Kluwer Arbitration Blog

2024 PAW: Wake Up (with) Arbitration: Is It Still Allowed to Have Friends?

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The breakfast debate "Wake up (with) Arbitration" created in 2012 by Valence Borgia, Maria Beatriz Burghetto and Caroline Duclercq relaunched on the occasion of the 2024 Paris Arbitration Week.

The aim of the "Wake up (with) arbitration!" roundtable is to bring together arbitration practitioners of all backgrounds and professional experience, to discuss in an interactive formula, a practical topic of arbitration and to exchange knowledge and know-how. These debates were covered by the Chatham House Rule, which is undisputedly one of the practical advantages of this type of meeting, allowing any topic to be addressed or any question to be raised, and participants can express their personal positions freely, without worrying on being quoted publicly.

The topic of the roundtable organized on 20 March 2024 at Medici Law Firm was "Arbitration: is it still allowed to have friends?" ("*Arbitrage: les amis sont-ils encore permis?*") and featured a lively debate between two speakers, Pascal Hollander (HVDB) and Andrea Carlevaris (Bonelli Erede), who were called to argue the affirmative and the negative answer to the question.

One Can Still Practice Arbitration and Have Friends

The question of friendship for arbitration practitioners raises at least three questions:

- What is a friend?

It was observed that there is a very thin line between personal and professional relationships among arbitration practitioners given the nature of the roles they undertake. For instance, bonds between arbitration practitioners emerge when appointing an arbitrator (where trust in the prospective arbitrator plays a significant role), or naturally occur when siting in an arbitral tribunal.

A recent article of Marc Henry was cited, in which the author tried to define friendship between arbitration practitioners by identifying three friendship categories: the "enjoyable or true friendship", the "beneficial friendship" and the "arbitral friendship".

Additionally, it was suggested that in order to distinguish between "true friendship" and "arbitral friendship", one could ask the following question: would I spend a week on a sailboat with an

arbitration friend? This can count as a very tangible criterion of distinction.

- Should arbitration practitioners refrain from arbitrating with friends?

This question covers the situation where the arbitrator is friends with the counsel of a party or with one of the co-arbitrators.

On one hand, with respect to arbitration friends, an arbitrator should not refrain from undertaking his or her role. Otherwise it would be nearly impossible to appoint an arbitrator given the number of candidates who would end up being disqualified.

Here, we can draw a parallel between the situation of national judges and those of arbitrators. Historically, some national laws (such as French and Belgian) used to recognize the concept of "commensality", meaning that a judge cannot rule over a case involving a party who attended a meal at the judge's house. Nowadays, however, looking at the particular case of smaller towns, attorneys and judges might frequently meet in day-to-day side-activities, whether it is for participating in a philanthropic association or as a member of the same tennis club. Nevertheless, in practice, these circumstances do not prevent them from meeting in court under their respective roles, which raises the question of the distinction made for arbitrators.

On the other hand, with respect to true friends, there is nothing that can strictly prohibit an arbitrator from accepting an appointment in such case. However, the question is debatable as to (i) the arbitrator who might unconsciously be biased in favor of his/her friend and (ii) the perception of the arbitrator who might adopt a more severe approach towards a friend's case, according to the saying *qui bene amat bene castigat*.

- Should arbitration practitioners declare their friendship?

Most arbitration rules require disclosure of all circumstances that might raise a reasonable or justifiable doubt as to the prospective arbitrator's independence and impartiality. For instance, article 11 of the ICC Arbitration Rules (2021) states that "[t]*he prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality*". Furthermore, the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration requires the disclosure by the prospective arbitrator of any "professional or close personal relationship with counsel to one of the parties or the counsel's law firm." Similarly, the IBA Guidelines on Conflict of Interest include within the Orange List of circumstances to be disclosed by arbitrators "a close personal friendship" with the counsel of a party or the manager/ the director/ the member of the supervisory board of a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.

Firstly, if we consider the case of true friends, the disclosure is obviously required.

Secondly, if we consider the case of arbitration friends, the skills justifying the creation of arbitration bonds are inherent to the practice of arbitration itself. Since the disclosure must reveal circumstances likely to create legitimate or reasonable doubt, it is not legitimate to doubt the independence or impartiality of practitioners simply because they know each other, they meet each

other, or they appreciate each other's past arbitration experience.

Having Friends in the Arbitration World is Incompatible with the Arbitration Practice

The real disagreement lies in the distinction between true friendship and friendly relationships forged through arbitration practice. Because friendship is a feeling, it is harder to detect and therefore to disclose. An effective criterion for determining whether to disclose an arbitration friendship could be the frequency of activities that foster connections among arbitration practitioners, such as regularly dining together, participating in the same sports club, or even making plans for vacation together.

It is widely accepted that in the presence of true friendship, one should refrain from arbitrating or at least should declare it, so that eventually it is the parties' responsibility to accept this specific situation. Turning to arbitration friends, such circumstance should be disclosed. The question is then, what should one disclose? Regular dinners at each other's homes, regularly playing sports together, sharing a common passion, etc.? In any event, a friendship relationship should never hinder the pursuit of truth, or as Aristotle said, *Amicus Plato, sed magis amica veritas* ("Plato is my friend, but truth is a better friend").

Turning to the questions raised by the audience, it has been observed that, from a party's perspective, the financial stake is ultimately the underlying risk of an existing friendship relationship between a member of the tribunal and a counsel to one of the parties or the party's witness or expert.

Conversely, from an arbitration practitioner's perspective, it was emphasized that a friendship relationship is very challenging to qualify, as the perception of friendship varies greatly and is highly subjective based on individual emotions. In this regard, a participant cited an example where a practitioner could act as counsel to a party, only to discover that the co-arbitrator appointed by the opposing party is someone whom the counsel considered as friend. In that particular case, from the counsel's perspective, there was an expectation for disclosure of the relationship, yet none was made. This illustrates the subjective nature of what individuals may perceive as a friendship relationship.

As to the friendship relationship between two members of the arbitral tribunal, it has been pointed out that in such a case, it becomes the responsibility of the President of the tribunal to ensure a team dynamic, thereby preventing any sense of minority exclusion within the tribunal.

Similarly, counsel for parties have a role to play in educating the parties who are less familiar with the arbitration world as to what is a real risk when identifying potential conflicts of interest.

Lastly, the question of enmity between a counsel and an arbitrator or between two arbitrators was raised, since such a situation is often forgotten whilst it constitutes a real issue.

Ultimately, the key takeaway from the lively debate and from the participants' contributions is that the decision to disclose any circumstances potentially giving rise to reasonable or legitimate doubts is made on a case-by-case basis, using a factual approach.

The following Wake up (with) Arbitration! roundtable will be announced soon on the dedicated

LinkedIn page, as well as on www.wakeupwitharbitration.com. Hope to see you there!

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