

The importance of ethics in the role of arbitrators

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Resumen

La importancia de la ética en el papel de los árbitros, es un documento de investigación que analiza varios casos de arbitraje internacional, desde los que se estudia el valor de la neutralidad y de los deberes de los árbitros cuando son partícipes en un conflicto.

Introduction

International Arbitration has become the most effective process to resolve commercial disputes between international actors. Arbitration is attractive for business players because it (i) creates predictability in the international commercial world; (ii) prevents parallel litigation in different countries and, (iii) assures neutrality in the dispute resolution. However, if the arbitrators are not ethical “judges”, these benefits will not exist.

The importance of arbitrators’ ethics has been recognized by international authorities for decades. Recently, two important codified guidelines for arbitrators’ ethics have been modified. The American Arbitration Association’s Code of Ethics for Arbitrators in Commercial Disputes and the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration reformed the old Triple A’s Code and IBA Rules respectively.

This paper intends to compare and contrast the ethical rules that have been modified with the new guidelines issued by the organizations mentioned above. The objectives are to explain the development of the ethical rules for arbitrators’ behavior and to discuss the scope of the duty of disclosure, material facts to be disclosed, conflicts of interest, and the neutrality of the party nominee arbitrator. *Commonwealth Coatings v. Continental Ca-*

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sualty, *AT & T Corp. v. Saudi Cable Company*, *Merit Insurance v. Leatherby Insurance* and *Sunkist v. Sunkist* will be the cases discussed as the judicial context of the ethical rules.

I. Commonwealth Coatings v. Continental Casualty

Duty of Disclosure

The United States Supreme Court decision in *Commonwealth Coatings v. Continental Casualty* reflects a strict judicial point of view related to the arbitrator's duty to disclose information that could be perceived as a bias in the arbitration proceeding¹.

In *Commonwealth Coatings*, a subcontractor filed a request for arbitration process to recover money for a painting job that he claimed the prime contractor owed him. This commercial relationship derived from a principal construction contract. According to an agreement to constitute the panel, each party should appoint one arbitrator and the two party-arbitrators should select a third neutral arbitrator. However, the third arbitrator had business connections with the prime contractor that were never disclosed to the subcontractor. He had served as an engineering consultant for the contractor on many projects, including the projects involved in the arbitration. After the award was made, the subcontractor discovered the existing relationship and challenged the award².

The Supreme Court vacated the arbitration award on the ground that the United States Arbitration Act authorizes vacating an award where it was "procured by corruption, fraud or undue means", or "where there was evident partiality in the arbitrators"³. Nonetheless, the Court recognized that the petitioner in *Commonwealth Coatings* did not charge the arbitrator with fraud or bias in deciding the case, and that the Court had no reason, different than the lack of disclosure of the arbitrator's relationship with the prevailing party, to suspect that the arbitrator acted with improper motives⁴.

Thus, what was the real reason for deciding against the award? Was lack of disclosure the reason for the Court's decision? Moreover, was the relationship sufficiently material to vacate the unanimous arbitration award?

It seems as if in this case, lack of disclosure was sufficient reason to vacate an arbitration award, because there were no charges of corruption, fraud, undue means or partiality on the part of the arbitrator and the Court did not have a suspicion that the arbitrator acted with improper motives. Is it a valid conclusion of the Court that -non disclosure- is a material fact to vacate an award?

1 Commonwealth Coatings Corp. v. Continental Casualty Co. 393 U.S. 145 (1968).

2 Ibid, 146.

3 Ibid, 147.

4 Ibid, 146.

For the purpose of the decision in *Commonwealth Coatings*, the Supreme Court compared the arbitrator's role with the roles of the Jury and Judge in a judicial proceeding and established that arbitration should not be distinguished from judicial process in this kind of situation. By interpreting the statutory language, the Court understood that the principle that governs to set aside a judicial decision when there is "the slightest pecuniary interest" on the part of the judge is the same concept that governs arbitration proceeding⁵. Accordingly, "the slightest pecuniary interest" from the arbitrator is sufficient ground to vacate or at least, challenge an arbitration award. But, specifically what was the decision of the United States Supreme Court in *Commonwealth Coatings*? Is this principle enforceable in private conflict resolution? Do international arbitration rules recognize this premise as a valid one? Does the concurring rationale focus on the same point?

