

♦THE INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION

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I. Introduction

International commercial arbitration is an alternative dispute resolution method (ADR), in general, voluntarily chosen by the parties. It is a private and effective method to resolve disputes. Nowadays, it tends to be the preferred means for settling disputes within the international business community¹. Arbitration is a quasi-judicial process and hence one of the fundamental principles of international commercial arbitration is the impartiality and independence of arbitrators during the arbitral process². However, unlike the judges, arbitrators are often involved in the market they serve being often predisposed and interested in the outcome of the arbitration³. In addition, the analogy between an arbitrator and a judge should not be taken too far. A judge is a servant of the state having responsibilities closely linked with public policy and sovereignty that go far beyond those of an arbitrator, whose responsibilities are determined by private entities like arbitral institutions or the appointing parties themselves⁴. The national judge finds the source of his power and *auctoritas* in the rules of the *lex fori*; these rules do not bind the international

♦ Este artículo fue presentado a la revista el día 4 de abril de 2007 y fue aceptado para su publicación por el Comité Editorial el día 7 de junio de 2007, previa revisión del concepto emitido por el árbitro evaluador.

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¹ Redfern, Alan, Hunter, Martin, *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 2003

² Alam, Naser, *Independence and Impartiality in International Arbitration-An Assesment*, National Commissioner, International Chamber of Commerce Bangladesh, available at www.transnational-dispute-management.com

³ Ibid.

⁴ Redfern, 2003.

arbitrator due to the private character of the commercial arbitration⁵. Nevertheless, there is a long tradition in the analogy judge-arbitrator. Hoosac Tunnel Dock and Elevator Company v James W. O'Brian⁶, for instance, claim that an arbitrator is a "quasi-judicial officer" and therefore the court ruled that impartiality, independence and freedom from undue influence from the arbitrator must be protected⁷. Nevertheless, we might take a different approach particularly when we refer to the ethical component of the arbitral process and more specifically, the requirement of impartiality and independence by the arbitrators.

It is often said that the quality of an arbitral process is as much as the quality of the arbitrators involved in it⁸. Thus, it seems important to establish which is the nature of the arbitration, the role of the arbitrator and more specifically to determine whether and to what extent the arbitrator's role could be conceived as limited to watching a game played by others (the parties) as an impartial observer having the function to proclaim whose is the victory once the game is finished⁹. Although unusual, it is not rare finding party appointed arbitrators acting like "negotiating advocates" and representing the interests of their party¹⁰. In these cases, most of them ad hoc arbitrations, the only neutral arbitrator is the presiding arbitrator being the only one not nominated by the parties¹¹. However, the rules of the most arbitral institutions, for instance the ICC, require the independence and impartiality of their arbitrators¹².

II. Why does international arbitration seek to have arbitrators that are impartial and independent?

It has been argued that every action at law has a moral dimension and therefore questions of fairness, impartiality and independence are very important. In addition, it has also been said that "if a judgement is unfair then the community has inflicted a moral injury on one of its members"¹³. Arbitration has been described as "the most ethical institution in the society of labour relations; arbitrators exercising their ethical powers as to what is good or bad, right or wrong"¹⁴. International commercial arbitration does not escape yet to these ethical considerations having a limited party autonomy. The consensual process of the arbitration which allows the disputing parties to choose their arbitrators does not allow them to dictate the process of fairness and somehow avoid the ethical norms and principles of justice

⁵ Bernardini, Piero, *The Role of the International Arbitrator*, Arbitration International, Vol.20, n.2.,2004

⁶ 137 Mass. 424

⁷ Glick, Lesli Alan, *Bias Fraud, Misconduct and Partiality of the Arbitrator*, 22 ARB. J. 161 (1967)

⁸ Figueroa Valdes, Juan Eduardo, *La Etica en el Arbitraje Internacional*, XXXIX Conference, Inter-American Bar Association, New Orleans, June 2003.

⁹ Ibid.

¹⁰ Above n°1

¹¹ Ibid

¹² Ibid

¹³ Dworkin, R., *Law's Empire* 1, Oxford: Hart Publishing, 1998 in Alam, Naser, *Independence and Impartiality in International Arbitration-An Assesment*, National Commissioner, International Chamber of Commerce Bangladesh.

