INTERNATIONAL COMMERCIAL ARBITRATION

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What obligations do the parties and the arbitrators owe to each other? What protection does law offer each group?

An Arbitrator's authority is derived from law and his jurisdiction is derived from or based on will of the parties. The arbitrator's authority is no broader than that defined by the parties and law defines some of his rights and duties. Not only national legislators set limits inside which an arbitrator must act but international customs, usages, conventions also play an important role. In a broad sense, the status of arbitrators encompasses the aspect of all their rights and duties throughout the arbitral proceedings. This extends to the arbitral hearings, the determination of law governing the substance of the dispute and the making of the award-all matters where arbitrators enjoy considerable powers. Arbitrators are empowered by the parties to decide their dispute. That judicial power is the principal characteristic of their role and enables arbitration to be distinguished from superficially similar concepts such as expert proceedings, conciliation and mediation. The fact that an arbitrator has the ad-judicatory power has given rise to the Jurisdictional theory. According to this theory, the State allows within its territory privately administered justice systems (delegated justice or parallel justice) by way of assignment or tolerance. This follows from the legal effect a State and its legal system attaches to an arbitration agreement and to an arbitral award. Consequently, arbitrators can be said to exercise a public function[1].

There is another theory, which emphasises that arbitration has a contractual character. It has its origin in and depends for its existence and continuity on the parties' agreement. The supporters of the this theory deny the primacy or control of the State in arbitration and argue that the very quintessence of an arbitration is that it is ' created by the will and consent of the parties.' As per the mixed or hybrid theory, arbitration is a private justice system that is created by a contract and the autonomous theory advocates in particular its trans-national and delocalised nature. Despite the numerous and varied theories existing vis-à-vis the status of arbitrators, some rights and obligations imposed on the arbitrators are more or less universally accepted.

The sources, which contribute to the definition of the rights and obligations of arbitrators, include guidelines for arbitrators, the practise of arbitral institutions, certain provisions of arbitral institutions, as well as codes of ethics adopted by such institutions and by Bars and Bar Associations.

[1] See further Carabiber, RCADI 1960-I,148-50

REQUIREMENTS/ OBLIGATIONS IMPOSED ON ARBITRATORS

Most national laws, international conventions and arbitration rules provide that arbitrators must be **independent and impartial**[2].

On occasions the courts have also required neutrality or objectivity on the part of arbitrators. The UNCITRAL Model Law has added impartiality as a condition apart from independence of the arbitrator (Art. 12(2)) and was followed in that respect by the Netherlands Code of Civil Procedure (Art. 1033(1)) , the Tunisian Arbitration Code (Art. 57) ,the German Arbitration statute of Dec 22,1997 (Art.1037 of the ZPO) The English Arbitration Act only contains the requirement of impartiality (Sec. 24(1) (a)) as does the 1999 Swedish Arbitration Act (Sec.8).The ICC Rules (Art. 7(1)) only requires arbitrators to be independent from the parties involved [3] .The 1965 Washington Convention also lays emphasis on the condition of independence of arbitrators.

Independence is a situation of fact or law capable of objective verification. It is dependent on various factors such as past, or present relations with any of the parties to the dispute, whether personal, business or any other relationship which is reasonably likely to affect the independent exercise of mind by the arbitrator. Impartiality on the other hand, is more a mental state, which will necessarily be subjective. It amounts to the absence of risk of bias on the part of arbitrator towards one of the parties. The impartiality of an arbitrator is often disputed on the grounds that he or she is already familiar with the dispute, or a connected dispute, from a previous arbitration. Nevertheless, in the absence of any prior decision by the arbitrator which may be characterised as prejudice with respect to the subsequent case , the courts have held that there is no reason to prevent that arbitrator from participating in the connected proceedings. A second situation where accusations of bias arise results from an arbitrator's prior conduct. Such prior conduct may be the position taken by an arbitrator in a general discussion on a legal or professional matter, which a party claims is contrary to its interests.