As Mr. Justice White and Mr. Justice Marshall confirmed in their concurring opinion in *Commonwealth Coatings*, arbitrators are not to be held to the judicial standards because they are "men of affairs" and, as a consequence, they are not disqualified *per se* by their business relationship with any of the parties⁶.

In the context of the new Code of Ethics of the American Arbitration Association, the *Commonwealth Coatings v. Continental Casualty* ruling is well received although not completely unambiguously understood. In Canon I (c), the new code reduces the scope of unethical behavior of an arbitrator establishing that after full disclosure of the relevant facts, when the parties have agreed to continue with the arbitrator's appointment or services, it is not unethical for the arbitrator to serve his role⁷. This same idea is explicit in Canon II (f) which says as follow:

When the parties with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve⁸.

Accordingly, Mr. Justice White and Mr. Justice Marshall were right in their reasoning that if a business relationship exists between the arbitrator and one of the parties, but it is known and accepted by both parties, or it is trivial, this is not a disqualifying factor⁹.

On the other hand, the IBA Guidelines on Conflicts of Interest admit the same rule that knowledge and acceptance of the relationship by the parties is a valid exception for disqualification of an arbitrator. Under the IBA codified ruling, the parties have 30 days after disclosure to object to an arbitrator's appointment. If the interested party does

5 Ibid, 148.

6 *Commonwealth Coatings Corp. v. Continental Casualty Co.* Mr. Justice White, concurring opinion 393 U.S. 145,150 (1968).

7 The Code of Ethics for Arbitrators in Commercial Disputes. A.A.A..

8 Ibid, Canon II (f).

9 *Commonwealth Coatings Corp. v. Continental Casualty Co.* Mr. Justice White, concurring opinion 393 U.S. 145,150 (1968).

not raise any objection within that time, he or she has waived any potential conflict of interest and the possibility of objecting in a later stage of the proceeding¹⁰. However, the IBA guidelines do not establish this rule as an absolute principle. There are some red list issues which the parties are compelled not to waive. Those non-waivable issues derived from the common law principle that says that “no person can be his or her own judge”¹¹. In consequence, these rules limit the autonomy of the parties’ consent in order to obtain an impartial arbitration proceeding¹².

Nevertheless, when referring to the duty of disclosure, both rules -the IBA guidelines and the Triple A code- focus on the same direction as the concurring rationale of *Commonwealth Coatings* decision does. Non-disclosure is not *per se* disqualifying, if the facts or relationship undisclosed were trivial¹³. Therefore, the question is, which facts should one disclose? Which facts are trivial?

The answer to that inquiry should be determined by applying the principle which says that when there are doubts to which information one may disclose, those doubts should be resolved in favor of disclosure. The new codified ethic rules described above, and the *Commonwealth Coatings*’ decision, stated that any doubt as to whether or not an arbitrator ought to disclose some information should be resolved in favor of disclosure¹⁴. Thus, if arbitrators err, they should do so on the side of disclosure.

II. A Royal Courts of Justice Decision

AT & T Corporation v. Saudi Cable Company

Which are Material Facts to be Disclosed?

The Supreme Court of Judicature’s pronouncements In *AT & T Corporation v. Saudi Cable Company*, led us to a more confused stage of uncertainty than *Commonwealth*

10 IBA Guidelines on Conflicts of Interests in International Arbitration. International Bar Association, General Standard 4 (a).

11 *Ibid*, Explanation to General Standard 2(d).

12 As a difference, the AAA Code of Ethics and the *Commonwealth Coatings v. Continental Casualty* decision do not take into account the possibility of non-waivable issues on the parties consent. One may understand that *Commonwealth Coatings* and AAA ethics rules leave the door open for the parties to decide whatever they consider the best for their arbitration process.

13 For the IBA guidelines, *trivial* would be understood as all the facts listed on the permissive green catalog, where there is not duty to disclose and, as a consequence, there should not be disqualification of the arbitrator and the process may continue without disturbance.