¹⁴ Marx, Herbert L, *Arbitration as an Ethical Institution in Our Society*, The Arbitration Journal, Sep. 1982, Vol 37 No. 3.

underlying any national or international law¹⁵. In this line of argument, party autonomy is restricted by public order considerations, as G.C Moss states:

“In the field of international commercial arbitration, party autonomy is restricted by ordre public: both at the challenge stage and at the enforcement stage, it is provided that an award can be set aside or, respectively, its enforcement refused, if the award is in conflict with the public policy principles of the court in question’s lex fori”¹⁶.

Why is independence and impartiality so important in international commercial arbitration? As Figueroa Valdes and Juan Eduardo point out, arbitration is based in trust, therefore the arbitrators’ respect of professional ethics acquires great importance for the respectfulness of the arbitral institution itself as an alternative dispute resolution mechanism¹⁷. In the same way, judicial independence is recognised to be a key element for maintaining the credibility and legitimacy of international courts and tribunals¹⁸. Thus, it has been argued that an arbitrator, besides his intellectual and professional credentials, must comply with the moral integrity of a judge¹⁹. Overall, we may say that the long credibility of international commercial arbitration has been based on the perception that the arbitral process is fair and that it produces arbitral awards worthy of consideration and respect; being the arbitrators the essential tools for such fair judgements²⁰.

One of the problems of international commercial arbitration is that there is not a supranational authority to control arbitrators’ behaviour²¹. A domestic lawyer is constrained by the norms and ethical rules of his own domestic bar where he practises. However, when operating outside of their environment, like in international arbitration, some of the unwritten pressures disappear operating in what Block terms “an ethical no man’s land”²².

III. The concepts of Independence and Impartiality

At first sight, the concepts “independent” and “impartial” seem almost similar. Despite this fact, they do have some differences that are necessary to explain. The concept of independence is related to the personal connection or relationship between the arbitrator and the parties or their counsel-personal, social and financial²³. The stronger the

¹⁵ Alam Naser, above.

¹⁶ Moss, G.C., *International Commercial Arbitration, Party Autonomy and Mandatory Rules*, Oslo, Norway: Tano-Aschehoug, 1999, see also above n. 2

¹⁷ Figueroa Valdes, Juan Eduardo, *La Etica en el Arbitraje Internacional*, XXXIX Conference, Inter-American Bar Association, New Orleans, June 2003

¹⁸ Makenzie, Ruth, Sands Philippe, *International Courts and Tribunals and the Independence of the International Judge*, Conference paper, University of Pennsylvania School of Law, 2001

¹⁹ Gonzalez de Cossio, Francisco, *Independencia Imparcialidad y Apariencia de Imparcialidad de los Arbitros*. Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana, nº 32, 2002.

²⁰ Lorvarth, Gunther J.L. *The Selection of Arbitrators*, Center for International Legal Studies, International Construction Law and Dispute Resolution, June 1998.

²¹ Block, Sheila, *Ethics in International Proceedings*, International Bar Association, International Litigation News, October 2004.

²² Ibid.

²³ Redfern, 2003, pp.212-213.

connection between the arbitrator and one of the parties, the less independent the arbitrator is. The concept is related to an objective measure in the sense that it is possible to determine what is the relationship between the arbitrator and the party in question. Hence, the quid is to determining what is the necessary proximity between both to consider an arbitrator “dependent”²⁴. A clearer example of the concept of independence can be found in the ICC rules of arbitration requiring each arbitrator to declare whether there pre-exists any kind of relationship, past or present, direct or indirect, with any of the parties or counsellors assisting them.

Unlike independence, the concept “partiality” is more abstract being a state of mind that only can be proved through facts²⁵. Impartiality is the absence of any bias in the mind of the arbitrator towards a party or the matter in dispute²⁶. Is the absence of any favouritism and the obligation and commitment to serve all the parties as opposed to a single²⁷. Hence, impartiality and independence are different concepts, as Bishop and Reed note:

An arbitrator who is impartial but not wholly independent may be qualified, while and independent arbitrator who is not impartial must be disqualified. In selecting party-appointed arbitrators in international arbitration, the absolutely inalienable and predominant standard should be impartiality²⁸.