A well know author, Lalive has suggested that the concept of neutrality involves the " arbitrator taking a certain distance in relation to his legal, political and religious culture," not confining himself to his own traditions, or an intellectual openness to other ways of thinking. The independence of arbitrators and their neutrality can be enhanced by their nationality. If their nationality is different from that of the parties, it can be assumed that they will have greater freedom of judgement. This explains the requirement found in some arbitration rules that a third or sole arbitrator must not share the nationality of any of the parties.[4]

The distinction between neutral and non-neutral arbitrators has been approved by the United States courts and was confirmed and clarified in the " Code of Ethics for

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[2] See THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS (ICC PUBLICATION No. 472,1991) Aldo Berlinguer, impartiality and independence of arbitrators in International practice ,6 AM.REV.INT'L ARB.339 (1995)D.Bishop and L.Reed , practical guidelines for interviewing, selecting and challenging party –appointed arbitrators in International Commercial Arbitration, 14 ARB. INT'L 395 (1998)

[3] See Michel A. Calvo, The Challenge of the ICC arbitrators-Theory and Practice ,15 J. Int'L ARB.63 Dec 1998)

[4] See, e.g. Art.9 (6) of the ICC Rules, Art. 6 .1 of the LCIA Rules, Rule 22 of the Indian Council of Arbitration Rules.

arbitrators in Commercial Disputes jointly adopted in 1977 by the AAA and the American Bar Association. Arbitrators' obligations of independence and impartiality were set forth in six canons, with a seventh canon covering " ethical considerations relating to arbitrators appointed by one party." According to the code, a party appointed arbitrator is not expected to be neutral and unless the parties or the rules applicable to the arbitration provide otherwise, he is not obliged to comply with the same standards as the third arbitrator. Perhaps as a response to the position in U.S domestic arbitration, in 1987, the International Bar Association adopted " Rules of Ethics for International Arbitrators." These Rules state from the outset that " international arbitrators should be impartial, independent" and that they "shall be and shall remain free from bias " (Article 1: Fundamental Rule). In the 1997 Rules, the AAA has now removed the option allowing the parties to agree to appoint non – neutral arbitrators.

Duty of Disclosure

Any person asked to assume functions of an arbitrator must inform the parties and the appointing authority or arbitral institution of all the circumstances, which, from the parties' view, might be likely to affect his or her independence or impartiality. The UNCITRAL Model Law in its Article12, paragraph 1 states:

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

The same wording is to be found in Canada's federal and provincial arbitration laws, the Tunisian Arbitration Code of 1993(Art.57) and the 1997 German Arbitration Law (Art. 1036 (1) of the ZPO) .International arbitration rules consistently impose the duty of disclosure such as UNCITRAL Rules (Art. 9), the ICC Rules (Art. 7(2) of the 1998 Rules, the LCIA Rules (art.5.3 of the 1998 Rules.).

PROTECTION OF LAW AVAILABLE TO THE PARTIES IN CASE OF BREACH OF OBLIGATION OF ARBITRATOR TO BE INDEPENDENT AND IMPARTIAL

The party making such a claim has two possible remedies: it can challenge the arbitrator or seek to have the award set aside (if the award has already been made when a party becomes aware of the circumstances affecting the arbitrators independence and impartiality). However, a party bringing the claim must demonstrate that the facts and circumstances on which it relies were not known to it prior to the appointment of the arbitrator. If the party was aware of such facts and circumstances at that time, it will be presumed to have waived that right to rely on them. This rule reflects a principle widely accepted in international arbitration and is described by UNCITRAL as a waiver of a party's "right to object"[5]. The courts draw

[5] Art.4 of the Model Law

a distinction according to whether the challenge has been rejected by a third party such as an arbitral institution or by a court In the former case, as decision is merely an administrative measure within the arbitral proceedings, it is not resjudicata and will not prevent the courts from determining after the award has been made, whether the challenge raised against the arbitrator and rejected by the arbitral institution constitutes a ground on which to refuse the action to enforce or set aside the award.

