the arbitral process, ensuring that arbitrators adhere to the standards of impartiality and independence, essential to the legitimacy of arbitration. Currently, few institutions publish reasons for their decisions on challenges and therefore there is limited publicly available jurisprudence setting out reasons for successful and unsuccessful challenges. Gradually, institutions are increasingly providing parties with reasons to accompany decisions on challenges. This is a welcome development. However, these reasons are not being published for the wider arbitration community. Greater transparency would enhance the predictability and consistency of decisions and would reduce the number of opportunistic challenges.

The major arbitral institutions' rules, and the key non-institutional arbitral rules, do not require the body which decides a challenge to provide reasons for its decision to the parties. Most of the major arbitral rules are silent on this topic, and as such no obligation exists. While no rules require a decision-maker to provide the parties with reasons for the success or failure of a challenge, there is a trend towards providing parties with a reasoned decision to the challenge of an arbitrator [1]. In addition, some institutions from time to time publish summaries of the reasoning in respect of selected decisions on arbitrator challenges (for example the ICC does this).

Reasons underlying decisions on arbitrator challenges should be routinely provided to the parties to enhance the transparency of the arbitral process. Most institutions do not stipulate whether or not they will provide reasons, but the ICC has set out that it will not do so. (This is largely to avoid any further embarrassment to the challenged arbitrator.) Parties pay significant fees to the bodies that make the decisions in relation to arbitrator challenges, and it is not appropriate for them to be denied information about the reasons for a decision on the crucial subject of the fitness for office of an arbitrator. The reasoning is of fundamental interest to the parties, in particular to the challenging party, who may have serious concerns about the suitability of an arbitrator to continue to act in the proceedings. Providing parties with decisions in response to arbitrator challenges would increase the parties' confidence in the decision-making processes of the bodies ruling on arbitrator challenges. A reasoned decision is likely to hold greater legitimacy in the eyes of the parties, and would make the decision-making bodies more accountable for their reasoning. It is also more likely to be considered seriously if the challenge decision is ever appealed to the state court.

In addition, all arbitral institutions should regularly publish summaries of the reasoning underlying their decisions on arbitrator challenges. Evidently, such reasons would need to be published in a way that safeguards the confidentiality of the arbitration (i.e. by providing generic descriptions of the issues in question). Publishing the reasons underlying a decision regarding a challenge would augment the presently limited jurisprudence available, providing more information to bodies ruling on challenges to arbitrators, and it is likely this would increase the predictability and consistency of challenge decisions. This body of reasoning would also be of use to parties and counsel, to guide them in making and responding to challenges, hopefully reducing the number of spurious challenges. Such jurisprudence would also be of interest to arbitrators, in guiding their disclosure of information to parties. As arbitrators come from a variety of legal backgrounds where conflict of interest rules differ greatly, a body of jurisprudence on the standards of independence and impartiality expected in international arbitration would be of assistance to them.

[1] The LCIA Court, which decides arbitrator challenges, does provide reasons to the parties along with the decision (P. Turner and R. Mohtashami, A Guide to the LCIA Arbitration Rules, 2009, at para. 4.124), as does the Board of the Centre of the VIAC, which decides arbitrator challenges, also provides reasons to the parties for its decisions (F. Schwarz and C. Konrad, The Vienna Rules: A Commentary on International Arbitration in Austria, 2009, at 16-045). Where cases are governed by PCA rules, the decision-making body will provide reasons for a challenge decision where they are requested to do so by the parties. Practice in respect of challenges under the ICSID and DIS rules demonstrates a trend towards providing the parties with reasoned decisions, although there is no obligation to do so.

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