To better illustrate the concept of impartiality and independence we may list some arguments used to challenge an arbitrator²⁹:

- Barristers from the same chamber³⁰
- Arbitrator’s comment that “Portuguese people were liars”³¹
- Arbitrator being a former official adviser of the government³²
- Arbitrator acted as consultant previously for a party to the arbitration³³
- Allegation of past partial behaviour of the arbitrator³⁴
- Conferring with a party by the party-appointed arbitrator³⁵

²⁴ Gonzalez de Cossio, 2002.

²⁵ Redfern, 2003.

²⁶ Scott Donahey, M., *The UDRP and the Appearance of Partiality: Panelist Impaled on the Horn of a Dilemma* Paper, Tomlinson Zisko Morosoli & Maser LLP, 2001.

²⁷ *Mullerat Ramon*, Ethical Rules for International Arbitrators, published by the Chicago International Dispute Resolution Association,

available at <http://www.cidra.org/articles/ethics/ethicalrules-03.htm>

²⁸ Bishop D, Reed L , *Practical Guidelines for Interviewing, Selecting and Challenging Party Appointed Arbitrators in International Commercial Arbitration* Arbitration International 14, 345, 1998.

²⁹ Alam, Naser, *Independence and Impartiality in International Arbitration-An Assesment*, National Commissioner, International Chamber of Commerce Bangladesh.

³⁰ *Laker Airways Inc. v. FLS Aerospace LTD.* [2000] 1WLR 113

³¹ *The Owners of the Steamship “Catalina” and Others and The Owners of the Motor Vessel “Norma”* (1938) 61 Ll.L.Rep. 360

³² *Buraimi Oasis* arbitration.

³³ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

³⁴ *Tracom SA v. Gibbs Nathaniel (Canada) LTD and another* [1985] 1 Lloyd’s Rep 586.

³⁵ *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* (1993) 10 F. 3d 753 (11th Cir.)

In addition to independence and impartiality there is another concept, namely that of “neutrality”. Once again, it is not an easy task to distinguish impartiality and neutrality at a first sight³⁶. As with impartiality, this requirement is not bound with the concept of the independence of the arbitrator³⁷. The concept of neutrality is linked to the nationality of the arbitrator and, in such case, parties from different nationalities will require the presiding arbitrator to have a different nationality³⁸. This is reflected for instance in the Stockholm Chamber of Commerce arbitration rules, where article 16.8 requires the sole arbitrator to be of a different nationality, “unless the parties have agreed differently or if otherwise deemed appropriate by the SCC Institute”³⁹. In the same sense the ICC rules provide that ‘The sole arbitrator or the chairman of an arbitral tribunal shall be of a nationality other than those of the parties’⁴⁰.

This requirement (which could be waived with the agreement of both parties) is, to an extent, a psychological measure. It is designed to provide the parties the conviction that the arbitral tribunal is neutral and independent⁴¹. In the opinion of the International Chamber of Commerce, it is this conviction the one “that facilitates the decision of so many losing parties to honour voluntarily the ICC arbitral awards”⁴². In addition, the concept of neutrality implies a subjective requirement as well. Arbitrators must be open minded, aware of cultural issues and without any prejudice as well as internationally minded⁴³. In this regard often the parties (particularly from Eastern Europe and developing countries) have complained regarding the arrogance and superiority attitude of one of the arbitrators composing the tribunal⁴⁴. In this regard, the ICC rules and practice in the constitution of the arbitral tribunal are specifically designed to produce “good arbitral tribunals” both in the reality and in the eyes of the parties⁴⁵.

As Redfern notes⁴⁶, the UNCITRAL Rules are less restrictive than the ICC Rules, they *advise* of the convenience to appoint an arbitrator with another nationality:

In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the *advisability* of appointing an arbitrator of a nationality other than the nationalities of the parties.⁴⁷

As we have noted above, the impartiality and independence of arbitrators is required in most of the arbitral processes to protect the arbitral institution itself. Arbitration remains a

³⁶ Jarvin, Sigvard, *Appointment of Arbitrators*, Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm Arbitration Report 25, June 2002.

³⁷ Ibid.

³⁸ Redfern, 2003, pp.212.

