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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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PDRCI amends guidelines on challenge to arbitrators

By: Juan Paolo E. Colet

On October 17, 2011, the PDRCI Board of Trustees approved amendments to its Administrative Guidelines on the challenge to arbitrators. The amendments will take effect on January 1, 2012.

Under the revised Guidelines, after an arbitrator rejects a challenge, the party who did not initiate the challenge has 15 days from notice of such rejection to either agree or disagree with the challenge. If such party agrees with the challenge, the challenged arbitrator shall be deemed removed. Otherwise, the party who initiated the challenge may request PDRCI to decide the challenge.

The revised Guidelines also provides that a challenged arbitrator shall be replaced if he accepts the challenge, or if the party that did not initiate the challenge agrees to it, or when a challenge is elevated to the PDRCI and it decides to remove the challenged arbitrator.

The period for PDRCI shall resolve a challenge was extended from the original 15 days to 30 days under the revised Guidelines.

The revisions were recommended by PDRCI Vice Chairman for External Affairs Eduardo R. Ceniza. The recommendations were initially requested by PDRCI President Victor P. Lazatin so that the Guidelines would conform to the New Arbitration Rules on Challenge of Arbitrators.

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Testing the independence of the arbitrator

By Mario E. Valderrama

Disclosures in arbitration

An important element in determining an arbitrator's impartiality and independence is disclosure (Redfern & Hunter, Law and Practice of International Arbitration 242). The rules on disclosure limit party autonomy in the sense that failure to disclose what must be disclosed may give rise to a challenge. If successful, the challenge would result in the removal or disqualification of a nominated arbitrator.

Article 12 (1) of the Model Law requires an arbitrator "… to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." The disclosure should be made to the parties "without further delay … from the time of (the arbitrator's) appointment and throughout the arbitral proceedings" unless the parties "have already been informed" by the arbitrator.

Article 9 of UNCITRAL Rules (1976) requires at the outset that a "A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances."

The norms of transparency also require that the arbitrator make the necessary disclosure to the other arbitrators, to the administering institution, and to the appointing authority. Once challenged, both the Model Law and the UNCITRAL Rules allow an arbitrator to withdraw but without admitting that the challenge has basis.

The provisions on disclosure cover almost *all relationships and events,* other than casual, that are related to an arbitration: between the parties to the arbitration, including directors, important officers and significant shareholders; between the arbitrators, between the arbitrator and party representatives (or counsel for the parties); and even the relationship between the arbitrator and key witnesses.

The unwritten rule is, in case of doubt if a matter should be disclosed or not, the doubt should be resolved in favor of disclosure. If an arbitrator knows someone who is involved in the arbitration, or the arbitrator had participated in, or had gained knowledge of, an event related to the arbitration no matter how remote, then the better course would be to disclose such knowledge.

If an arbitrator is prevented by rules of confidentiality, professional or otherwise, to make the necessary disclosure, then he should not accept the assignment or should resign from it (Derains & Schwartz, A Guide to the New ICC Rules of Arbitration 122, Note 246; also the IBA Guidelines, *infra*).

For that matter, lack of knowledge of the fact or circumstance that should be disclosed is not an excuse if the arbitrator failed to make an attempt to make the necessary investigation (see IBA Guidelines). It is not the failure to disclose *per se* that will result in the removal or disqualification of an arbitrator. Rather, it is the resulting appearance of being partial or biased that leads to the disqualification.

An arbitrator may in fact be impartial and independent, yet he might be disqualified or removed if he appears to be partial or biased as a result of his non-disclosure. In contrast, disclosure clothes the arbitrator with the presumption, until challenged, that he is not disqualified or has no conflict of interest.

It is true that disclosure opens the door for the parties to probe further to determine whether or not the disclosed fact or event is a ground for disqualification. But once a disclosure is made, the facts and the circumstances – not the *appearance* of being partial or biased – will determine if the arbitrator is disqualified.

The "Eyes of the Parties" test

The test usually applied to determine if an arbitrator complied with his duty to disclose is all embracing. The test is synthesized in the following sentence: "An arbitrator must appear to be impartial and independent in the eyes of the parties."

If an arbitrator fails to disclose what should be disclosed, then a party would be justified in asking itself, *What is this arbitrator trying to hide?*, and *What else is this arbitrator trying to hide?* From these questions, the party may speculate on the arbitrator's motives based on presumed or verifiable facts. One result is that the arbitrator may cease to appear independent and impartial in the eyes of the party.

Thus, an arbitrator may be challenged and removed for failure to disclose that he previously sat as an arbitrator in a dispute involving one of the parties to the arbitration. This fact is not a disqualifying circumstance *per se* because acting as an arbitrator in another dispute involving the same party, even if the same party nominated the arbitrator, does not result in an interest by the arbitrator in the dispute or a relationship between him and the party.

But the arbitrator may be challenged and removed for appearing partial or biased due to his failure to observe the duty to disclose.

Khong Cheng Yee of International Chamber of Commerce (ICC) International Court of Arbitration Asia cited this rule in her lecture last year at the University of the Philippines. She said, "If you failed to disclose that a lawyer for a party was at one time a lawyer in your law firm, then you will surely be removed!"