14 See *Commonwealth Coatings Corp. v. Continental Casualty Co.* Mr. Justice White, concurring opinion 393 U.S. 145,152 (1968); The Code of Ethics for Arbitrators in Commercial Disputes. A.A.A., Canon II (d); IBA Guidelines on Conflicts of Interests in International Arbitration, Part One, General Standard 3 (c).

Coatings' decision referring to which information one should disclose and when. While *Commonwealth Coatings* is clear that one may err for disclosure, *AT & T v. Saudi* takes an ambiguous position facing the same issue¹⁵.

In *AT & T v. Saudi*, AT & T Corporation filed a request for arbitration against Saudi Cable Company, trying to solve a dispute derived from a pre-bid agreement for a telecommunications project (TEP-6). It was a condition for the bidders that cable required for the project should be acquired from Saudi Cable Company, and that was the reason for existence of the pre-bid agreement involved in the dispute. AT & T and its competitor, Nortel, submitted bids for that project (TEP-6), but the contract was awarded to AT & T making Nortel one of the aggrieved bidders¹⁶.

According to the ICC rules that were applicable for this proceeding, each party may nominate its own arbitrator subject to confirmation by the ICC and a chairman also subject to confirmation. Mr. Fortier, an outsider director of Nortel, who was also a minority shareholder in Nortel as well as in AT & T, was named the chairman of the panel. The information in reference to Nortel connections was never disclosed during the arbitration proceeding. Furthermore, the Nortel directorship was omitted from the resume sent to the ICC while at the same time, Mr. Fortier sent different resumes to other institutions, in which he included his directorship information. This fact, however, was found by the court as a secretarial mistake¹⁷.

During that time, the arbitrators' panel issued three partial awards in favor of Saudi Cable Company against AT & T¹⁸. In addition, for procedural effects, AT & T had to reveal to the panel some confidential information which did not want it to fall in to competitors' hands. Afterward, it was known that Mr. Fortier was an outside director of Nortel; therefore AT & T began judicial process to set aside the awards and to remove him from the panel¹⁹.

The Supreme Court of Judicature decided against AT&T because it was unable to show any grounds for setting aside the awards or removing Mr. Fortier based on bias or misconduct. The Court's rationale was based on the fact that there was no consciously, apparent or unconscious bias, or in any matter, misconduct. The Royal Court's reasoning focused on different facts as follow, (i) Nortel was not a party to the arbitration process, (ii) the outcome of the projects triggering the dispute would not be a real economic

15 *AT & T Corp. v. Saudi Cable Co*, 2000 WL 571190 (CA), 5-23-2000 Times 571, 190, (2000).

16 *Ibid*, 2.

17 *Ibid*, 3.

18 The first partial award, issued on 4 September 1996, stated that the terms of the pre bid agreement were legally binding and that the parties obliged to meet promptly and negotiate in good faith. The second partial award issued on 2 July, 1998 concluded that AT & T had not negotiated in good faith with Saudi Cable. On 15 September, 1999, the third partial award was issued, establishing the quantum of US\$ 30.000.000, plus interest, as partial compensation for Saudi Cable.

19 *AT & T Corp. v. Saudi Cable Co*, 2000 WL 571190 (CA), 5-23-2000 Times 571, 190, (2000).

benefit or loss for the arbitrator, (iii) the directorship in Nortel was incidental and not vital for the arbitrator's life, (iv) he had no managerial power in Nortel's day to day life, (v) Mr. Fortier is a recognized lawyer and arbitrator and he did not represent a real danger for the proceedings' fairness, and (vi) nothing in the arbitration proceedings showed bias because there was not real disposition or prejudice for one party or another, among others reasons²⁰.

AT & T v. Saudi, develops a different view of arbitration duty to disclose. As petitioner's counselor properly alleged, Mr. Fortier had plenty of opportunities during different stages of the arbitration to disclose his connections with Nortel and he did not. He failed to disclose his directorship in three different stages of the process, (i) at his statement of independence, (ii) when it became apparent that Nortel had been involved as a disappointed bidder, and (iii) when AT&T had to disclose confidential information and it was concerned that it could get in competitors' hands. However, according to the Court, Mr. Fortier failed "innocently" to disclose such information²¹. Was this undisclosed information sufficiently material to be disclosed? Why, in *Commonwealth Coatings*, failure to disclose relevant information was sufficient ground to vacate the award? Was Mr. Fortier's failure to disclose different in some way from the contractor's failure to disclose in *Commonwealth Coatings*? Was the standard of review different for each case?

