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12 DEC 2011

## Reflections on the LCIA Arbitrator Challenge Digests

By [Jean E. Kalicki](#)

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The recently published abstracts of LCIA Court decisions on arbitrator challenges between 1996 and 2010 (*Arbitration International*, vol. 27, no. 3, 2011) make surprisingly interesting reading. They are an important reminder of the types of egregious arbitrator conduct that, while fortunately rare, can give the system a bad name unless promptly corrected. At the same time, the abstracts also shed light on the lengths to which parties sometimes will go in launching challenges, often for tactical reasons, on grounds that are manifestly unfounded.

Of the 28 published abstracts, six cases were considered to be sufficiently problematic to satisfy the LCIA challenge standard, involving circumstances that give rise to “justifiable doubts” about an arbitrator’s impartiality or independence. Of these six accepted challenges, three involved *improper conduct by the arbitrator*, and three involved *relationship conflicts*.

**The “Conduct” Decisions.** Two of the three accepted challenges involved *ex parte* communications. In one, an arbitrator was disqualified for providing the party that appointed him with advance notice of the content of the tribunal’s award before it was issued (LCIA Ref. No. 0252). In the other, an arbitrator was removed after meeting privately with one of the parties, accusing the other party without foundation of breaking into his chambers, and unilaterally instructing that certain passages be deleted from the hearing transcripts (LCIA Ref. No. UN3490).

The third accepted “conduct” challenge is a reminder of the age-old truth that how one responds to adversity is often as important as the underlying event. In LCIA Ref. No. 1303, the Court removed an arbitrator who responded to an otherwise unfounded relationship-based challenge by accusing the party bringing the challenge of dishonesty, malevolence, and viciousness. This escalating rhetoric led the Court to

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conclude that “the self-evident tension and ill-feeling that had arisen as a result of the challenge had created circumstances that may, of themselves, give rise to justifiable doubts” about impartiality.

By contrast, some of the “conduct” challenges were brought on more spurious grounds, including complaints about procedural decisions resting soundly within the arbitrator’s discretion. For example, one party challenged the Chair’s impartiality for refusing to postpone the final hearing; the LCIA found to the contrary that the Chair had been “remarkably tolerant and patient,” and that “it was more likely that a fair-minded and informed observer would conclude the challenge had been motivated by a desire to delay the proceedings” (LCIA Ref. Nos. 81209 and 81210). Another party alleged impropriety in a series of procedural directions and rulings; after reviewing the file, the LCIA concluded that the “constant” objections by the challenging party “had amounted to an increasingly vexatious attempt to hinder the proceedings and/or evidenced a fundamental lack of understanding of the process,” and the arbitrator’s response to these provocations in no way justified a challenge based on independence or impartiality (LCIA Ref. No. 3431).

**The “Relationship” Decisions.** Three of the accepted challenges involved relationship issues. Interestingly, only one of these (LCIA Ref. No. 81160) involved the arbitrator’s own relationships. The arbitrator in that case (which involved insurance issues) disclosed that he had acted both for and against the respondent underwriters in prior matters, that he was currently acting against one of the respondents in one case and on behalf of another in a second case, and that by the “very nature of this work” in the closely knit London insurance world, he would “no doubt” continue to act for and against them in future. Respondents’ counsel collectively represented 11% of all the instructions he had received over the past 5 years. The LCIA not surprisingly ordered disqualification, on the grounds that an objective observer could reasonably find a real risk of bias from an arbitrator “who would accept future retainers by a Respondent whilst sitting on an arbitration case” to which that party had appointed him.

Interestingly, the two other accepted challenges arose not from any personal relationships of the arbitrators themselves, but from prior activities of the law firms with which they worked. One of these cases was not a close call: the firm had previously rendered advice with the respect to the very contract underlying the dispute (LCIA Ref. No. 9147). But the other case involved completely unrelated work in the past by other partners, for a company that was simply associated with one of the parties. The LCIA described this scenario as more “borderline,” but concluded that removal of the arbitrator was warranted since he remained affiliated with the law firm. It articulated the principle that “a partner in a law firm had to be identified with his partners, at least insofar as their professional activities were concerned” (LCIA Ref. No. UN96/X15).

The latter decision should be contrasted with LCIA Ref. No. UN3476, where the Court rejected a challenge based on the arbitrator’s own prior work as counsel to the respondent on an unrelated matter, while associated several years previously with a prior law firm. The involvement was brief and largely supervisory, but did include meeting with employees of the respondent. The LCIA found that the past relationship did not give rise to any doubts as to the arbitrator’s impartiality, emphasizing that in the years since leaving his prior law firm, the arbitrator did not continue any ties with the respondent.

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The fact that departure from a prior law firm was deemed in this case to have eliminated any concerns, even where the arbitrator himself had previously served as counsel to a party, contrasts curiously with the previously described case where the Court accepted a challenge based simply on past work by the arbitrator’s partners, because the arbitrator nonetheless remained a member of that firm. The IBA Guidelines on Conflicts of Interest in International Arbitration provide in Part I(6) that “the fact that the activities of the arbitrator’s firm involve one of the parties” or another entity in a larger corporate group “shall not automatically constitute a source of [a] conflict,” but the LCIA’s endorsement of the rule that “a partner in a law firm had to be identified with his partners” seems to suggest a more categorical bar. This ruling is a reminder of the obstacles to building and sustaining an active arbitrator practice while remaining affiliated with a larger law firm, and in combination with the LCIA case involving subsequent departure, it serves to reinforce a message that striking out on one’s own ultimately may be the only way to minimize the risk of relationship conflicts. It is precisely this specter of conflicts from far-flung activities of a law firm that recently led Yves Fortier to announce his departure from Norton Rose, following its absorption of his prior firm Ogilvy Renault; others before him have reached the same conclusion. In an age of increasing law firm mergers – resulting in mega-firms with many hundreds of partners with a history of thousands upon thousands of past client relationships – others dedicated to an arbitrator career may be tempted to follow suit.

Of course, the option of “going solo” is less feasible for those earlier in their arbitrator careers, who do not yet have a full plate of appointments. As a matter of economic necessity, the “next generation” of arbitrators will continue to need a period of transition between counsel and arbitrator work. This process also provides necessary training, since wise arbitrators are not simply hatched, or spring fully formed like Athena from Zeus’ head. They accumulate a nuanced appreciation of both law and fact from the experiences they have had before, and one of the most common paths to sophistication has been through active counsel work at larger law firms. The recent LCIA challenge decisions remind us, however, of the limits that ultimately stem from that dual role.

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