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MANNHEIMER SWARTLING

Bias, confidentiality and disclosure

Norwegian Maritime Day

Oslo, 17 November 2021

The applicable legal standard

Section 8 of the Swedish Arbitration Act

An arbitrator shall be impartial and independent.

If a party so requests, an arbitrator shall be released from appointment if there exists any circumstance that may diminish confidence in the arbitrator's impartiality or independence. Such a circumstance shall always be deemed to exist:

Section 8 of the SAA (continued)

1. if the arbitrator or a person closely associated with the arbitrator is a party, or otherwise may expect noteworthy benefit or detriment as a result of the outcome of the dispute;
2. if the arbitrator or a person closely associated with the arbitrator is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect noteworthy benefit or detriment as a result of the outcome of the dispute;
3. if the arbitrator, in the capacity of expert or otherwise, has taken a position in the dispute, or has assisted a party in the preparation or conduct of its case in the dispute; or
4. if the arbitrator has received or demanded compensation in violation of Section 39, second paragraph. SFS (2018:1954)

Section 9 of the Swedish Arbitration Act

A person who is asked to accept an appointment as arbitrator shall immediately disclose all circumstances which, pursuant to Sections 7 or 8, might be considered to prevent the person from serving as arbitrator. An arbitrator shall inform the parties and the other arbitrators of such circumstances as soon as all arbitrators have been appointed and thereafter in the course of the arbitral proceedings as soon as the arbitrator has learned of any circumstance.

Section 10 of the Swedish Arbitration Act

A challenge of an arbitrator on account of a circumstance set forth in Section 8 shall be presented within fifteen days from the date on which the party became aware both of the appointment of the arbitrator and of the existence of the circumstance. The challenge shall be adjudicated by the arbitrators, unless the parties have decided that it shall be determined by another party.

If the challenge is successful, the decision shall not be subject to appeal.

Section 10 of the SAA (continued)

Para 3

A party who is dissatisfied with a decision denying a challenge or dismissing a challenge as untimely may file an application with the District Court that the arbitrator be released from appointment. The application must be submitted within thirty days from the date on which the party was notified of the decision. The arbitrators may continue the arbitral proceedings pending the determination of the District Court.

Section 34 of the Swedish Arbitration Act

An award that may not be challenged under Section 36 shall, following an application, be wholly or partially set aside upon the request of a party:

[...]

6. if an arbitrator was unauthorized to adjudicate the dispute due to any circumstance set forth in Sections 7 or 8; or

[...]

Section 34 of the SAA (continued)

Para 3

An action must be brought within two months from the date upon which the party received the award or, if correction, supplementation, or interpretation has taken place pursuant to Section 32, within a period of two months from the date when the party received the award in its final wording. Following the expiration of the time limit, a party may not invoke a new ground of objection in support of its claim.

SFS (2018:1954).

Article 18 in the SCC arbitration rules

Impartiality, independence and availability

1. Every arbitrator must be impartial and independent.
2. Before being appointed, a prospective arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence.

[...]

4. An arbitrator shall immediately inform the parties and the other arbitrators in writing if any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence arise during the course of the arbitration.

Article 19 in the SCC arbitration rules

Challenge to arbitrators

1. A party may challenge any arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed by the parties.
2. A party may challenge an arbitrator it has appointed, or in whose appointment it has participated, only for reasons it becomes aware of after the appointment was made.
3. A party wishing to challenge an arbitrator shall submit a written statement to the Secretariat stating the reasons for the challenge, within 15 days from the date the circumstances giving rise to the challenge became known to the party. Failure to challenge an arbitrator within the stipulated time constitutes a waiver of the party's right to make the challenge.

Article 19 in the SCC arbitration rules (continued)

4. The Secretariat shall notify the parties and the arbitrators of the challenge and give them an opportunity to submit comments.
5. If the other party agrees to the challenge, the arbitrator shall resign. In all other cases, the Board shall take the final decision on the challenge.

Case law

- The standard for arbitrators' impartiality is a high one
- An arbitrator's impartiality should be assessed objectively.
- The decision on whether to sustain a challenge to an arbitrator should be based on an overall assessment taking all relevant circumstances into consideration.
- A failure to make disclosure is a factor to take into account in assessing whether there is a real possibility of bias.

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