PROTECTION OF LAW AVAILABLE TO ARBITRATORS –PRINCIPLE OF IMMUNITY

The word " Immunity" in the present context is used by courts and authors in common law countries to highlight the principle that arbitrators cannot be held liable for the manner in which they perform their judicial functions. It is believed that they should also enjoy the protection enjoyed by judges, both during and after the proceedings. It can also be used in a civil law context where the immunity from prosecution traditionally enjoyed by judges may or may not be extended to arbitrators. This is intended to serve the public interest by guaranteeing that arbitral justice can function properly. In a case before the Reims Tribunal of First Instance , a party brought an action against the arbitrators seeking to recover the loss suffered as a result of their award. The court held that:

All of the claimants' arguments essentially amount to the general criticism that the arbitrators reached a wrong decision. In this context, the arbitrators could only incur liability in the event of gross fraud, fault, or connivance with one of the parties. Otherwise the protection., independence and authority of the arbitrators would be restricted to an extent that would be incompatible with the task of judging which is conferred on them.

A survey covering thirteen countries[6] suggests that the United States is the only country in favour of absolute immunity. The countries like Austria, England, Germany, and Norway only grant limited immunity. Legal systems which afford arbitrators no immunity include Spain, where the Arbitration Statute of December 5,1988 provides that arbitrators can be sued for loss caused by misrepresentation, or fault on their part (Art.16(1)) . The Austrian Code of Civil Procedure also admits such liability in the event of an unjustified default or delay (Art.584(2)).

Liability for failure to comply with Duty of Disclosure And For Wilful Violation of their obligations

There's no doubt that where an award is set aside because of arbitrator's fault, the parties expenses and costs incurred in the course of arbitral proceedings are wasted and that loss is recoverable. In addition to award of costs against the arbitrator in the court proceedings, the courts can also order the arbitrator to indemnify the parties of all or part of the costs incurred in their defence in the arbitral proceedings. The courts can also award damages for the costs of the new arbitral proceedings required after the setting aside of the award as a result of the arbitrator's conduct.[7]Even the United States courts make exceptions for wilful misconduct[8]. In England, the Arbitration Act,

[6] THE IMMUNITY OF ARBITRATORS (Julian D.M. Lew ed.,1990)
[7] See CA Paris,Oct.12,1995,VanLuijk
[8] Lundgren v freeman,307 F.2nd 104 (9th Cir. 1962)

1996 removes arbitrator's immunity when it is established that they acted in bad faith[9] and allows them to be held liable for losses resulting from their resignation. The French courts have been more restrictive. In the Bompart case , the Paris tribunal of First Instance held that " Civil liability can only be incurred when it is established that they have committed fraud, misrepresentation, or gross fault"[10] .Authors and practitioners seeking to determine when arbitrators will not enjoy immunity are broadly in agreement :any intentional fault, and any misrepresentative or fraudulent conduct will render them liable[11].In such cases the arbitrators violate their judicial obligations to act fairly and treat the parties equally.

THE CONTRACTUAL NATURE OF ARBITRATORS STATUS

Despite the judicial role of arbitrators, the source of their status remains contractual. Many authors such as Alan Redfern and Martin Hunter, Smith are supporters of the contractual approach. According to Fouchard and a few other authors like Mustill and Boyd, it is a suigeneris contract that shares the hybrid nature of arbitration itself: its source is contractual but its object is judicial. In the recent years, courts of various jurisdictions have expressly recognised the existence of s a contract between the arbitrators and the parties to the arbitration, and the consequences that result from that relationship. In England, in Compagnie Europeene De Cereales S.A. v. Tradax Export S.A followed by K/S Norjarl A/S v. Hundai Heavy Industries Co. Ltd,(1992) 1 Q.B 863, the courts confirmed that by accepting their appointment ,arbitrators contractually undertake to fulfil their brief diligently, in return for remuneration and that by accepting their functions they become a party to the arbitration contract. The French courts in cases like Quasiconsult v. Groupe Lincoln have adopted a similar approach. The contract between the arbitrators and the parties, which is like a contract for provision of services, is bilateral and creates rights and obligations for both parties and the arbitrator.

