

Client Alert

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International Arbitration Update No. 7

Arbitrators' duty to disclose information relevant to their independence and impartiality: avoiding the pitfalls

Last June, the Osaka High Court handed down a judgment setting aside an arbitral award, only the second occasion on which Japanese Courts have done so.

Arbitrators are required to be independent from both parties and impartial, and to that end, many countries' international arbitration legislation and institutional arbitration rules require arbitrators (and, prior to their appointment, arbitrator candidates) to disclose any information to the parties and the arbitral institution that might give rise to doubts as to their independence and impartiality as and when they become aware of it.

For example, the Japanese Arbitration Act provides that, where there are "reasonable grounds to suspect the impartiality or independence of an arbitrator," there are grounds to seek their removal. Moreover, arbitrators are required to disclose information which "might give rise to doubts as to the independence or impartiality of the arbitrator," even if such information would not be sufficient to justify that arbitrator's removal.

This raises the question as to what information an arbitrator (or candidate arbitrator) must disclose, and other aspects of the disclosure process where caution should be exercised. The Arbitration Act leaves this point open to interpretation.

In this client alert, we look to provide a brief summary of the decisions by the District and High Courts in relation to this duty of disclosure, outline and analyze the decisions, and identify points arbitrating parties should be aware of.

1. Decisions by the Courts

(1) Case Outline

The applicants (US companies) and the respondents (a Japanese and a Singaporean company) had conducted an arbitration seated in Osaka, Japan under the Commercial Arbitration Rules of the Japan Commercial Arbitration Association (the "JCAA"). There were three arbitrators, of whom the third and presiding arbitrator ("A") was jointly nominated by the other two arbitrators.

A was a partner in the Singapore office of an international law firm ("B"). When accepting his appointment, A made a declaration to the JCAA (the "Declaration") in the following terms:

"It is possible that law firm B may in the future act for or advise the parties in this arbitration or their affiliates in matters unconnected to this arbitration. For the duration of this arbitration, I shall neither



involve myself in such mandates nor be provided with information relating to the same, and I believe that there is no possibility that such mandates may have any effect on my independence or impartiality as an arbitrator in this arbitration."

After the arbitration proceedings commenced, a lawyer ("C") moved to a US office of firm B. In advance of his move to firm B, he had acted as counsel on the record for an affiliate of the Japanese respondent company in class action litigation in the US that had no connection to the arbitration, and continued to act in this capacity following his move to firm B (the "**Relevant Facts**"). Notwithstanding this, A rendered an award in favor of the respondents without disclosing the Relevant Facts to either of the parties to the arbitration or the JCAA.

Having learned of the Relevant Facts after the rendering of the award, the applicants commenced proceedings in the Osaka District Court seeking the annulment of the award.

(2) Summary of the Decision of the Osaka District Court (handed down 17 March 2015) [cite]

Conclusion

Dismissal of the application for annulment on the basis that there were no grounds for doing so.

Reasoning

According to the Osaka District Court, the Relevant Facts did not, in and of themselves, amount to a ground for the recusal of the arbitrator (*i.e.*, did not amount to reasonable grounds to suspect the impartiality or independence of the arbitrator), although they arguably ought to have been disclosed by A (as facts which might give rise to doubts as to his independence or impartiality).

However, in this case, A gave the Declaration on accepting his appointment without any objection from the respondents. Accordingly, even on the assumption that A had not disclosed the Relevant Facts, the breach was *de minimis* and did not ultimately warrant the annulment of the award.

(3) Summary of the Decision of the Osaka High Court (handed down 28 June 2016) [cite]

Conclusion: Award annulled.

Reasoning

According to the Osaka High Court, the Relevant Facts were, from the perspective of the applicants, critical information bearing on the applicants' decision whether or not to seek to recuse A and should have been disclosed by him.

Moreover, A was subject to a limited duty to investigate whether there were facts to be disclosed by him. In concrete terms, he was bound to retrieve information that was readily accessible. In the event that information was not disclosed due to his failure to undertake such investigation, A would be in breach of his duty of disclosure.