³⁹ SCC Rules, Article 16.8, see also above n. 37

⁴⁰ ICC Arbitration Rules, Art 9.5

⁴¹ Bond, Stephen R., *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Nw. J. Int'l L. & Bus.

⁴² Ibid.

⁴³ Ibid

⁴⁴ Ibid.

⁴⁵ Ibid

⁴⁶ Redfern 2003.

⁴⁷ UNCITRAL Arbitration Rules, Art 6.4 (emphasis added).

credible ADR as long as the process to achieve the arbitral award is perceived as fair⁴⁸. As an essential element of this fairness is the request for arbitrator to make its own decision, ideally without any kind of bias predisposing him towards one of the parties⁴⁹. However, the very nature of the arbitral process may prejudice the arbitrators. The selection of the arbitrator, especially in party-appointed arbitrations can indeed incline the arbitrators, often lawyers in practice, to protect the interest of the party who nominated them, and at the same time the parties may try to influence the arbitrator in their favour⁵⁰. Thus, it may come at no surprise to encounter the following words by a legal practitioner; ‘In choosing an arbitrator to be nominated by a client, I look for the maximum predisposition towards my client consistent with the minimum appearance of bias’⁵¹.

In party appointed arbitration it is known that the arbitrators may be predisposed in favour of one of the parties, being the appointment of the arbitrators a chance to shape, to an extent, the outcome of the arbitration process⁵². However, in the opinion of Redfern and Hunter, in practice although the arbitrators may be predisposed in favour of one of the parties, most of the non-neutral arbitrators “do not allow this to override their conscience and professional judgement if they believe that the other party has made a better case”⁵³.

In practice, this may be questionable. In a socio-legal study made by Pierre Bourdieu, Yves Dezalay, and Bryant G. Garth (1996) in which they analyse the arbitration community they distinguish two generations of arbitrators; ‘the grand old men’ and ‘the new generation of arbitration technocrats’⁵⁴. ‘The grand old men’ are arbitrators, most of them from Europe and with academic backgrounds, appointed as arbitrators due to their professional and intellectual prestige. On the other hand, the new generation is led by US law firms with offices in Paris whom have founded a new business line in Paris due to the ICC arbitrations. They conclude that the new generation of arbitrators run its arbitration services much more as an US styled enterprise; being the clients’ needs the main point for their decision making processes⁵⁵. Dezelay and Garth also conclude that in the battle between both generations the new one seems to be winning, as, at the moment, the market for international business disputes is more transparent and competitive than the past corporatist club of the old grand men⁵⁶.

In this sense, the ideal of the party appointed arbitrator pictured by Redfern and Hunter it is doubtful. In practice, international commercial arbitration struggles between two tensions. As noted by Gunther Horvarth, “The nature of the tension inherent to the arbitration process is thus clear: it is a tension of an ideal- perfect fairness of the arbitrator

⁴⁸ Horvarth, Gunther J.L. *The Selection of Arbitrators*, Center for International Legal Studies, International Construction Law and Dispute Resolution, June 1998.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Smit .H. Pechota V. *The Roster of International Arbitrators*, Juris Publishing’, Sweet & Maxwell, in Lorvarth, Gunther J.L. *The Selection of Arbitrators*, Center for International Legal Studies, International Construction Law and Dispute Resolution, June 1998.

⁵² See above Lovarth, Gunther.

⁵³ Redfern,2003 pp.213.

⁵⁴ Appelbaum, R.P.Felstiner,William L.F, Gessner V., *Rules and Networks: The Legal Culture of Global Business Transactions*, The Oñati I.I.S.L. Hart Publishing Oxford and Portland, Oregon 2001, see also Dezelay Ives, Garth Bryant G., *Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago, University of Chicago Press, 1996.

⁵⁵ As above

⁵⁶ As above.

against the reality that the very method by which arbitrators may be selected can undermine such fairness”⁵⁷.

