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International Arbitration Experts Discuss The Standards Of Review And Disclosure Rules For Arbitrators

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Commentary

International Arbitration Experts Discuss The Standards Of Review And Disclosure Rules For Arbitrators

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on the standards of review and disclosure rules for arbitrators. We would like to thank the following individuals for sharing their thoughts on this important issue.

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- Barbara A. Reeves, President of the College of Commercial Arbitrators and Arbitrator, JAMS, Los Angeles
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Mealey's: Challenges to the impartiality of arbitrators are evaluated by varying standards in different fora, such as before arbitral institutions or before U.S. Circuit Courts of Appeals. Do you believe that the current standards of review and disclosure rules for arbitrators are proper, or do you think they should be changed, and why?

Henriques: Indeed, the two examples cited above illustrate the different standards used to assess the impartiality and independence of arbitrators. Section 10(a)(s) of the U.S. Federal Arbitration Act focuses on the vacatur of arbitral awards, allowing an award to be vacated only where there is "manifest partiality or corruption on the part of the arbitrators". It is silent on the procedure for challenging arbitrators before an award is rendered. In contrast, the rules of arbitral institutions and national laws based on the UNCITRAL Model Law provide broader standards for the evaluation of arbitrators. These rules allow challenges not only from the outset of the proceedings, but also on a broader range of grounds.

International standards focus on the appearance of bias, such as Article 180(1) of the Swiss Law of Private International Law, which states that an arbitrator may be challenged if there are "reasonable doubts as to the arbitrator's independence". The International Bar Association's Guidelines on Conflicts of Interest, recently revised in 2024, reflect these broader standards and have been incorporated into some ethical rules for arbitrators. They serve as a guide for arbitral institutions and national courts in evaluating challenges.

The current wealth of information about arbitration, including information about arbitrators, is overwhelming. Web-based platforms, including those using AI such as Arbitrator Intelligence, scrutinize arbitrators and uncover information that may cast doubt on their impartiality. The increased availability of information has led to more restrictive criteria to avoid conflicts of interest. This trend threatens to reduce the ability of parties to appoint arbitrators, possibly leading to panels composed entirely of so-called "independent arbitrators" or even entirely appointed by appointing authorities.

It is uncertain what sociological or empirical studies have been conducted to support this approach, but

the standards should not overlook that arbitration is a contractual method of resolving disputes based on the consent of the parties and is not similar to a judicial process. Therefore, I believe that the standards for assessing the impartiality and independence of arbitrators exceed their purpose and should be limited or at least not expanded further.

Crncevic: It is axiomatic that arbitrators should be impartial. However, there is no standardized assessment of whether an arbitrator is impartial. Despite these circumstances, arbitrating parties and counsel routinely hew to the IBA Guidelines on Conflicts of Interest in International Arbitration for arbitrator-related disclosures that provide some uniformity in assessing impartiality of arbitrator candidates. This is in line with the recent trend of over-disclosing connections in order to protect as much as possible any future award from potential impartiality challenges. The reality of varying standards requires arbitration practitioners to carefully balance and scrutinize the arbitration clause, any applicable arbitral rules, and national laws of the seat of the arbitration and jurisdictions where parties might enforce their awards. However, it is not realistic to expect that the many arbitral rules and national laws can, or should, change to conform to one standard of review or set of disclosure rules for arbitrators. Adhering to the IBA Guidelines (which were updated in February 2024) could provide consensus on arbitrator disclosures that unifies the expectations of the arbitrating parties at the outset by comprehensively addressing actual or perceived conflicts.

Also, while international arbitration has proliferated globally, there is a small pool of arbitrators with repeat appointments—and who may still act as arbitration counsel or are at law firms that regularly act as arbitration counsel. To combat this issue, arbitrating parties and counsel would be well-served to consider a broader pool of arbitrator candidates. In addition, counsel should conduct comprehensive arbitrator due diligence at the outset to avoid or flag any impartiality concerns. Arbitrator candidates and parties may wish to over-disclose even relatively innocuous connections. While this may provide fodder for some parties to vexatiously seek to challenge arbitrators during the arbitration, it can protect the integrity of the award and minimize the impact of any post-award challenges.

