Challenging the Selection of Party-Appointed Arbitrators

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As arbitration continues to be widely utilized in international commerce, the issue of how arbitrators should handle conflict checks, and who is suitable for appointment as arbitrator in complex cases, will remain a vital one. A pending case is likely to shed light on challenges to arbitral awards based on an arbitrator's conflicts or partiality.

Under most modern international arbitration rules (as well as those of the leading U.S. domestic commercial arbitration bodies), all members of an arbitral tribunal are expected to be neutral and independent of all parties. Thus, under the rules of most international arbitral institutions as well as the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), each arbitrator — not just the chair — is subject to challenge if there is a conflict that compromises independence or impartiality. Where, as often occurs, the arbitration agreement or rules provide for a three-person tribunal (a chair plus two arbitrators appointed by the parties), the opposing party's choice of arbitrator is often scrutinized to ensure there are no disabling conflicts or other considerations that would make the appointment inappropriate.

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For an arbitration seated in the United States, issues of arbitrator "conflicts" are occasionally raised after an award has been rendered, through a petition to vacate the award under Section 10(a)(2) of the Federal Arbitration Act (FAA) on grounds of evident partiality. There are myriad cases dealing with evident partiality, with some disagreement among various federal circuits as to the precise test to apply when an arbitrator conflict is alleged. For example, the U.S. Court of Appeals for the Second Circuit has suggested that there is a duty to check conflicts, and that "a failure to either investigate or disclose an intention not to investigate [conflicts] is indicative of evident partiality." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*

In the pending case of *Republic of Argentina v. AWG Group*, a challenge was filed in the U.S. District Court for the District of Columbia that raises similar points on conflicts and evident partiality. In that case, a U.K. investor sought and obtained a significant damages award from an UNCITRAL tribunal after Argentina impaired its interests in an action found to violate the Argentina-U.K. bilateral investment treaty. In the course of that arbitration, Argentina challenged the claimant's choice of arbitrator on the basis that she was the director of an international bank that held an investment portfolio that included shares in one of the claimants. At an early stage in the case, the challenge was heard and rejected pursuant to Article 11 of the UNCITRAL rules, on the grounds that the arbitrator was not aware of the investment and that it was, in any event, immaterial.

In 2015, an award of damages was rendered against Argentina, which prompted it to seek *vacatur* of the award on the same grounds as stated in its prior arbitrator challenge, but this time, the issue was framed as whether the arbitrator's ties revealed evident partiality warranting *vacatur* under Section 10 of the FAA. Among the issues to be determined by the D.C. court is whether the prior decision rejecting the challenge should be granted deference, or whether the question of evident partiality can be litigated afresh. The case is pending, and practitioners will be watching closely.