The appointment of party nominated arbitrators is theoretically distinct from the non-neutral party appointed arbitrators that are usual in certain trade arbitrations and domestic procedures (USA)⁵⁸. Whatever the reasons for each party to nominate a particular arbitrator, in most of the arbitral institutions worldwide the arbitrator must be non partisan theoretically. Nevertheless the reality often is different, as Toby Landau notes:

In practice, the party appointed arbitration system of international arbitration shares many features from its American stepsister of dubious integrity, the institution of partisan arbitrators. Under both systems rather than selecting each arbitrator solely, on the basis of his qualifications and integrity parties tend to choose their party appointed arbitrators on the basis of advocacy skills and perceived willingness to toe the party line, and to nominate a chairman based on the potential symbiosis between the nominee and the party’s party appointed arbitrator. Ironically even if the party appointed arbitrator chosen in fact is completely neutral, he will frequently be viewed by his co-arbitrators to as expounding to some extent the party line thereby diminishing his influence within the panel and, most notably, with the Chairman. Finally the incentive to compromise inherent in the party appointed arbitrator system also lends itself to the splitting the baby phenomenon with which arbitration is widely associated in the United States⁵⁹.

In fact, in most arbitral institutions in party appointed arbitrations composed by three arbitrators, the third one is nominated by the arbitral institution instead by the parties in an effort to maintain an equilibrium⁶⁰. For instance article 8.4 of the ICC Rules provides that;

Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request for Arbitration and the Answer thereto respectively one arbitrator for confirmation by the Court. The third arbitrator, who will act as a Chairman of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation by the Court⁶¹

However, it has been commented that an obvious favouritism from one of the appointed arbitrators may be counterproductive for the interest of the party. As Martin H. Hunter note:

It is entirely counterproductive to a party’s interest if the arbitrator he has nominated demonstrates (inadvertently or otherwise) at an early stage of an arbitration that hi is going to vote for that party regardless of the merits of the case. The Chairman will nearly always lean away from forming a majority award with an arbitrator who is obviously acting simply as an advocate for the party who

⁵⁷ Horvarth, Gunther J.L. *The Selection of Arbitrators*, Center for International Legal Studies, International Construction Law and Dispute Resolution, June 1998.

⁵⁸ Bond, Stephen R., *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Nw. J. Int’l L. & Bus.

⁵⁹ Landau, Toby, *Composition and Establishment of the Tribunal* 9. Am. Rev. Int’l Arb.45 1998

⁶⁰ Ibid

⁶¹ ICC Arbitration Rules Article 8.4

nominated him, parties ought to bear this in mind when making their nominations

⁶².

IV. Impartiality and Independence in International Arbitral Institutions

International institutions all over the world promote the perfect fairness of the arbitrator idea. The requirement of impartiality and independence are widely emphasised in the rules and codes of most arbitral institutions and formulating agencies like UNCITRAL, ICC, ICSID and LCIA, AAA and IBA⁶³.

In this regard the arbitration rules of the International Chamber of Commerce (ICC) provide in its article 7.1 that; "Every arbitrator must be and remain independent of the parties involved in an arbitration"⁶⁴.

Article 7.2 contains a precaution measure in this respect when it states that;

Before its appointment or confirmation a person proposed as an arbitrator must sign a declaration of his independence and turn over to the Secretariat a written report on any fact or circumstance that from the perspective of the parties may jeopardise his independence. The Secretariat must turn over such written report to the parties and set a deadline for the parties to express their opinion on the matter.

The rules also allow in article 2.8 for the challenge of the arbitrator for the lack of independence or otherwise⁶⁵.

Surprisingly, the rules do not mention the concept of impartiality, only emphasising the independence of arbitrators. This absence does not allow the arbitrator to be "partial". It was decided to use solely the term independence due to its ability to be measured objectively, unlike the term "impartiality", a state of mind difficult to prove⁶⁶. The first specific reference to the arbitrators' independence in the ICC Rules was made in 1975; until then, ICC Rules were only related to co-arbitrators⁶⁷. Later, in 1980, the independence requirement was extended to sole arbitrators and the Chairman, in the Internal Rules of the Court⁶⁸. A proposal to include the concept of impartiality was made in 1988 ICC Rules. Nevertheless, the proposal was finally rejected due to the difficulty to

⁶² Hunter, J Martin H. Presentation in ICC publication No. 472 (1991) p. 25. See also Horvarth, Gunther J.L. *The Selection of Arbitrators*, Center for International Legal Studies, International Construction Law and Dispute Resolution, June 1998.

⁶³ Redfern, 2003 pp.213.

