Kluwer Arbitration Blog

Arbitration Corruption? The U.S. Fifth Circuit Says No

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In the second half of 2020 there have been two heavily discussed challenges to arbitration awards stemming from an arbitrator's nondisclosure. The more recent, *OOGC America, L.L.C. v. Chesapeake Exploration, L.L.C*, was an appeal in the U.S. Fifth Circuit. The other, *Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v. Kingdom of Spain*, was heard by an ICSID annulment committee. As more fully discussed below, the reviewing bodies came to opposite conclusions, even though they were reviewing the matters under remarkably similar standards of review.

The Dispute Before the Fifth Circuit

On September 14, 2020, in *OOGC America, L.L.C. v. Chesapeake Exploration, L.L.C*; Cause No. 19-20002, the Fifth Circuit vindicated an arbitrator accused of tainting an arbitration. The court ordered an opinion from the Southern District of Texas titled "Opinion on Arbitration Corruption" to be vacated.

This arbitration originated from claims by OOGC that Chesapeake was overcharging fees to it and overpaying affiliates to the tune of $210 million. The arbitration panel was tasked with determining who were "affiliates" or "related parties" under the Development Agreements and JOA between the parties and if Chesapeake paid those entities at market rates. One of these entities was FTS International. The arbitration panel unanimously found that FTS was paid at the market rate, so it took no further action to determine if FTS was an "affiliate" or "related party." Subsequently, the award was challenged by OOGC.

That district court opinion accused the arbitrator of "deceit" and "corrupt[ion]." The specific conduct complained of by OOGC to the district court included the arbitrator's business relationship with FTS's chairman, connections to the chairman's daughter, and connections to FTS's general counsel. The latter two were both former coworkers of the arbitrator. Accordingly, OOGC sought to vacate the arbitration awards on the grounds that the arbitrator's connections to FTS showed "evident partiality" and "misbehavior by which the rights of all parties have been prejudiced." Both are grounds to vacate an award under the Federal Arbitration Act (FAA). According to the district court, the former was satisfied by the arbitrator failing to disclose professional and social connections with the parties or witnesses. Reviewing the matter *de novo*, the Fifth Circuit was not convinced that corruption existed. However, the Fifth Circuit was clear that it did not condone the arbitrator's actions in the matter.

Implications for Further Analysis before U.S. Courts

For practitioners in the United States, the Fifth Circuit further developed its precedent regarding what constitutes "evident partiality" and "exceeding arbitral authority." Notably, it did not buy OOGC's argument that the facts presented to the court satisfied the Fifth Circuit's *Positive Software* "evident partiality" test, nor did the facts evidence that the arbitrator had exceeded his authority, analogous to *PoolRe Insurance v. Organizational Strategies, Inc., 783 F.3d 256 (5th Cir. 2015)* .

Positive Software Solutions, Inc v. New Century Mortgage Corp., 476 F.3d 278 (5th Cir. 2007) (en banc), as a nondisclosure case, was directly on point. In that opinion, the Fifth Circuit made it clear that the nondisclosure must evidence a "reasonable impression of bias" deriving from a "significant compromising connection to the parties" that is "concrete and not speculative." The Fifth Circuit found that the facts and theories presented to it by OOGC were speculative since OOGC could only speculate that the arbitrator was aware of specific provisions since neither party made the arbitrators aware of the potentially disqualifying condition. Further, the court noted that FTS was properly compensated, meaning the question of whether FTS was an "affiliate" was moot. Accordingly, the arbitrator's connections to FTS was not a significant compromising connection to the parties as required. Alternatively, OOGC argued that the arbitrator only ruled in favor of Chesapeake so as to not jeopardize future work from FTS. Again, the Court found this to be too speculative and ripe for opening the door to post-award investigations, which would undercut arbitration as an alternative to litigation.