The IBA guidelines on Conflicts of interest offer a non-exhaustive list of situations that an arbitrator must disclose²². None of these situations directly encompasses the facts of *AT & T v. Saudi*. However, the chairman in this case had a close relationship with a third party, Nortel, which may have had some interest in the outcome of the case, and may get some indirect benefit from the defeat of the unsuccessful party.

Furthermore, an arbitrator's directorship to one of the parties has significant importance under the IBA guidelines. This situation is even listed at the non-waivable red catalog. The reason for listing this situation as a non-waivable one is the magnitude and weight of a relationship between a director and an enterprise. Accordingly to the IBA understanding of directorship, when one is a director of an enterprise and one is deciding something that could affect this enterprise, one is acting as his own judge²³. Even when Nortel was not a party to the arbitration process and this non-waivable situation does not apply, it was a direct competitor of AT & T in the project involved in the dispute and, possibly, in future projects with the same contractor. Therefore, the arbitrator in the pre-

20 Ibid, 3.

21 Ibid, 3.

22 The IBA rules have design three different color lists for practical application purposes of the general standards. The red color is a catalog of the more serious situations which an arbitrator should disclose to the parties. Some red listed issues are waivable and some others are not. The orange color is a record of less serious situations which an arbitrator has the duty to disclose. Finally, the green color list is an inventory of trivial facts that the arbitrator has not duty to disclose.

23 IBA Guidelines on Conflicts of Interests in International Arbitration. International Bar Association, Part II, Practical application of the General Standards (2).

sent case represented an interested party in defeating AT & T and so, there was an evident conflict of interests. Was this a material fact to be disclosed at some stage of the proceeding? If it was a material fact, why the award was not vacated?

One may believe, as the Court did, that Mr. Fortier's failure to disclose was an innocent fact. Nevertheless, one may not forget that his failure lasted throughout the whole arbitration process. From an objective point of view, Mr. Fortier's failure to disclose could appear to be innocent only until AT & T expressed its concern about the discovery of confidential information that could fall on competitors' hands. He was the competitor, and he did not disclose it²⁴. Thus, what is the scope of duty of disclosure?

III. Merit Insurance Company v. Leatherby Insurance Company

Immaterial Facts and Impartiality

In *Merit Insurance v. Leatherby Insurance*, the United States Court of Appeals for the seventh circuit recognized that the standards of disqualification for arbitrators are less strict than for judges²⁵. This recognition is standing on the side of Mr. Justice White and Mr. Justice Marshall concurring opinion in *Commonwealth Coatings*, where they affirmed that arbitrators, as men of affairs, can not be held by the strict principles of the judicial process²⁶.

The interesting part of *Merit Insurance's* decision, is that the Court acknowledged that in order to get the expertise required in a specific arbitration proceeding, the parties must be open to accept arbitrators that may know the parties by their prior contact with the industry²⁷.

In *Merit Insurance*, the Court made a balancing exercise between impartiality and expertise under two different scenarios, the judicial system and the arbitration process, and concluded that the weight of those concepts differs depending on the scenario in which it is analyzed. According to the Court, arbitration is a way to obtain expertise in a dispute resolution, and as a consequence, arbitrators must know the business, and maybe, the parties involved. That means that in arbitration proceedings, impartiality is a little bit sacrificed in order to obtain an expert's award. On the other hand, the judicial system must

24 The IBA ethic's guidelines as well as the AAA ethic's rules do not make any difference between an insider director of an enterprise and an outsider. Moreover, the IBA rules in its General Standard 2, stated that a board member of an enterprise has its same identity, and under that understanding Mr. Fortier had the same identity that Nortel, the competitor of AT & T. See IBA Guidelines on Conflicts of Interests in International Arbitration. International Bar Association, Explanation to General Standard 2 (d), May 2004.

25 *Merit Insurance Company v. Leatherby Insurance Company* 714 F.2d 673 (1983).

26 *Commonwealth Coatings Corp. v. Continental Casualty Co.* 393 U.S. 145 (1968).