⁶⁴ Article 7.1 ICC Arbitration Rules.

⁶⁵ Article 2.8. ICC Arbitration Rules, see also Redfern 2003.

⁶⁶ Figueroa Valdes, Juan Eduardo, La Etica en el Arbitraje Internacional, XXXIX Conference, Inter-American Bar Association, New Orleans, June 2003.

⁶⁷ Horvarth, Gunther J.L. *The Selection of Arbitrators*, Center for International Legal Studies, International Construction Law and Dispute Resolution, June 1998.

⁶⁸ Ibid.

define the concept satisfactorily⁶⁹. In addition to these issues, the rules do not explain what is meant by the term independence⁷⁰.

The independence and impartiality of arbitrators are also mentioned in the IBA draft guidelines on impartiality, independence and disclosure. These general standards are abstract, and overall they establish that an arbitrator must remain impartial and independent throughout the arbitral proceedings and are required to resign voluntarily when he or she has doubts regarding his or her impartiality or independence⁷¹. Article 1 establishes that; 'Arbitrators shall proceed diligently and efficiently to provide the parties with a fair and effective resolution of their disputes, and shall be and shall remain free from bias'.

Further on, the guidelines also address the conflicts of interests that may arise when an arbitrator is a member of a law firm at the same time, establishing that the activities of an arbitrator's firm shall not *per se* be considered as creating a conflict⁷². As we have mentioned before, nowadays the developments in the international legal profession have raised new circumstances creating important conflicts of interest. Arbitrators are often partners of transnational legal firms with offices in many countries throughout the world⁷³. Could then an arbitrator be independent from a party's counsellor belonging to another office of the same firm? According to the ICC practice Court, it is likely to consider that the link between both is close enough to influence the arbitrator's independence⁷⁴. In reality, these relationships can be more complicated. As Carlevaris points out, it may be the case that the arbitrator may have a partner who lives in a different country and belongs to different offices of the same law firm who has advised a company belonging to the same group of companies as one of the parties to the arbitration on totally different matters⁷⁵. Another doubt regarding the arbitrator's independence may arise in recent relationships and alliances between law firms which do not constitute a merger⁷⁶. In this regard, 'the main criteria on which the ICC Court bases its rulings on these issues is that of the arbitrator's economic interest in the outcome of the arbitration, and of the possible profit-sharing system existing among the various offices of law firms involved'⁷⁷.

On the subject of local chambers of commerce, the Chamber of National and International Arbitration of Milan for instance, in its code of ethics of arbitrators, requires in its article 5; 'When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to perform his task with the necessary impartiality characterising the adjudicating function he undertakes in the interest of all parties'⁷⁸.

⁶⁹ Ibid

⁷⁰ Carlevaris, Andrea, *Global Development: The 1998 ICC Rules and Some Recent Trends in International Commercial Arbitration*, 9 Croat. Arbit. Yearb. 27, 2002

⁷¹ Wiwen-Nilson, T. *IBA Draft Guidelines on Impartiality and Independence*, Stockholm Arbitration Newsletter, 2/2003.

⁷² Ibid.

⁷³ Carlevaris, Andrea, *Global Development: The 1998 ICC Rules and Some Recent Trends in International Commercial Arbitration*, 9 Croat. Arbit. Yearb. 27, 2002

⁷⁴ Ibid.

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Chamber of National and International Arbitration of Milan, Code of Ethics of Arbitrators, Article 5

In that case, the independence of arbitrators is also mentioned by article 6, with the requirement of the independence as long as the arbitration lasts; 'When accepting his mandate, the arbitrator shall, to the best of his knowledge, be objectively independent. He shall remain independent during the entire arbitral proceedings as well as after the award is filed, during the period in which annulment of the award can be sought'⁷⁹.

Generally, in the arbitral institutions above mentioned the lack of impartiality and independence is sufficient for the parties to challenge the arbitrator in question, in this regard the UNCITRAL model law on international commercial arbitration establishes the following;

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made (article 12.2)⁸⁰.