In sum, parties should agree to a set of comprehensive arbitrator disclosures to provide at the beginning and throughout the arbitration to insulate the arbitrator and the award as far as possible from a challenge to impartiality across the varying standards in different fora. Also, parties and counsel should think broadly when selecting arbitrator candidates and methodically assess connections that could call into question impartiality.

Er: To be sure, the standards of review and disclosure rules for arbitrators vary, reflecting a balance between flexibility and the need for impartiality. While the current system allows for tailored standards that suit the specific needs of each arbitral institution, some changes could enhance consistency and trust in the arbitration process.

The flexibility afforded by varied standards allows parties to select forums and rules that align with their specific needs. However, this lack of uniformity can lead to unpredictability and inconsistent outcomes, particularly in international commercial arbitration where clear and consistent standards are paramount.

Stricter disclosure requirements for arbitrators regarding potential conflicts of interest—such as past professional relationships with parties or their counsel and financial interests—would increase transparency and trust. Nevertheless, overly restrictive disclosure regimes could undermine the attractiveness of arbitration as a flexible and efficient dispute resolution method. Thoughtfully enhancing disclosure standards while preserving the core attributes of arbitration could bolster the process's legitimacy on a global scale.

In the United States, the American Arbitration Association (along with most arbitration bodies) mandates that neutral arbitrators maintain impartiality, allowing parties to challenge an arbitrator or award based on partiality. For its part, the Federal Arbitration Act (FAA), while not providing a mechanism for challenging the appointment or continued service of an arbitrator, addresses challenges to final awards due to arbitrator bias. Under the FAA, a court may vacate an award "where there was evident partiality" in the arbitrators (9 U.S.C. § 10(a)(2)).

The interpretation of "evident partiality" has led to a circuit split, causing uncertainty for parties. The U.S.

Supreme Court has not clarified this standard since Commonwealth Coatings Corp. v. Continental Casualty Co. (1968), and it recently declined to address the issue in Grupo Unidos por el Canal, S.A., et al. v. Autoridad del Canal de Panama (2023).

The circuit split arises from differing views on whether Justice Black's opinion in Commonwealth Coatings represents a plurality or majority stance. The Ninth Circuit, following Justice Black, requires arbitrators to disclose any dealings that might cause an impression of possible bias. Conversely, the Second Circuit and others, adhering to Justice White's concurrence, impose a less stringent standard, disqualifying arbitrators only for significant, undisclosed relationships.

Eliminating the tension between circuits by adopting a more uniform standard would provide greater predictability and confidence in the arbitration process, benefiting parties across different jurisdictions. While maintaining some flexibility for arbitration fora, achieving a clearer and more consistent standard of impartiality would enhance the legitimacy and reliability of arbitration worldwide.

Perez and Martinez: The current standards of review and disclosure rules for arbitrators could be stronger and require changes. The standards of review of the qualifications of an arbitrator are deficient as they basically rely on self-reporting by the arbitrators. The biggest problem is that arbitrators do not always disclose issues that could create a conflict and, in turn, the parties do not always have the means to ascertain the correctness or completeness of the disclosures. In addition, there is no way of doing away with inherent bias that the arbitrators might have. This becomes of greater concern when the tribunal is comprised of only one (1) arbitrator. When the panel is comprised of three (3) arbitrators there is a greater chance for "partiality." These types of inherent biases are not always disclosed and most parties will not be aware of those biases until given a chance to observe the arbitrators making decisions that reflect those biases.