27 *Merit Insurance Company v. Leatherby Insurance Company* 714 F.2d 673, 679 (1983).

be impartial, rather than expert, because it is a branch of the governmental power and its legitimacy depends on impartiality.

Merit Insurance's decision is, once again, the Court's forgiveness of an arbitrator's failure to disclose.

Were the facts so trivial that they did not deserve to be disclosed? Is failure to disclose a reason for setting aside an award? What happened with *Commonwealth Coatings'* majority decision?

In 1972 Merit Insurance and Letherby Insurance were parties in a reinsurance contract. Merit Insurance sued Letherby in a Federal District Court for fraud in inducing the contract²⁸. Letherby moved to arbitration according to prior agreement. The arbitration was conducted under the American Arbitration Association (AAA) rules. Each party appointed one arbitrator and together the parties appointed a "neutral" arbitrator named Jack Clifford²⁹.

At the first meeting the arbitrators decided that all of them were going to act as neutral arbitrators. The arbitration process lasted more than three (3) years and, as a result, there was a unanimous award of more than ten million dollars for Merit Insurance. At the judicial level for confirmation of the award, Leatherby alleged that one of the party-nominee arbitrators had been biased. However, the court confirmed the award³⁰.

During appeal proceeding, Leatherby filed a motion alleging that the "neutral arbitrator" Mr. Clifford, fourteen (14) years ago worked for the actual president and principal shareholder of Merit Insurance, while he was working in Cosmopolitan. On that base, and taking into account the failure to disclose the past relationship between the third arbitrator and the party's president, the District Court set aside the arbitration award³¹. Merit Insurance appealed and the Appeals Court reversed the decision and remanded in order to reinstate the award³².

The United States Court of Appeals observed two factors of great importance related to arbitrator's ethics, (i) the materiability of the relationship between the arbitrator and the party, and (ii) the spirit of the ethical rule of disclosure in the old Code of Ethics of Triple A.

To reach the decision, the United States Court of Appeals analyzed that the past relationship between Mr. Clifford and the president of Merit Insurance was not a close relationship, but only a professional one, and that it ended fourteen (14) years ago thus there was no possible financial interest in the outcome of the arbitration. However, to reach its

28 Ibid, 676.

29 Ibid, 676.

30 Ibid, 676..

31 Ibid, 677.

32 Ibid, 683.

decision, the Court did not use the “trivial relationship” test, but rather it used the “intimate relationship” test³³.

Accordingly, an intimate arbitrator-party past relationship would be a material fact to be disclosed and a strong consideration for setting aside an arbitration award. In the Court words, the relationship must be “so intimate, personally, socially, professionally, or financially, as to cast serious doubt” on the arbitrator’s impartiality³⁴.

In addition, the Court evaluated Mr. Clifford’s failure to disclose under the previous Code of Ethics that provided that disclosure was intended to be applied realistically so that it did not become impracticable³⁵.

Regarding the issue of disclosure under the ethical rules, the Court concluded that, although, failure to disclose could be a violation of the arbitrators’ ethical standards it did not mean that the arbitration award should be nullified judicially³⁶. The inquiry of an award’s validity must be analyzed under Section 10 of the United States Arbitration Act because the ethical rules do not have the force of the law³⁷.

What is the point of establishing ethical standards if they are not enforceable? What is the applicability and enforceability of the arbitrators’ ethical duties?

IV. Sunkist Soft Drinks, Inc. Del Monte Corporation v.

Sunkist Growers, Inc.

Neutrality of the Party Nominee Arbitrator

In *Sunkist v. Sunkist*, the United States Court of Appeals for the eleventh circuit, based upon the Canon VII of the Triple A previous Code of Ethics, declared that party appointed arbitrators may be permitted, and should be expected to be predisposed towards the party who appointed them³⁸. This affirmation encompasses *Merit Insurance*’s decision

33 Nevertheless, the Court compared *Merit Insurance* with *Chitimacha* a case that held that a district judge did not have to disqualify himself from a case in which the defendant was a corporation which he had represented in private practice. That relationship was trivial because it has terminated six (6) years ago.

34 *Merit Insurance Company v. Leatherby Insurance Company* 714 F.2d 673, 680 (1983).