V. The Disclosure Requirement

International arbitration rules normally require the disclosure from the arbitrator of any circumstances or facts that may influence a reasonable person against one of the parties⁸¹. Generally speaking, the disclosure is an on going requirement for the arbitrator throughout all the arbitral process, if any new circumstances arise that may influence his impartiality or independence, he should disclose them⁸². However this inclusion of the disclosure requirement has not been standardised in the codes and rules of international arbitral institutions, perhaps with the objective of differentiating one from another, and thus the requirements are more specific in some institutions than others⁸³. In this respect, the United Nations Commission on International Trade Law in its arbitration rules establishes the following;

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances⁸⁴.

The American Arbitration Association's (AAA) Arbitration Rules establishes in similar terms that;

Arbitrators acting under these rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's

⁷⁹ Chamber of National and International Arbitration of Milan, Code of Ethics of Arbitrators, Article 6

⁸⁰ Uncitral Arbitration Rules article 12.2

⁸¹ Scott Donahey, M, *The UDRP and the Appearance of Partiality: Panelist Impaled on the Horn of a Dilemma* Paper, Tomlinson Zisko Morosoli & Maser LLP, 2001.

⁸² Redfern and Hunter (2003)

⁸³ Horvath, Gunther J.L. *The Selection of Arbitrators*, Center for International Legal Studies, International Construction Law and Dispute Resolution, June 1998.

⁸⁴ UNCITRAL Arbitration Rules article 9.

impartiality or independence. If, at any stage during the arbitration, new circumstances arise that may give rise to such doubts, an arbitrator shall promptly disclose such circumstances to the parties and to the administrator. Upon receipt of such information from an arbitrator or a party, the administrator shall communicate it to the other parties and to the tribunal⁸⁵.

In the case of the ICC, article 2 (7), paragraph 2 of the Arbitration Rules provides that;

Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.⁸⁶

In practice, in party appointed arbitrations, *the person approached to act as an arbitrator will normally* disclose informally any relevant circumstances to his prospective client⁸⁷. If the prospective appointing party considers that the facts disclosed by the arbitrator are not relevant to influence his independence and impartiality, the arbitrator should, after his appointment, write formally the facts disclosed delivering them to both parties⁸⁸. Hence, these disclosure requirements in international commercial arbitration are intended to avoid any justifiable doubt regarding the impartiality of an arbitrator. The disclosure element has important implications *a posteriori*. As Redfern and Hunter note, once the arbitrator has fulfilled the requirement of disclosure all the circumstances potentially ground for a disqualification and there are not objections in this regard, any subsequent challenge to the arbitrator based on this circumstances are null.

VI. The ICC Statement of Independence

In ICC arbitration rules there are some particularities regarding the disclosure requirement. For instance, even if the parties do not object after the disclosure of potential circumstances by the arbitrator, the ICC court on its own initiative is able to disqualify and reject the arbitrator due to the broad powers that the Court has under article 9.1⁸⁹. However, the ICC has been reluctant to doing so and would probably need to be very sure of the lack of independence to take such step⁹⁰.

In ICC arbitration there is an additional requirement attached to the disclosure requirement, that is the "arbitrator's statement of independence"⁹¹. To further the objectives pursued by the disclosure requirement, in 1989 the Bureau of the ICC Court (composed by a Chairman and Vice-Chairmen from France, Egypt, India, Japan, Mexico, Sweden, Switzerland and the United States) approved a text of the 'Arbitrator's Statement of Independence' a statement which every arbitrator must fill before taking part in the

⁸⁵ AAA International Arbitration Rules (1997), Article 7.

⁸⁶ ICC Arbitration Rules, Article 2.7

⁸⁷ Redfern, Alan, Hunter, Martin, *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 2003 pp.217.

⁸⁸ Ibid

⁸⁹ Carlevaris, Andrea, *Global Development: The 1998 ICC Rules and Some Recent Trends in International Commercial Arbitration*, 9 Croat. Arbit. Yearb. 27, 2002

⁹⁰ Ibid

⁹¹ Bond, Stephen R., *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Nw. J. Int'l L. & Bus. 1, 1991.

procedure⁹². In it, the arbitrator must disclose any relationship with the counsel of the parties and with the parties themselves that 'might be of such a nature as to call into question the arbitrator's independence in the eyes of any of the parties'⁹³. Some concerns arise regarding the disclosure of any relationship with the counsel. In some countries like Switzerland and Belgium the legal community is relatively small and legal practitioners often have relations with each other. The statement requires to disclose relationship with counsels and therefore it could unfairly disqualify competent lawyers from these countries from ever becoming arbitrators. Nevertheless, it is important to note that in these statements of independence where arbitrators have disclosed circumstances affecting their independence, over 95% of the parties did not raise any kind of objections⁹⁴.