Given that A could have identified the Relevant Facts through a conflicts check without any particular difficulty, this was information A should have



disclosed. On this occasion, it was not clear whether the reason for the non-disclosure was that A knowingly withheld the information or whether he failed to undertake a conflicts check or make other inquiries. But whatever the position might have been, A was in breach of his duty of disclosure. Moreover, as the Declaration did not reveal the situation that actually occurred, the submission of the Declaration was not such as to satisfy his duty of disclosure.

The Osaka High Court considered that the non-disclosure in this case was a grave procedural defect. As a result, even on the assumption that it had no effect whatsoever on the outcome of the arbitration, the non-disclosure engaged the ground for annulment under art. 44(1)(vi) of the Arbitration Act (breach of Japanese laws and regulations relating to the constitution of the tribunal or arbitration procedure). Both to ensure the fairness of the arbitral procedure and award and to maintain confidence in the arbitral system, the Osaka High Court held it was necessary to set aside the award (the court further declined to dismiss the application on discretionary grounds).

2. Analysis

The following points come out of the decision of the Osaka High Court:

- The scope of the information covered by the duty of disclosure is relatively wide and can include, for example, the activities of lawyers assigned to offices of the same firm in other countries.
- The duty of disclosure is an ongoing one that continues beyond the appointment of an arbitrator.
- There is a limited obligation on the part of the arbitrator to make enquiries in relation to information that may fall within the duty of disclosure.
- A breach of the duty of disclosure (or investigation) may justify the setting-aside of an award even if it has no direct effect on the outcome of the arbitration.
- An advance waiver in the form of the Declaration will not be sufficient to discharge the duty of disclosure.

It is debatable whether or not the Relevant Facts can really be said to be information falling within the scope of the duty of disclosure (*i.e.*, whether they "*might give rise to doubts as to the impartiality or independence of the arbitrator*"), a point which the Osaka District Court did not decide. Moreover, when one considers the time and expense needed to get to the final award, there may be much to be said for an approach like that taken by the Osaka District Court, whereby a set-aside application can be refused on discretionary grounds if the breach is minimal because, for example, it has no direct effect on the outcome of the award. Be that as it may, the present case is one where the presiding arbitrator ought to have erred on the side of caution, but failed to do so.

The case has been appealed to the Supreme Court, and the final decision of the Supreme Court in this matter is currently pending.



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3. Practical tips for arbitrating parties

In practice, in light of the decision made by the Osaka High Court, the parties to a Japan-seated arbitration need to be mindful of the following points:

- Parties, counsel, and arbitrator nominees alike should look to the IBA Guidelines on Conflicts of Interest in International Arbitration for guidance about disclosure of potential conflicts. This case, for example, was an "Orange List" matter under the IBA Guidelines for which a conflicts check should have been undertaken (see IBA Guidelines, para 3.2).
- The duty of disclosure is an ongoing one right throughout the proceedings, and the Court emphasized the importance and relative ease with which conflicts checks can be conducted and monitored. There are two practical safeguards arbitrators employed by or affiliated with a law firm can take to minimize the risk of a challenge. First, they should ensure that there is a "red flag" on their conflicts system requiring any partner looking to take on work on behalf of a party or affiliate thereof (or any joining partner with a potential conflict) to contact the arbitrator immediately to ensure that any potential conflict is brought to their attention. Second, prior to the conclusion of the proceeding, they should run a final conflicts check to double-check that no potentially disclosable information has slipped through the net.
- The decision indicates that there is a high likelihood that a post-award challenge brought merely on the ground of non-disclosure will succeed. This gives rise to a risk that unscrupulous parties with weak cases may take one of two courses of action. First, they will have an incentive deliberately to withhold information that might give rise to doubt about an arbitrator's independence until after an award has been rendered. If a challenge is brought pre-award, the only consequence is the substitution of the arbitrator and a change to the schedule. The setting-aside of the award will result in the successful party having to start the proceedings again from the beginning. Second, they may wait until the conclusion of the proceedings to start "digging for dirt" in the hope of turning up something that might found the basis of a challenge to the award.
- Conversely, the high likelihood of a set-aside in the event of even a minor breach of the duty of disclosure puts the onus on party representatives to ensure that the arbitrators comply with their duties. They should not hesitate to raise any potential connection between an arbitrator and a party or party representative promptly, however tenuous it may seem on its face.

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