35 The spirit of the old standard of disclosure under the Triple A previous code, was very confusing. The duty to disclose was limited from the beginning without any legitimate reason, leaving on the air the understanding of permission of non disclosure. The new Triple A ethical rules do not say anything similar to that permissive duty to disclose. Instead, the new Code of Ethics makes a stricter approach of disclosure establishing in its II canon (d) that any doubt as to disclosure concerns should be resolved in favor of disclosure.

36 *Merit Insurance Company v. Leatherby Insurance Company* 714 F.2d 673, 680 (1983).

37 *Ibid.*

38 *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* 10 F. 3d 753 (1993).

which affirmed that impartiality is a principle subordinated to expertise in arbitration proceeding³⁹. *Merit Insurance* stated that the importance of expertise over impartiality is “dramatically illustrated by the practice whereby each party appoints one of the arbitrators to be his representative rather than a genuine umpire⁴⁰”.

There were two issues in *Sunkist v. Sunkist*. One was associated with a nonsignatory to a contract invoking an arbitration provision, and the second one was related to party appointed arbitrator’s ethics⁴¹. For the purpose of this paper we will focus only on the second issue of discussion.

Sunkist Grower and General Cinema Corporation were parties on an orange soda deal. Cinema Corporation created a wholly owned subsidiary named Sunkist Soft Drinks that entered into a license agreement with Sunkist Grower which contained an arbitration clause. A couple of years later, in 1984, Del Monte Corporation acquired Sunkist Soft Drinks and absorbed it into its beverage products division. In 1986 Del Monte and Sunkist Soft Drinks filed a declaratory relief action against Sunkist Grower in order to obtain a declaration that the controversy relating to Sunkist Soft Drinks’ performance under the license agreement was subject to arbitration. After the complaint was filed, Sunkist Soft Drinks was sold to another company, Cadbury Schweppes, Inc., a fact that was reflected in an amendment to the original complaint⁴². There was a whole procedural development in California and Georgia that ended up in Georgia with a granted motion to compel arbitration filed by Del Monte⁴³.

The parties applied the American Arbitration Association (AAA) rules to constitute the arbitrators panel and for the purposes of the subsequent proceeding. Each party appointed an arbitrator and mutually agreed upon a third neutral arbitrator. Del Monte appointed Mr. Meyers as its party-nominee arbitrator⁴⁴.

Before the arbitration process began Mr. Meyers met with counsel and other representatives of Del Monte to prepare for the hearing. A third party witness was interviewed in Mr. Meyers’ presence. However, after being designated as an arbitrator to the process Mr. Meyers submitted a written disclosure as it is required by the Triple A rules⁴⁵.

Sunkist Grower filed a motion to the Triple A requesting that Mr. Meyers was not confirmed as arbitrator to the process based upon his prior contact with the possible witness. The Triple A confirmed Mr. Meyers’ appointment and Sunkist Grower brought action to

39 *Merit Insurance Company v. Leatherby Insurance Company* 714 F.2d 673 (1983).

40 *Ibid*, 679.

41 *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* 10 F. 3d 753 (1993).

42 This amendment to the complaint also added Nabisco Brands, Inc.

43 *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* 10 F. 3d 753, 755 (1993).

44 *Ibid*, 756.

45 *Ibid*, 756.

the District Court which declined to rule on the merits of the motion because it was too premature⁴⁶. The panel entered in a two-to-one decision for Del Monte.

At the confirmation level, Sunkist Grower moved to vacate the award on the grounds of misconduct on Mr. Meyers' part. The Court denied the motion to vacate the award and, instead, confirmed it. Sunkist Grower appealed the decision and the Court affirmed the confirmation of the award⁴⁷.

The Court of Appeals relied on the fact that Mr. Meyers was a party-appointed arbitrator and that Triple A old Code of Ethics recognized different rules for neutral and nonneutral arbitrators, imposing less and more flexible duties to nonneutral arbitrators⁴⁸.

In harmony to the old Code of Ethics, party-nominee arbitrators, like Mr. Meyers, may be predisposed toward the party that appointed them. Thus, if nothing different was said, there was a permissible non impartial way of acting for the party-nominee arbitrators. However, that permission was not absolute because they were obligated to act in good faith, integrity and fairness⁴⁹. The Court analyzed Mr. Meyers' conduct under the standard of good faith, integrity and fairness and found that he had acted in accordance with the valid ethical rules and that there was no misconduct in his behavior. As a consequence, the Court sustained the arbitration award.