OBLIGATIONS OF AN ARBITRATOR

1. All arbitrators are obliged to act equitably and impartially and to treat the parties equally throughout the proceedings and give proper opportunity to the parties to argue their case. The arbitrators generally are allowed to unilaterally conduct meetings with one of the parties without informing the other party and giving full details of such discussion and provided the merits of the case are not discussed (IBA Code of Ethics) .
2. Arbitrators must complete their functions within the legal or contractual deadlines that they have been given.
   If the arbitrator fails to deliver an award in the time given then he must apply to the competent court to obtain an extension of the deadline. If the arbitrator fails to apply he must be personally liable.
3. The arbitrators are obliged to carry out their function diligently.

   If the arbitrator fails to participate in the hearings or deliberation, he would be in breach of his duty to act diligently. If they do so in order to obstruct the

[9] secs.29(1) and (3) and 25
[10] TGI Paris, June 13,1990
[11] See Philippe Fouchard, Final report on the status of the Arbitrator- A Report of the ICC's Commission on International Arbitration, ICC BULLETIN, Vol.7,No.1,at 27 (1996)

proceedings, in the interest of party who appointed them, they will be liable for wilful misconduct. Also, arbitrators are obliged to pursue their functions till the final award is made and they cannot resign without proper grounds. This rule is commonly found in many statutes like the French law (Art. 1462 of the New Code Of Civil Procedure), Italian Law (Art.813 of the Code of Civil Procedure), and the Dutch law (Art. 1029(“) of the code of civil procedure.) .Iran –United States Claims tribunal at Article 13, paragraph 5 provides that arbitrator must continue to serve in all cases where they have already participated in a hearing on the substance of a dispute. However, they may resign on proper grounds such as it may become impossible to carry on their functions due to serious illness or old age, circumstances may arise which affects their independence vis-à-vis the parties, etc.

4. Duty of confidentiality of the arbitrators

Arbitration rules and Code of ethics generally specify this obligation of the arbitrators. Article 34 of the AAA International Arbitration Rules (similar to Art.30.2 of the 1998 LCIA Rules) provides that-

Confidential Information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award .

REMEDIES FOR NON_COMPLIANCE WITH ARBITRATOR’S OBLIGATIONS

A party is entitled to challenge the validity or enforceability of the award where the arbitrator has failed to observe the principles of equality or due process, or if they have made the award after the applicable deadline has expired.

The most effective way of dealing with the delaying tactics of the arbitrators resigning in the midst of the arbitration proceedings is to continue with a truncated tribunal without replacing the resigning arbitrators. Article 11 of the AAA is to this effect. However, another method is for replacement arbitrator to be directly appointed by the appointing authority or the competent court. Article11 of the 1998 LCIA Rules and Art.12.4 of the 1998ICC Rules ,Sec 16 of the 1999 Swedish Arbitration Act and Art.813 of the Italian Code Of Civil Procedure have adopted this approach.

Arbitrators can be removed if they become unable or refuse to pursue their functions and especially where it is established that they have acted negligently or are guilty of misconduct. Only agreement of the parties is required for their removal in this case.

An arbitrator will be dismissed where he fails to satisfy the qualities required of persons acting in a judicial capacity. Dismissal is generally sought by one party only and in the event that the challenge is contested, the matter is decided by arbitral institution, the appointing authority or the courts.