The "Eyes of the Parties" test is reflected in Article 7.2 of the ICC Arbitration Rules (1998).

The "Reasonable Third Person" test

The International Bar Association Guidelines on Conflict of Interest in International Arbitration (IBA Guidelines) tempered the "Eyes of the Parties" test, which the IBA found to be subjective. It believed that there be should be a limit to disclosure and adopted what it describes as a more objective rule: an arbitrator must appear to be impartial and independent from the point of view of a reasonable third person having knowledge of the relevant facts.

To attain this, the IBA Rules made a varied but non-exhaustive list of potential situations that it classified into its so-called *Green List, Orange List, Waivable Red List,* and *Non-Waivable Red List.*

Disclosure is discretionary if a situation falls within the Green List. For example, if an arbitrator is a former partner in a law firm representing a party, the arbitrator need not disclose his former relationship with the firm if he ceased to be connected with the firm for a period of at least three years.

The duty to disclose begins with the situations falling in the Orange List. In the situations in the Waivable Red List, the duty to disclose must be coupled with a written waiver by the parties for the arbitrator to continue acting as such.

If the situation falls within the Non-Waivable Red List, the arbitrator is disqualified. Disclosure will not cure the disqualification.

However, the "Eyes of the Parties" test still exists, though tempered. Even if the arbitrator in our example was already separated from the law firm but the required period had not lapsed, then he has a duty to disclose because the situation is covered in the Orange List. The failure to disclose will be a ground for challenge.

Nevertheless, in the same example non-disclosure will not necessarily result in the arbitrator's removal. At the end of the day, the question is whether or not the undisclosed fact or circumstance will create justifiable doubt of the arbitrator's impartiality or independence from the point of view of a reasonable third person having knowledge of the relevant facts.

Redfern and Hunter note that "There is thus a subtle difference, in this context, between the *objective* test as to whether the relevant facts would cause doubt in the mind of a reasonable third party, and the *subjective* test as to whether they might cause doubt in the mind of the parties involved in the specific case in question." (Id., at 242) The exclusion of situations falling within the Green List is another difference if the objective test were the applicable standard.

Regardless of which test is applied, it is still the *appearance* of being partial or biased that will disqualify the arbitrator and not necessarily whether or not the undisclosed facts or circumstances are really disqualifying. However, the IBA Guidelines will only apply if adopted by the parties or by the administering institution, such as the PDRCI.

About the Author

Mario E. Valderrama, AB, LLB, FCIArb, FHKIArb, FPIArb, SCM is the only Filipino in the Approved Faculty List of The Chartered Institute of Arbitrators (CIArb), the institution that provides, globally, the highest educational standards in ADR training to arbitration users and practitioners. He was the first Filipino to be admitted as a Fellow of CIArb and the Hong Kong Institute of Arbitrators (HKIArb).

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Supreme Court rules that abandonment of construction work is not arbitrable

By: Juan Paolo E. Colet

In an unpublished minute resolution issued on October 5, 2011 in G.R. No. 197463, the Philippine Supreme Court threw out the appeal filed by Stronghold Insurance Co., Inc. ("SICI") and held that it was liable for overpayments and damages under surety and performance bonds it issued to Alcatel Philippines, Inc. ("Alcatel"). SICI had argued on appeal that the trial court had no jurisdiction over the claim of Alcatel because it should have been referred to arbitration by the Philippine Construction Industry Arbitration Commission ("CIAC"), a defense that SICI first raised before the trial court.

In its unanimous decision, the third division of the Supreme Court rejected SICI's argument, holding that the subcontractor's failure to complete the construction works and its subsequent abandonment were "clearly not within the scope of the issues which the parties agreed to be submitted for arbitration, i.e., (1) the interpretation, application and effects of the subcontract, or (2) any act of matter of language under the subcontract."

In 1991, Alcatel was engaged by the Philippine Long Distance Telephone Company (PLDT) to carry out its Fast Track Project in Metro Manila, which involved expanding PLDT's telecom network. Alcatel then subcontracted certain civil works to I.M. Bongar & Company, Inc. (IMBC) for a total price of P5,750,000. IMBC posted surety and performance bonds issued by SICI to guarantee IMBC's obligations to Alcatel. The subcontract contained an arbitration clause stipulating that: "In the event a dispute arises (as to interpretation, application and effects of this Subcontract or as to any act of matter of language under this Subcontract) which cannot be settled by mutual agreement, it shall be submitted for arbitration by three (3) qualified arbitrators selected in accordance with the Rules of the Construction Industry Arbitration Commission under E.O. 1008."

IMBC failed to complete the works within the agreed period. As a result, Alcatel cancelled the subcontract and demanded that IMBC return overpayments and the value of uninstalled materials. Alcatel also sought to collect its claims from SICI pursuant to the surety and performance bonds. Both IMBC and SICI rejected the demands, prompting Alcatel to file a complaint for sum of money and damages against them in 1996.

IMBC and SICI argued that Alcatel's claim should be submitted to the CIAC for arbitration. The trial court overruled IMBC's and SICI's objections and confirmed its jurisdiction to try the case. The Court of Appeals affirmed the trial court's judgment in favor of Alcatel, which the Supreme Court also affirmed in its recent Resolution.

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