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Too Close For Comfort: Arbitrator Independence After Eiser

Daniel Greineder (McNair International) · Friday, October 9th, 2020

In its decision of 11 June 2020, an ICSID Annulment Committee annulled an award in *Eiser and Energia Solar Luxembourg v. Spain*, ICSID Case No. ARB/13/36. It did so on the grounds that the arbitrator appointed by the investors, Stanimir Alexandrov, and his former law firm, Sidley Austin, had worked so closely and frequently with the claimant investors' damages expert Carlos Lapuerta and his firm, the Brattle Group, that a reasonable outsider *"would find a manifest appearance of bias"* on the facts (at para. 229). The committee further concluded that Dr Alexandrov had failed in his duty to disclose the relationship. It held that had the other members of the tribunal known of the relationship, this would have altered their perception of Dr Alexandrov's statements and analysis – including during the tribunal's deliberations (at para. 250). The supposed compromising "closeness" between an arbitrator and an expert witness in *Eiser* highlights the increased sensitivities of disclosure and conflicts in international arbitration.

The decision has attracted much attention, including on this blog. It shows that an arbitrator's professional relationships with third parties and failure to disclose those relationships may have a drastic effect on proceedings, resulting even in the annulment of an award.

Yet, Spain did not specify any act by Dr Alexandrov that had evinced bias or otherwise been improper. The issue was narrowly his failure to make disclosure. The committee found that (i) the arbitrator's failure to disclose his ties with the Brattle Group had deprived Spain of the possibility to challenge him for lack of impartiality and led to the improper constitution of the tribunal; and (ii) that failure of disclosure had resulted in a serious departure from a fundamental rule of procedure.

The Problem of Conflict of Interest in Arbitration

An outsider may be forgiven for wondering what the fuss is about. After all, a party chooses and pays an arbitrator to resolve its dispute. Surely, this creates an inevitable conflict of interest. Moreover, why would one choose an adjudicator, unless it were someone one already knew and liked? Yet arbitration practitioners will explain that a party-appointed arbitrator will rise above such considerations to act with impeccable fairness. Perhaps it is this already delicate relationship between an appointing party and its arbitrator that requires users to monitor and minimize extraneous conflicts of interest with special care.

Those categories of independence and conflict of interest are, however, neither straightforward nor

fixed. A conflict of interest may be defined as "*a situation in which some interest of a person has a tendency to interfere with the proper exercise of his judgment in another's behalf.*"[1] As a textbook definition this is unexceptionable, yet it refers loosely to a "*tendency*" and leaves open in what circumstances such a situation arises. Conflict of interest in arbitration depends heavily on specific facts and the judgment and perception of users. It is not easy to devise widely applicable guidelines. The main mechanism for identifying conflicts of interest is spontaneous disclosure by arbitrators. In recent years, a laudable desire for transparency and consistency has led to protocols that promote greater disclosure and that identify and formalize a wide range of possible conflicts.

The leading instrument is the IBA Guidelines on Conflicts of Interest, a non-binding soft law instrument that sets out standards for good international practice. The *Eiser* decision arguably shows up their limitations, in that they do not expressly address the relationship between arbitrators and expert witnesses. Additionally, institutions increasingly set their own standards. The ICC expanded the scope of disclosure by prospective arbitrators beyond that of the IBA Guidelines. For example, under section 3.1.2 of Part II of the IBA Guidelines, the following circumstances fall under the Orange List of the traffic light classification of arbitrator relationships: "*The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter*". An Orange List classification identifies a disclosable situation that may give rise to doubts as to the arbitrator's impartiality or independence. In contrast, the ICC Note to Parties and Arbitral Tribunals, 1 January 2019, at paragraph 23, largely replicates the provision but omits the time limit, suggesting a longer reference period.

Of course, the mere disclosure of a relationship does not concede the existence of a conflict of interest. However, the two cannot be neatly separated. There is no good reason to disclose a relationship, whether personal or professional, unless it is potentially the source of a conflict of interest. The wider the scope of disclosure, the wider the scope of conflicts must be. By requiring broader disclosure arbitration institutions make users more suspicious. Relationships that were previously uncontroversial may now amount to conflicts.