Criminal liability may arise when an arbitrator commits a breach of his obligation to act as independent and impartial judge. Certain legal systems impose special forms of criminal liability, e.g in case of passive corruption.[12]

Although in their judicial capacity arbitrators enjoy a degree of immunity which prevents them from being sued in respect of errors yet, a fault committed in conducting the arbitral proceedings constitutes a breach of contract ,and as remunerated providers of services the arbitrators are accountable for such breaches under the ordinary law of contract. For instance, the Austrian Code of Civil Procedure provides in its Article 584, paragraph 2 that arbitrators who have failed to perform, or failed to perform in due time, the obligations they assumed on accepting their functions, are liable to the parties for any loss caused by their default or delay, without prejudice to the parties ' right to request that the arbitral proceedings be terminated. Similarly, 1986 Portuguese Law in Art. 9.3 lays down that an arbitrator who having accepted his functions, refuses, without justification, to exercise them, shall be liable for any damage, which he may cause. The1998 LCIA Rules states that arbitrators are not liable for "any act or omission" in connection with any arbitration conducted in accordance with those rules, but that they can be liable for the consequences of " conscious and deliberate wrongdoing" The 1996 English Arbitration Act grants arbitrators immunity except where an arbitrator resigns or there is evidence of bad faith

The arbitrator may be imposed pecuniary liability in case he fails to perform his duties properly. Payment of his fees may be suspended or a party may claim its restitution.

RIGHTS OF THE ARBITRATORS

1.Right to Remuneration

They are entitled to remuneration from the parties who appointed them to decide the dispute. That remuneration is made by way of payment of fees.

The Italian code of Civil procedure states that arbitrators are entitled to be reimbursed in respect of their expenses and to receive fees for work which they have carried out, unless they have waived such rights. Article 84 of the Code states that if the parties donot accept the assessment and fees and expenses carried out by the arbitrators, they will be determined by the court. A similar provision exists in Belgian Law.

It is a well established rule of commonlaw that an arbitrator has alien over the award against the payment of fees and so has a right to bring an action for fees.

The IBA Rules of Ethics prohibit any unilateral financial arrangement between an arbitrator and the appointing authority as a safeguard for independence of all arbitrators.

[12] See Final Report on the Status of the Arpacity itrator-appendix II –Comparative Synthesis of Current Substantive Law in various Countries,ICC BULLETIN ,Vol.7,No. 1 ,at 37,39 (1996)

Arbitrator's moral rights

2.Arbitrators can legitimately expect the parties to cooperate throughout the proceedings. This principle is self-evident as a general principle, yet it is not explicitly mentioned in most of rules of arbitral procedure.

3. Arbitrators have the right to pursue their brief until its conclusion. They can only be dismissed with the consent of the parties. Arbitrators cannot be subject to the wishes of one of the parties and their mandate cannot be revoked unilaterally by the party that appointed him.

4.The confidentiality of the arbitral process is a right that an arbitrator can exercise against parties, any arbitral institution and even third parties (subject to review by courts).

Carter in one of his writings on rights and obligations of an arbitrator enumerated certain rights each, corresponding to the obligations of arbitrators detailed hereinbefore. These rights are as follows-

1. The right to limit disclosure about the arbitrator's background to what is reasonable under the circumstances.
2. The Right to reasonable flexibility in dealing with a party who may appoint the arbitrator.
3. The right to conduct arbitral proceedings in what the arbitrator considers a sensible way (including procedural aspects in the case of absence of agreement between parties).
4. The right to decide the case on the basis of the arbitrator's own assessment of the necessary issues and proof.
5. The right of an arbitrator in the minority to write a dissent from an award
6. The right of the arbitrator to tell appropriate 'War stories'

There is no document proclaiming these rights and few of them may be found in any institution's rules. They are infact inherent in an arbitrator's role.

Hence, we may have many different approaches to comprehend the unique relationship between an arbitrator and the parties to an arbitration, whether contractual, status approach or the like but in essence the nature of rights and obligations that they have against each other flows inherently from the unique nature of dispute resolution mechanism of arbitration itself. Whereas many of these have found a place explicitly in statutes, rules and codes, cases, etc. many like the rights of an arbitrator as suggested by Carter are yet to be proclaimed and placed in authoritative documents giving it the force of (and protection) law.

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