Kluwer Arbitration Blog

Arbitration, Social Media and Networking Technologies: Latent Existing Conflicts

Alonso Bedoya · Friday, June 15th, 2018

Introduction

Currently, social network trends are focused on consumer markets, such as the fashion or food industry. The uninterrupted use of smart phones, computers, tablets, Ipod´s, etc. with unlimited internet connection has resulted in us being mere dependent beings on these devices. Social networks are everyday forms of social interaction, defined as a dynamic exchange between people, groups and institutions of high complexity, involving groups that identify with the same needs and problems.

It is within this understanding that a novel additional variable has become relevant within the legal domain as technology pervades all ambits of our human endeavor. International arbitration has since several years ago been affected by social networks as the latter have become an important part of our day-to-day lives. Whether we access them in our workplaces or elsewhere, social networks no longer serve solely to keep us connected with friends and family but also establish very important networks of professionals in the global labour market. Social networks for this purpose must thus be understood enunciatively – and without simply being limited to: Facebook, Twitter, Tumblr, LinkedIn, YouTube, Google +, Instagram, etc.

Arbitration and Social Networks: A reason for conflict

In addressing the matter, and as an anecdote, he who writes these lines was once appointed to act as party arbitrator in an ad hoc arbitration some time ago, and as it is expected, prior to accepting the charge, did research on both parties in the dispute and on those who were to be their counsels so that the proper disclosure and declaration of independence and impartiality could be provided. After concluding that there was no connection with any of the parties or with any of their lawyers involved in the case, the disclosure was made, indicating that there existed no conflict of interests by being part of the tribunal, in accordance with the minimum standards for impartiality and independence for arbitrators that is exemplified in the new Arbitration Regulation of the Lima Chamber of Commerce in its article 14, numeral 2, which is very similar to the provisions in the English Arbitration Act or the U.S.A. Federal Arbitration Act, as follows:

“(…) 2. The arbitrator, upon accepting the designation, subscribes to a statement of availability, independence and impartiality, in which he must make known in writing to the institution any fact or circumstance that could give rise to justified doubts about his impartiality or independence … ”

Nevertheless, on the first procedural hearing day, one of the parties objected to my appointment as arbitrator, requesting me to desist from being part of the arbitral tribunal. The party alleged that I do so because I had the brother of the other party as a LinkedIn contact; this was a fact of which I was not aware and could have, therefore, never anticipated the objection.

Conclusion

It is undeniable that under current social media trends, contact suggestions, automated publicity and repetitive confirmation notifications are the standard once a person is online; and few are those who do not manage their professional contact networks with LinkedIn and who have probably accepted contacts before really knowing them in person. A good reason may be that the present competitive work environment prompts international arbitrators as well as highly trained individuals to establish a solid professional network that may generate business opportunities and/or work positions in the future. Hence, many have come to add contacts without necessarily coming to meet or know all the members of this network personally, and thus I found the objection to my appointment quite absurd. Consequently, having a relative of one of the parties to the process as a LinkedIn contact did not compromise any impartiality or independence; even so, one of the parties wanted to challenge one of the arbitrators and his counsels devised a viciously pernicious campaign in order to achieve it.

In principle, the synergy between arbitration and social media has been fruitful and constructive. Since the publicity of arbitration as an alternative mechanism for dispute settlement, arbitral institutions and arbitrators in general have been positively received by the majority of the domestic and international community. Nonetheless, this still-not-well-documented combination of areas does present some incompatibility, since arbitration is based on the premise that the arbitrators who form the panel have the obligation to be an independent and impartial body and must not have any bond with the parties in dispute; and yet this premise, by reference to social networking, is not always true.

Thus, arbitrators are prompted to consider that, as a consequence of technology becoming an everyday-life instrument, some of the following questions need to be addressed: What happens if the Chairman of the arbitral tribunal has as a “friend” on Facebook who is the respondent or one of his counsels in the arbitration? A worse scenario still, what if the respondent, being a national or international celebrity, has one of the members of the arbitral panel as a follower on Instagram? As we see, the various possibilities for arbitrators to be linked to their parties or their counsels may become endlessly numerous; and even the most diligent of arbitrators may likely never be able to foresee all these facts in this ever evolving digital era.

Moreover, even though the International Bar Association (IBA) Council has created Guidelines on Conflicts of Interest in International Arbitration (hence, the famous Non-Waivable Red List, Waivable Red List, Orange List and Green List, which in brief terms try to reflect situations that in practice are usually present in arbitration), These Guidelines fall short of covering the plurality of potential scenarios that may arise as a consequence of a conflict of interest. Even more, none of the lists remotely mentions all the probable relationships that the parties and arbitrators may have with one another through social networks. Therefore, although the Red List describes critical situations in which the arbitrator has a very close relation with one of the parties or with the result of the process, and the Orange List only mentions those situations in which the arbitrator and any of the disputing parties may have a degree of closeness, I still stand pondering as to where being part of the same social network should be included.

This latent but active social media phenomenon further presents a condition in which the parties involved in an arbitration process, whether acting as claimant or respondent, may stand vulnerable to the fact that one of them (or its lawyers) may maliciously use social networks to manipulate and to challenge arbitrators principally because of fear that such arbitrator may issue an award (if it is a sole arbitrator) or vote against one of the parties' interests. It is clear then and without doubt that these sorts of inquiry should inspire us practitioners to continue studying and researching on the evolution of new technologies and social media and its effect on our legal profession because we are currently entering a transformational digital era that will bring rise to issues requiring continuous analysis during the coming years.

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This entry was posted on Friday, June 15th, 2018 at 9:00 am and is filed under Conflicts of interest, IBA Guidelines on Conflicts of Interest, Independence and Impartiality, International arbitration, Social media, Social media
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