The Danger of Abuse

Regrettably, evolving standards and a proper concern for transparency are open to abuse by unscrupulous counsel who challenge arbitrators to deny their opponents their chosen arbitrator, delay proceedings, and intimidate the tribunal. Challenges are now a recognized part of what Sam Luttrell calls the "*Black Arts*",[2] the use of procedural manoeuvres not for their legitimate ends but purely to secure some tactical advantage. If you aim to disqualify an arbitrator, it is much easier to do so on grounds of a conflict of interest at the outset than bias evinced during the proceedings. Commentators may argue about the precise legal standard for proving bias, but a party will always have to identify some conduct by the arbitrator that strongly and plausibly suggests it.

Personal and professional associations are a particularly fertile ground for challenges. Has the arbitrator worked with opposing counsel? How well do they know each other? To show a conflict of interest it is sometimes enough to pick out a state of affairs in the arbitrator's environment, suggest that it falls into one of the opaque categories of the Orange List of the IBA Guidelines and write four or five angry letters, only for the arbitrator to cave in and withdraw quietly before the appointment is even confirmed. Be warned, though. Some arbitrators will fight back hard, and an

unsuccessful challenge tarnishes the applicant's credibility.

The Challenge of Rethinking Arbitrators' Relationships

The combination of expanded disclosure and focus on arbitrators' personal and professional contacts has thrown into relief relationships that might previously have been overlooked or not yet existed in that form. *Eiser* is a case in point. Expert witnesses, especially damages experts, now perform a vital role in arbitration. They have moved far beyond the accountant who put the figures in some sort of order, or the delay and disruption expert who analysed the course of a construction project. Damages experts now develop and advocate legally sophisticated models, which, in big cases, such as the *Yukos* arbitrations, attract expert commentary of their own. Of course, experts' overriding obligation is to the tribunal and not the appointing party, still less counsel. It would be unfair to dismiss them as "hired guns", but they work with counsel to contribute to as good a case as can responsibly be presented.

Next, close personal relationships may come under scrutiny. An arbitrator's "close personal friendship" with a counsel or a party already falls under section 3.3.6 the Orange List and is thus disclosable. Similarly, the SIAC Code of Ethics for an Arbitrator, ICC Note to the Parties and Arbitral Tribunals, and LCIA Notes for Arbitrators recognize personal relationships as possibly compromising an arbitrator's independence. Given the current obsession with detailed disclosure, it is very much to be hoped that arbitrators' private lives will not become the subject of seedy and intrusive fishing expeditions by counsel looking to dredge up a scandal and explore close friendships and relationships.

Finally, much has been made of arbitrators' relationships with third-party funders. In its report, the ICCA-Queen Mary Task Force on Third-Party Funding recommended that parties disclose funding arrangements in part because this would allow arbitrators to assess any conflict of interest towards the funder.

These conflicts of interest are less remarkable than is sometimes suggested. Arbitrators may have a role at a third-party funder. For example, they may act as advisors. Arbitrators may also in their role as counsel advise funders on the merits of claims. These professional links can be assimilated to well-known categories of conflict or potential conflict. An arbitrator's role on the board of a funder may be similar to a position on an advisory board of another sort of business. Advising a funder on a claim is a lawyer-client relationship. There are established practices for dealing with such relationships in disclosure.

When and where a conflict of interest will arise or an arbitrator's independence be compromised is not susceptible to neat definition. Rather, it will depend on judging and balancing individual circumstances. This applies particularly to the shifting field of arbitrators' relationships. As the decision in *Eiser* brought home, excessive "closeness" can arise in circumstances that would have surprised an earlier generation of practitioner. It is therefore imperative that those bodies responsible for deciding challenges to an arbitrator – whether institutions or courts – will make the necessary effort to publish reasoned and principled decisions that will clarify when close is too close for comfort. Otherwise there is a risk of uncertainty on a foundational matter of arbitration, the appointment of a tribunal, and yet further scope for abusive challenge applications.

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References

?1 M. Davis, Conflict of Interest, p. 589.

?2 S. Luttrell, Bias Challenges in International Commercial Arbitration: The Need for a ‘Real Danger’ Test, p. 276.

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