For today's Triple A Code of Ethics for Arbitrators in Commercial Disputes, there are no arbitrators known as "nonneutral". The valid Code establishes that party-appointed arbitrators which are expected by the parties to be predisposed toward the party that appointed them should be known as Canon X arbitrators⁵⁰.

On the other hand, if nothing has been said about arbitrators' neutrality, all arbitrators are presumed to be neutral and are expected to comply with the same standards as the third arbitrator⁵¹.

Which would have being the outcome of *Sunkist v Sunkist* under the new ethical rules? Would the new presumption change the Court's point of view?

The presumption of neutrality of party-appointed arbitrators is an important change of the ethical rules. The previous Code of Ethics stated that party-appointed arbitrators should be considered nonneutrals unless both parties informed the arbitrators that all of them were to be neutral⁵². Today's Triple A Code of Ethics establishes an absolutely

46 *Ibíd*, 756.

47 *Ibíd*, 756.

48 *Ibíd*, 758.

49 *Ibíd*, 759.

50 The Code of Ethics for Arbitrators in Commercial Disputes. A.A.A., March. Canon IX (B).

51 *Ibíd*, Canon IX (A).

52 The Introductory Note of Canon VII of the Code of Ethics for Arbitrators in Commercial Disputes of 1977, stated as follows: ". . . In all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone

different rule, because the Triple A presumes that the panel is composed by neutral arbitrators, unless something different is said⁵³. Accordingly, the standard of neutrality rolled completely to the other side. But, is it better now than before?

V. Stef Shipping Corporation v. Norris Grain Co.

Do party-appointed Arbitrators have to be impartial?

In *Stef Shipping v Norris Grain*, the United States District Court for the Southern District of New York concluded that party-appointed arbitrators are not to be neutral or wholly impartial⁵⁴. This decision is guided by the same direction as *Sunkist v. Sunkist* where the Court understood that predisposition is a real fact in the mind of party-nominee arbitrators⁵⁵.

In September 1959, the parties entered into a charter party which involved the use of a Liberian flag vessel owner by Stef Shipping Corporation. Certain disputes arose and, pursuant to prior agreement, the parties referred the matter to arbitration. To create the panel, each party appointed an arbitrator and the two selected arbitrators would decide the nomination of the third arbitrator. However, they could not get in to an agreement, so by the parties' petition the Court ended selecting the neutral arbitrator⁵⁶.

During the proceeding, each counsel charged the other party-appointed arbitrator with different complaints of misconduct. This situation finished with the voluntary resignation of one of the arbitrators. Nevertheless, the other two arbitrators decided the matter and issued an arbitration award⁵⁷.

Stef Shipping Corporation brought suit to vacate the arbitration award on the grounds that (i) Norris Grain's party nominee arbitrator was guilty of misconduct and evident partiality, and (ii) that the arbitrators exceeded their authority by issuing an arbitration award while Stef Shipping's party-appointed arbitrator had resigned. The Court denied Stef Shipping's motion to vacate the arbitration award finding that that the arbitrators' panel

concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or non-neutrals. In such arbitrations, the two party-appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral, or unless the contract, the applicable arbitration rules or any governing law requires that all arbitrators are to be neutral. . ."

53 The Canon IX (A) of the new Code of Ethics for Arbitrators in Commercial Disputes from March 2004, establishes presumption of neutrality as follows: ". . . In tripartite arbitrations in which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator."

54 *Stef Shipping Corporation v. Norris Grain Co.* 209 F. Supp. 249 (1962).

55 *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* 10 F. 3d 753 (1993).

56 *Stef Shipping Corporation v. Norris Grain Co.* 209 F. Supp. 249, 251 (1962).

57 *Ibid*, 252.

had not exceeded their power and that there was not misconduct on the party-nominee arbitrator for Norris Grain⁵⁸.

On the issue related to misconduct, the Court stated that the party-nominee arbitrator “can not be expected to play a wholly impartial part”⁵⁹ because “they are partisans one removed from the actual controversy”⁶⁰.