Moreover, OOGC argued that the arbitrator exceeded his powers, permitting vacatur under 10(a)(4) of the FAA. OOGC argued that *PoolRe Insurance* was instructive. Specifically, OOGC argued that the arbitrator did not remain "neutral" as the contract required. Again, the court did not bite. It found that staying neutral was a "qualification" and not a failure to correctly choose an arbitrator according to the contract's terms, making it distinguishable from *PoolRe Insurance*.

In summary, the Fifth Circuit's opinion was a clear reminder of the burden that those seeking to vacate an arbitration award in the United States must overcome. Particularly, the Court clarified that Fifth Circuit courts must give deference to the arbitrators when possible and resolve all doubts in favor of upholding the award. Overall, it is a stern reminder that arbitral awards are only vacated under extraordinarily narrow circumstances, and this is not one of those circumstances.

Placing the Fifth Circuit's Approach in Context with International Approaches

The outcome of *OOGC America* is very different from the outcome of the recently decided *Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), even though both reviewing bodies were faced with the similar nondisclosure complaints. Like in *OOGC America,* the arbitrator in *Eiser* failed to disclose a relationship. As discussed more fully in another Kluwer blog post, the arbitrator appointed by the investors, Stanimir Alexandrov, and his former law firm, worked closely and frequently with the claimant investors' damages expert Carlos Lapuerta and his firm. Based on these facts, the Annulment Committee annulled the arbitral award on the grounds that that a reasonable outsider "would find a manifest appearance of bias." This is similar to what the Fifth Circuit standard applied in *OOGC*

America, yet that challenge resulted in upholding the arbitration award. There was an important factual difference between the disputes. In *Eiser*, the relationship that was complained of was between an arbitrator and the damages expert, which was actively part of the arbitration; while in *OOGC America*, the relationship complained of was between the arbitrator and persons that were unanimously held not to be part of the dispute.

Moreover, the different rulings likely stem from a difference in judicial concerns. The Fifth Circuit expressed a reservation in examining personal relationships, based on future concerns of abuse of procedure by unscrupulous counsel. Specifically, the Court was concerned that those unhappy with the award would examine every personal relationship involved in a dispute to attempt to vacate an award it was not pleased with. The Court stated such actions would defeat one especially important tenant of arbitration, expediency. This opinion is not without merit. In fact, others have expressed similar concerns regarding parties misconstruing personal relationships to attempt to gain a more favorable tribunal or annulment of an unfavorable award. Similar concerns were raised by Daniel Greineder's article regarding the *Eiser* dispute. In that article Greineder notes the desire for transparency is still subject to abuse by unscrupulous counsel who will challenge arbitrators to deny their opponents their chosen arbitrator, and delay proceedings.

Further, *Eiser* reflects the modern movement of hyper-disclosure for international disputes. This movement has been obsessed with categorizing conflicts of interest and erring on the side of disclosure. While disclosure of conflicts of interest are critical to fair decisions, some level nondisclosure must be tolerated. (i.e., non-disclosure should not become the go-to basis for annulment or vacation of an award). It is clear that ICSID and the Fifth Circuit have very different tolerances for nondisclosure failures. In *Eiser*, there was not a showing of specific acts by the arbitrator that evinced bias or otherwise improper influence. Instead, ICSID was focused on the principle that disclosure is a fundamental rule of procedure which should not be violated. This fundamental rule of fairness was of greater importance than an actual showing of a "significant compromising connection to the parties" that is "concrete and not speculative" to prove a "reasonable impression of bias," as required in the Fifth Circuit.

Concluding Remarks

Moving forward, reviewing bodies, across the globe, will have to decide what they require to annul or vacate an award based on nondisclosure. Will they require complainants to speculate and merely show a nondisclosure of a relationship could have had a material effect on the award as required in *Eiser*? Or will reviewing bodies require concrete facts and not speculation as was required in *OOGC America*? The answer to this question will be based on public policy concerns, fundamental fairness to the parties, judicial economy, soft and hard power regarding enforcement and comity.

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