Dubai Arbitration Week Recap: Arbitrator Disclosure – Local Flavour or International Standards?

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Participants at this year's Dubai Arbitration Week gathered for the ICC conference hosted by Al Tamimi & Co on 14 November 2018. The conference featured a lively roundtable discussion on the subject of "Arbitrator Disclosure – Local Flavour or International Standards?" chaired by Nadia Darwazeh. The panel comprised practitioners from across the MENA region and included Mohamed S. Abdel Wahab, Sara Koleilat-Aranjo, Nathan Landis, Hassan Saeed and Asli Yilmaz.

The conference covered recent developments in disclosure in the MENA region and the disclosure standards applied by the ICC. The panel also debated whether there ought to be an international standard for disclosure, or if local specificities have a valid role to play.

How has arbitrator disclosure evolved in the MENA region?

The implementation of the new United Arab Emirates Federal Law No. 6 of 2018 (**"UAE Arbitration Law"**) has recently altered the landscape of arbitrator

disclosure in the UAE. Prior to the enactment of the UAE Arbitration Law on 14 June 2018, Articles 114 and 115 of the UAE Civil Procedures Code (**"CPC"**) governed arbitrator disclosure. The CPC held arbitrators to the same disclosure standards as judges, meaning that arbitrators could be disqualified or recused for being the spouse/relative, agent, trustee or guardian of one of the parties, or for having given a legal opinion or pleaded for any of the parties in the case.

The new UAE Arbitration Law has shifted the standard of disclosure required for arbitrators, bringing the standard in line with that of the UNCITRAL Model Law. Article 10(4) of the UAE Arbitration Law states that anything likely to give rise to doubts in relation to the impartiality and independence of the arbitrator should be disclosed. As the UAE Arbitration Law has only been enacted in the last six months, there are no reported cases that have tested the extent to which this new standard is being applied in practice, so it may be well into 2019 by the time this becomes apparent.

The arbitration laws of Jordan (Arbitration Law No. 31 of 2001) and Bahrain (Arbitration Law No.9 of 2015) hold arbitrators to the same standard as the UAE Arbitration Law; i.e. any circumstances likely to give doubts as to independence and impartiality must be disclosed. However, in Lebanon, where there is no standalone arbitration law, the grounds for challenging an arbitrator are the same as those used to challenge judges (see Art. 770 of the Lebanon Code of Civil Procedure), as was previously the case in the UAE prior to the enactment of the UAE Arbitration Law.

Given the significant damage that is caused to parties in relation to wasted time and costs when an award is set aside after a successful challenge to an arbitrator, holding arbitrators to higher standards of disclosure (as per the arbitration laws of the UAE, Jordan and Bahrain) ought to be creating positive precedents for international arbitration in the region.

However, the panel noted that they had observed instances in practice of parties' counsel focussing more on finding creative ways to bring challenges to arbitrators than on presenting their clients' cases. Therefore, whilst the region's new disclosure regimes aim to bring local disclosure practices in line with the UNCITRAL Model Law, such regimes will only be successful if parties do not use arbitrator disclosures in a tactical manner to raise challenges to frustrate or abuse the arbitral process.

What is the standard applied by the ICC?

An arbitrator's decision regarding disclosure will always be subjective, and in that sense, there will always be a "local flavour" to disclosure based on an arbitrator's own perceptions of what ought to be disclosed (or not). In addition, what may be appropriate to disclose in one case may not be relevant in another.

Panel member Asli Yilmaz, Counsel at the ICC, noted that arbitrators should keep in mind when completing the ICC disclosure forms that they must gain the trust of the parties and aim for the parties to be comfortable with the appointment. Where the parties are appointing an arbitrator directly, the ICC prefers to receive forms on which no disclosures have been made. However, where the pool of arbitrator candidates is limited (for example, if the parties require the arbitrator to have specific language skills), the arbitrator with the "least unfavourable" disclosures is likely to be appointed.

Arbitrators may have tendencies to worry about making disclosures because they perceive there is a risk that making a disclosure will result in their appointment not being confirmed. However, a failure to make a disclosure is not necessarily a ground for disqualification later on in the arbitral process. The relevant court will assess the grounds for disqualification objectively with reference to standards of independence and impartiality (which are not defined by the ICC). However, the risk presented by *not* disclosing a fact at the outset must be balanced with the risk of a fact coming to light at a lighter stage, which may be perceived negatively by the parties or give rise to a challenge later down the line.

Does the future lie in a universal international standard of disclosure, or do local specificities also have a role to play?

The IBA Guidelines provide a universal international standard of disclosure that practitioners can follow. However, it can also be argued that an experienced arbitrator should be aware of what ought to be disclosed, for example in circumstances where they know either of the parties or have been involved with an affiliated case.

Local specificities do also have a role to play, as familiarity with certain practices in some jurisdictions may mean that parties are able to get comfortable with practices that would be unacceptable for others. For example, parties that are familiar with English law and practice may not take issue with an arbitrator from one barristers' chambers acting in a case where counsel for one of the parties is from the same chambers. However, for non-English parties unfamiliar with how barristers' chambers operate, such an arrangement may be perceived as entirely unacceptable.

As such, local specificities will always have a role to play in international arbitration cases where parties are likely to make different assessments of firstly what ought to be disclosed, and secondly whether any disclosures made provide valid grounds for challenging the arbitrator.

Conclusions

The disclosure regimes coming into force throughout the MENA region, which hold arbitrators to a higher standard than court judges, signify a positive change for raising standards in the region, as disclosure goes to the integrity of the arbitral process. However, the speakers noted that whilst internationally recognised institutions such as the ICC may already be seeking to uphold those higher standards in the region, there will need to be a transition period for smaller arbitration centres in the region to upgrade their standards of disclosure.

There is a fine line between too much disclosure and insufficient disclosure. Whilst it is likely to be excessive for an arbitrator to make disclosures such as panels they have sat on at events, lunches they have attended and people they have connected with on LinkedIn, at the same time, how can an arbitrator be sure that they have fully complied with their obligations?

To a great extent, arbitrators will have to rely on their own judgment and experience to satisfy themselves that they are in compliance with the relevant disclosure standards and the parties' expectations. It is for this reason that local flavours will always have a part to play in disclosure, as an arbitrator's own experience and familiarity with certain practices will shape their view of how disclosure ought to be carried out.