We believe that it is up to the institutions themselves to properly vet the arbitrators before they make it to the list of potential candidates for any specific matter. While a vetting process does occur, however, it is questionable if this is being done thoroughly enough. Again, a lot of the information evaluated is gathered through self-reporting of the arbitrators and the parties undertaking their own investigations regarding the background of the possible arbitrators. This leaves a possibility that arbitrator may fail to report key facts which would weigh heavily into the vetting done by the institutions.

We recognize that the "arbitration world" is not a perfect one. While there is possibility for errors with the standard of review and disclosure requirements, we recognize that there are clear advantages to pursing arbitration over litigation. Most arbitrators are much less biased than judges because there is a larger base of arbitrators for a specific jurisdiction than there is judges. That leaves less probability for a judge to develop certain inherent biases from routinely dealing with local counsel (*i.e.*, a preference because the counsel routinely appears before this judge) as opposed to counsel from outside their jurisdiction (who have never or seldomly appear before this judge). The chance of repeatedly having the same arbitral tribunal is rare. In short, we believe that improvements can be made to regulate the impartiality of arbitrators.

Reeves: Arbitration would be better served if disclosure and review standards were harmonized to require broad arbitrator disclosure, in the interest of ensuring that arbitration is, and is perceived to be, a reliable and trustworthy dispute resolution process.

The effectiveness of the arbitration process depends upon arbitrators who are, and who are perceived as being, unbiased, independent, impartial and trustworthy. Arbitrators are permitted by law to hear cases and to adjudicate the rights and obligations of the parties because the parties have agreed to give arbitrators that power. When arbitrators are perceived as having been fair and unbiased, the parties are more likely to voluntarily comply with the award and thus not involve the courts in motions to vacate. Full disclosure by the arbitrator at the outset, when the parties are free to reject or accept the arbitrator with knowledge of the disclosures and faith in the arbitrator's impartiality, is the way to support and protect the arbitration process.

The IBA Guidelines, with their Red, Orange and Green Lists, provide an excellent discussion of all sorts of conflicts, but can be confusing to courts, and conflict with standards that courts apply when reviewing

disclosures after the fact. Thus, an argument can be made for broader disclosures: disclose broadly and uniformly, and there will be less risk of vacatur after the fact.

Opponents to broad disclosure argue that arbitration is not a judicial proceeding, arbitrators are not judges, and arbitration does not need to be burdened with the formalism of judicial proceedings. While that may be true about formal judicial procedures and evidentiary rules, ensuring the impartiality of the arbitrator goes to the heart of establishing an arbitration process in which parties can trust that their disputes will be fairly heard and ruled upon.

As an arbitrator based in California, I have worked under California's disclosure requirements for my entire career. The state is known for requiring extensive arbitrator disclosures regarding all relevant *personal, professional, business and financial relationships, including a catch-all disclosure if it "will further the interests of justice."*

It is a daunting list, but one that is easily managed with good record keeping, and one that protects arbitrators and awards from being criticized and second-guessed by courts over undisclosed relationships. If all arbitrators voluntarily follow the California model, they will have clear guidance for making disclosures, and the courts will be better able to identify those undisclosed relationships that are inconsequential and thus do not warrant vacating an award.

Hamilton: The impartiality of arbitrators is fundamental to the credibility and fairness of the arbitration process. However, the standards of review and disclosure rules for arbitrators vary among national arbitration laws, court decisions, arbitration rules, arbitral institutions' policies, and "soft-law" guides. This variation leads to differing approaches and potentially inconsistent outcomes.

Arbitral institutions like the ICC, LCIA, HKIAC and AAA have streamlined procedures for addressing challenges to arbitrator impartiality, promoting efficiency and reducing delays. These institutions require arbitrators to disclose any circumstances that might give rise to justifiable doubts about their impartiality or independence. Arbitrators must sign a statement of acceptance, availability, independence, and impartiality, disclosing any potential conflicts. The institutions' practices and policies provide flexibility in interpreting disclosed circumstances, allowing adaptation to different disputes and parties' expectations.