VII. Ethics and objectives of the International commercial arbitration

Taking into account all the considerations above mentioned, it seems that international arbitration is a unique and hybrid institution where public policy, private interests and credibility mechanisms can be found. To have a clear definition of the nature of the international commercial arbitration it is important to be able to define *a posteriori* the requirements that an arbitrator should fulfil, although there seems to be a lack of understanding the nature of the arbitral process. There are at least five different theories regarding the very nature of international commercial arbitration: the jurisdictional theory, the contractual theory, the hybrid theory, the autonomous theory and the concession theory⁹⁵. The jurisdictional theory is based on the jurisdictional powers of the nation-state to control any international commercial arbitration within its boundaries. The contractual theory on the other hand argues that international commercial arbitration has its origin in the agreement between the parties to conduct any possible dispute by arbitration and therefore it should be based and conducted according to the parties wishes⁹⁶. The hybrid theory is a mix of the jurisdictional and contractual theory maintaining that both characters can be found in international commercial arbitration. The autonomous theory is a more recent approach and is more focused on the purpose of international commercial arbitration. Instead of trying to fit international commercial arbitration in the framework of the existing legal framework, it dismisses the traditional theory maintaining that international arbitration is an autonomous institution which should not be restrained by the rules of the place of arbitration⁹⁷. Finally, the concession theory proposes and state centric approach, maintaining that the state has the monopoly in the administration of justice and hence it has the prerogative to decide which kind of disputes can be submitted to arbitration⁹⁸.

From the point of view of the International Chamber of Commerce and the International Court of Arbitration, arbitration is a tool to promote and aid international trade and investment 'by providing a neutral, independent and impartial method of resolving international commercial disputes through effective and reasonably predictable

⁹² Ibid.

⁹³ ICC Arbitration Rules, Article 2.7, see also above n. 90

⁹⁴ Ibid.

⁹⁵ Lin Yu, Hong, *Explore the Void, An Evaluation of Arbitration Theories*, Int. A.L.R 2004, 7(6), 180-190.

⁹⁶ Ibid.

⁹⁷ Ibid

⁹⁸ Ibid

procedures⁹⁹. Thus, it seems that it ICC has a 'contractual theory' approach and hence the impartiality and independence requirements have a utilitarian nature rather than a jurisdictional nature. As Stephen Bond notes 'for the business person time is money and money is also money. Moreover, the parties will accept the alternative of arbitration only insofar as they are confident that the objectives sought are truly obtainable and the means required to reach these objectives are available'¹⁰⁰. Hence the requirement of impartiality and independence of arbitrators are important tools for the parties submitting a case to arbitration, as there are elements essential to feel 'confident that the objectives sought are obtainable'¹⁰¹. But are these elements essential in all cases?

VIII. Conclusions

The International business community is choosing more and more international commercial arbitration as a system to resolve their disputes due to its suitability, in comparison with litigation before national courts, to resolve disputes in a neutral, confidential, rapid, flexible and less expensive manner. The trust of the parties in international arbitration is also based in part, and only in part, on their expectations that the arbitrators composing the tribunal are entirely independent and impartial¹⁰². The requirement of impartiality and independence on an arbitrator is less important in some cases than others. We must take into account that international commercial arbitration pursues practical objectives, and in some cases like in party-appointed arbitrations this objectives are achieved in practice without a purely neutral tribunals and without *ordre public* considerations. As Gunther Hovarth note, international commercial arbitration is trapped between two tensions, the ideal of the prefect and absolutely neutral arbitrator and the reality where the very process of choosing arbitrators can undermine such ideal.

⁹⁹ Bond, Stephen R., *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Nw. J. Int'l L. & Bus. 1,1991

¹⁰⁰ Bond, Stephen R., *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Nw. J. Int'l L. & Bus. 1,1991

¹⁰¹ As above

¹⁰² As above

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