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Countdown to RIDW25: Sanctioned Arbitrator: Navigating Impartiality and Disclosure Obligations in International Arbitration

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In an era increasingly defined by unilateral economic sanctions, international arbitration faces a new set of challenges. Sanctions are not only imposed on the parties but can also implicate arbitrators, as seen in **Macquarie Bank Ltd v China Wanda Group Co., Ltd, (2021) Hu 74 Xie Wai Ren No.1,** which concerns the enforcement of a SIAC award rendered by an arbitral tribunal seated in Singapore. The tribunal was chaired by an arbitrator whose chambers was sanctioned by the **Chinese government**. The Chinese party challenged the enforcement of the award before the Chinese Court ("**PRC Court**"), arguing, *inter alia,* that the award was tainted and unfair due to the sanctions. The Chinese party also requested to suspend the recognition and enforcement proceedings on the ground that it had initiated proceedings before the Singapore High Court to set aside the arbitral award. The PRC Court rejected the sanction argument, noting that the award was issued before the sanction was imposed, the sanction targeted the chambers not the arbitrator himself, and the sanction alone did not constitute a public policy ground for the non-recognition of the award under Article V of the New York Convention. The PRC Court also did not consider the suspension request in the judgment, as when the judgment was handed down, the Singapore High Court had already rejected the set-aside application.

After rendering the decision in 2021, the judge observed in an **article** published earlier this year that in similar situations, the court would be concerned about whether the arbitrator had made a disclosure when accepting the appointment. Failure by the arbitrator to do so would cast doubt on the integrity of the arbitration proceedings and become a potential ground for set-aside or non-enforcement. It is thus suggested that sanctions on an arbitrator's chambers could possibly impact the arbitrator's impartiality or his or her perceived impartiality.

An arbitrator's impartiality lies in the core of the integrity of the arbitration. The importance of it cannot be overstated. However, impartiality is not a strictly defined term, and assessment of it is often not straightforward. Whilst the **IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines")** are widely used by arbitrators to examine their independence, impartiality, and disclosure obligations, however, ambiguity still remains, particularly due to the different legal and cultural backgrounds of international arbitration users.

To minimize this ambiguity and to promote uniformity, the existing frameworks attempt to impose an expansive and continuous duty on arbitrators to disclose any potential conflicts. For instance, Article 12(1) of the **UNCITRAL Model Law on International Commercial Arbitration (2006)**

imposes a continuing duty of disclosure on arbitrators for circumstances that may raise justifiable doubts about impartiality. Similarly, Article 3 of the IBA Guidelines places significant emphasis on the importance of disclosure in assessing conflicts. The newly introduced **UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution**, in Article 11, elaborates on disclosure obligations, highlighting its central role in addressing impartiality concerns.

The difficulty in discerning the impartiality of a sanctioned arbitrator is further illustrated by the cautious approach adopted by some arbitration institutions. For example, the ICC has foreshadowed in the "**Note to Parties and Arbitral Tribunals on ICC Compliance**" dated September 29, 2017, that it will implement "administrative measures" if the arbitrator is from an embargoed country, while the HKIAC, further to its **sanctions policy**, may avoid appointing such individuals altogether. Similarly, after the Chinese government issued the sanction on the relevant chambers in March 2021, a Chinese party to an ICC arbitration immediately applied to replace its sole arbitrator who was from the sanctioned chambers and was appointed by ICC. The sole arbitrator explained that he is independent from the chambers and that he could adopt measures to avoid any perceived connections with the chambers, such as changing his email address and using his personal bank account instead of the account of the chambers to receive the arbitrator's fees. Nevertheless, the ICC adopted a cautious approach and agreed to the **replacement of the arbitrator**.

Given the subjective nature of impartiality and the added complexity introduced by sanctions, assessing an arbitrator's neutrality is increasingly difficult. Considering the cautious approach adopted by institutions and concerns expressed by judiciaries, arbitrators are encouraged to make fullest disclosure to the extent possible to safeguard the enforceability of the arbitral award.

We look forward to attending the SCCA 25 Conference!

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