Which is the impartiality due by a party-appointed arbitrator? Is it less than the third arbitrator’s impartiality? Is it none?

Stef Shipping was decided in 1962, even before the previous Triple A Code of Ethics was issued. It is an old decision raised under old standards, but it is still cited by the courts in their written opinions. Is it still a valid precedent?

The new Code of Ethics of the American Arbitration Association (AAA) has change the presumption of neutrality on party-appointed arbitrators to the other side. Under these new ethical rules, a party-appointed arbitrator is presumed to be neutral unless something different is said and he/she has the duty to disclose any facts which may affect his/her neutrality⁶¹. Would *Stef Shipping* outcome change under the new Code of Ethics for Arbitrators in Commercial Disputes?

On the other hand, the International Bar Association (IBA) Rules of Ethics for International Arbitrators and Guidelines on Conflicts of Interest do not distinguished duties for party-appointed arbitrators and third arbitrators. The codified rules seem to be structured in a way where one can conclude that all arbitrators are expected to be impartial. The Guidelines first General Principle establishes as follows:

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated⁶².

There is no doubt that under this principle even a party-nominee arbitrator must remain neutral and impartial. *Stef Shipping* would have probably been decided differently if the arbitration proceeding was governed by the IBA ethical rules.

58 *Ibid*, 254.

59 *Ibid*, 253.

60 *Ibid*, 253

61 The Code of Ethics for Arbitrators in Commercial Disputes. A.A.A. Note on Neutrality.

62 IBA Guidelines on Conflicts of Interests in International Arbitration. International Bar Association, Part I, General Standards Regarding Impartiality, Independence and Disclosure (1).

Conclusions

Despite all the recognition of the efforts for defining ethical standards for arbitrators' role, the new codified norms and the judicial environment do not make clear the scope of duty to disclose information, the materiability of the facts to be disclosed, or even, the neutrality of party-appointed arbitrators. However, there are a couple of conclusions that one may consider as valid.

1. Disclosure

Disclosure of relevant information and conflicts of interests is a duty owed by all appointed arbitrators during the whole arbitration proceeding. The codified rules make clear that whenever there are doubts on which information one may disclose those doubts should be resolved in favor of disclosure. However, this is a principle that is not very clear and defined in judicial precedents.

In addition, non disclosure is not *per se* a disqualifying factor or a definitive ground to vacate an arbitration award.

2. Materiability

Although the codified rules are unambiguous in the principle that says that doubts related to disclosure should be resolved for disclosure, when the fact is not material the arbitrator has no duty to disclose it. The question then becomes which facts are material and which facts are not material.

The IBA guidelines are clear, at least as possible, in this issue. Those guidelines determined a list of different facts that should be disclosed. In addition, the list establishes the importance of the fact and the possible effects of non disclosure. On the other hand, Triple A rules are not that clear but are along the line of prevailing disclosure.

Nevertheless, the judicial thinking has stated that trivial relationships do not need to be disclosed. So when there is not disclosure of a trivial relationship the award is in perfect shape. The problem becomes the definition of the concept of triviality.

An arbitrator must disclose any intimate relationship with any of the parties because it is a material fact. The relationship must be "so intimate, personally, socially, professionally, or financially, as to cast serious doubt" on the arbitrator's impartiality⁶³. Lack of intimacy then, will become lack of materiability.

63 Merit Insurance Company v. Leatherby Insurance Company 714 F.2d 673, 680 (1983).

3. Party-appointed arbitrators, neutrality and impartiality

Under the new ethical rules of Triple A for arbitrators, all arbitrators are presumed to be neutral. This is a presumption that can be rebutted by agreement of the parties, or by contract, that determines that those arbitrators should act as Canon X arbitrators. This is a change in the standard of 180 grades because if nothing is said, arbitrators may remain neutrals.

The IBA rules do not differentiate between party-appointed arbitrators and third arbitrators. Those rules establish that unless something different is said, a common and primary rule governs, that is that arbitrators must be impartial.

However, the courts have defined that expectation of impartiality in arbitration proceedings can not be the same as in the judicial system. In arbitration, impartiality valued less than expertise.

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