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Arbitrator Disclosure

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What an arbitrator should (one need not) disclose is one of the more difficult, but important questions that a prospective arbitrator must consider when offered a nomination, an obligation that continues throughout the appointment, if made. This article addresses some recent jurisprudence on the perils of non-disclosure, and offers some suggestions to arbitrators for their guidance.

A vexing question for arbitrators approached for potential nomination (and throughout the arbitration itself, if appointed) is the extent of disclosure necessary. The internal conflict is between losing the nomination and failing to disclose something that could compromise the arbitration.
There is no right of appeal in international arbitrations, and either none or a limited right of appeal in most domestic arbitrations. The losing party often seeks a way to avoid the award or its enforcement, either by judicial review or when it is sought to be enforced. A common attack is to allege the failure to disclose a disqualifying fact or relationship by one or more of the arbitrators. Searches for failures usually take place after the award. The capabilities of today's search engines often turn up potentially compromising facts.
In the jurisprudence, the disclosure test is some form of the question:

> "What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would such a person think that it is more likely than not that the arbitrator, whether consciously or unconsciously, would not decide fairly?"

Recent cases are illustrative.

In *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm), the Canadian arbitrator was senior and experienced. The attack on his award alleged that his law firm regularly represented an affiliate of the claimant. The arbitrator was *emeritus* with the firm, and used it only for secretarial and administrative support. The challenge to the award failed, though arguably the IBA "Non-Waivable Red List" was engaged.
The Court of Cassation in France confirmed a decision to overturn an award by a senior and experienced Canadian arbitrator, where his law firm did work for the parent company of the unsuccessful party. The post award knowledge of the representation came from a posting in a legal publication by the firm, though unknown to the arbitrator in question. [*Cour de Cassation, Civ. 1, 16 December 2015, N°D14-26.279*]

In *Jacob Securities Inc. v Typhoon Capital B.V.*, 2016 ONSC 604 (CanLII), Mew, J. rejected a post award claim of bias where it was alleged that the arbitrator's former law firm had acted on a number of transactions for a party when he was still at the firm as senior counsel. Mew, J., formerly an experienced arbitrator and arbitration counsel, held that there was no obligation to search conflicts at a former firm where the arbitrator had no involvement with any of the retainers in question.
In *A and others v. B and another* [2011] EWHC 2345 (Comm), a sole arbitrator also acted as counsel to one of the firms of solicitors involved in the arbitration before him in an unrelated matter, instructed by other solicitors at the firm, but failed to disclose the retainer. An attack on the award failed, but it was a close run thing.

In none of these examples was there any evidence of actual bias of the arbitrator or prejudice to the complaining party. There was, at best, non-disclosure of what was not known but might have been known, had more diligent and ongoing searches been undertaken. In each case the reputation of the experienced arbitrator in question was not in issue. But they illustrate my central point - an unsuccessful party looks for avenues to attack the award, and it matters not that the arbitrator whose incomplete disclosure was or was not the nominee of the complaining party.

What lessons can be drawn from these cases?

One obvious one is that association with a multi-city or multinational, law firm carries with it a heightened and continual disclosure obligation, including not only parties but parents and affiliates of corporate parties. This lesson has not been lost on senior arbitrators practising in large firms, many of whom have left them and set up shop on their own, or in small arbitration chambers.
Another lesson is that if in doubt, disclosure to all parties is the rule. Unless the disclosure is truly problematic, waiver often will follow. The risk of losing the occasional nomination is far outweighed by the risk of to the parties and the arbitrator, as the foregoing examples show.

Every case is different, but there are many things for an arbitrator to consider, for instance:

- Need social relationships be disclosed?
- Has the arbitrator previously been appointed by the lawyer or law firm proposing him or her?
- Is there or has there been a personal or professional relationship between the arbitrator, the nominating firm or firms, or likely witnesses? Was the arbitrator formerly an associate or partner of the firm?
- How many years in the past should be considered relevant?
- Is there a minor shareholding in a party? Does it matter if through a mutual fund? What level of investment requires disclosure?
- What about a child, sibling or relative in one of the representing firms? Who is a "relative"?

There are no hard and fast rules. Social and professional relationships between lawyers and arbitrators in domestic arbitrations are commonly not disclosed, because the parties and their counsel would likely be aware of them. The situation differs in international cases, where the parties and counsel would have no such local knowledge.

Reference to institutional rules and the IBA Guidelines are useful, but they are not rules of law, though they may well bind in institutional arbitrations. They will not necessarily be followed, depending on the circumstances, as *W Ltd v M SDN BHD* indicates.

At the very least, a prospective arbitrator should ask this question: "If an attack is made on my appointment during the arbitration or after the award, would I be embarrassed by public knowledge of the lack of disclosure alleged, and would the successful party in the arbitration (whoever that turns out to be) be prejudiced by my failure?"

Not easy questions and there are no easy answers, but arbitrators who fail to address them do so at their peril.

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