Standards of review and disclosure for arbitrators also vary among national courts. U.S. courts, under the Federal Arbitration Act, require clear evidence of bias for a successful challenge. The "evident partiality" standard is high, often requiring proof of undisclosed significant relationships. While the FAA does not explicitly mandate continuous disclosure, failure to disclose significant relationships can be grounds for vacating an award.

UK courts use the "fair-minded and informed observer" test for apparent bias, focusing on whether a reasonable observer would perceive a real possibility of bias. The Arbitration Act 1996 mandates that arbitrators disclose any circumstances likely to give rise to justifiable doubts about their impartiality. This duty is ongoing, and failure to disclose can lead to removal or setting aside an award. Proposed amendments to the Arbitration Act 1996 are expected to reinforce these principles.

France and Germany apply the "apparent bias" test, requiring comprehensive and continuous disclosure of any circumstances that might affect an arbitrator's independence or impartiality. Both legal systems provide mechanisms for challenging arbitrators and allow court intervention to uphold high standards of impartiality and independence.

The English-speaking Caribbean, made up of small communities, mandates continuous disclosure of any facts or circumstances that might call into question an arbitrator's independence. Given the Caribbean's diverse legal traditions and local factors, adopting a one-size-fits-all approach to impartiality and disclosure is challenging. Smaller communities with sparse arbitration expertise may require different standards than those applied in more mature jurisdictions.

The international arbitration community should aim to enhance existing soft laws, such as the IBA Guidelines and arbitration institutions' Notes for Arbitrators and Party Representatives. These guidelines should accommodate the unique needs of different jurisdictions while maintaining the integrity of the arbitration process.

Challenges to arbitrators should remain a sui generis exercise, allowing national courts and arbitration institutions to apply necessary flexibility based on the circumstances. The current system enables arbitral institutions and national courts to develop and implement standards of review that leverage their expertise in arbitration, managing the nuances of international and complex disputes. When parties submit to an institution's rules or choose a seat, they accept the consequences of that choice, including the standards of review and disclosure.

Dracoulis and Morton: Put simply, things are moving in the right direction, but there is still some way to go. At present in England and Wales there is no statutory duty of disclosure that requires arbitrators to disclose any potential issues concerning their impartiality. While Section 33(1) of the Arbitration Act 1996 sets out the duty of impartiality imposed on arbitrators, parties have no real way of knowing whether this has been complied with.

Disclosure requirements are, however, in place in the rules of several commonly used arbitral institutions. Both the LCIA and ICC Arbitration Rules provide that an arbitrator has a continuing duty to disclose any facts or circumstances known to them that would likely give rise to justifiable doubts as to their impartiality. The International Bar Association also provides a set of guidelines to promote common standards of independence which, while not binding, are often referred to by both arbitrators and judges. The test in all such disclosure requirements is a subjective one. In other words, an arbitrator must only consider whether there may be doubts to their impartiality in the eyes of the parties themselves. While these rules are not compulsory, they are often referred to and relied on by Parties and Tribunals.

However, in the recent Supreme Court decision in *Halliburton v. Chubb*[1], the Court ruled that the logical corollary of Section 33(1) of the Arbitration Act is that, following their appointment, arbitrators are bound by a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. This test is an objective one and requires arbitrators to disclose any facts or circumstances which might reasonably, in the eyes of a fair-minded and informed observer, give rise to an appearance of bias. However, the extent of this requirement (for example the degree of inquiry required), and the consequences for failure, remain unclear.

Prior to the calling of an election on 4 July in the UK, a bill amending the Arbitration Act was proposed which sought to codify and expand on the Supreme Court's decision by placing a statutory duty on arbitrators to disclose any such circumstances from the moment they are first approached to act. We will now have to wait until after the dust has settled from the election to see what the party in power will propose.

Endnotes

1. [2020] UKSC 48 ■

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