

Western Canada Commercial Arbitration Society

SOCIAL RELATIONSHIPS AND ARBITRAL INDEPENDENCE

Presented By: Mary E. Comeau
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In both international and domestic arbitrations, perhaps the most difficult independence question to answer is "when is a social relationship between the lawyers and arbitration panel sufficient to give rise to the need for disclosure on behalf of the arbitrator"?

The language used around this issue does little to illuminate the boundaries.

Persons who are requested to serve as arbitrators should, before accepting, disclose any known existing or past financial, professional or personal relationships which might affect impartiality or lack of independence in the eyes of any of the parties....

Source: The AAA\ABA Code of Ethics for Arbitrations and Commercial Disputes.

A person who is nominated or appointed as an arbitrator must disclose ... a significant personal relationship with the party or lawyer for a party ["significant personal relationship" is defined to include a "close personal friendship"].

Source: California Ethics Standards for Neutral Arbitrators in Contractual Arbitration

A close personal friendship exists between an arbitrator and counsel of one party, as demonstrated by the fact that the arbitrator and counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

*Source: The IBA Guidelines on Conflicts of Interest in International Arbitration
Orange list.*

The question then becomes what is a "friendship" in 2013?



Caselaw is limited and not always clear whether there would necessarily be a problem if matters had been disclosed.

Arbitrator (one of a Panel of three appointed by AAA) accepting invitations to a Christmas party, a trip to Las Vegas prior to appointment and a fishing trip post appointment (all of which was not disclosed) resulted in Award being vacated.

L&H Airco v. Rapistan Corp SC Minnesota, 449 N.W.2d 372(1989)

Sole Arbitrator's (AAA) relationship with attorney's sister as longstanding boyfriend (not disclosed, though "personal friendship" with the attorney was) resulted in Award being vacated.

La Serena Properties et al v. Weisbach, Calif. Sup Crt, ref'd in 186 Cal. App.4th 893.

Arbitrator (one of a Panel of three appointed by AAA) arguably did not disclose that many years ago he was at the same firm and in the same associate class as one party's attorney but had no regular contact (were in different departments and did not work together) not grounds for vacating an award.

Blue Cross Blue Shield of Texas v. Juneau ref'd in No. 03-02-00545-CV

Arbitrator (one of three in an ICSID arbitration) had occasional, purely social, contacts with a key executive from one party not sufficient to challenge the arbitrator as determined by the other two arbitrators.

ICSID Case No. ARB/00/1 *Zhinvali Development Ltd. v. Republic of Georgia*
Jan 19, 2001 (unpublished)

In today's world, the internet is the most likely source of evidence of such relationships.

- Are your friends on "Facebook"?
 - Do you chat?
 - Do you "like" items on their page?
 - Do you "post" to each other?
 - Consider your privacy settings (but don't rely on them to ensure privacy).

- Do you follow each other on Twitter?
- Are you "connected" on LinkedIn?
- Have you endorsed each other on LinkedIn?
- Cease connections during an appointment.

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