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"The Double Requirement that the Arbitrator be Independent and Impartial"

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Introduction

This essay is devoted to the double requirement that arbitrators be independent and impartial. In international arbitration a transnational standard mandating the application of this twofold requirement to both party-appointed and presiding arbitrators seems well-established. However, despite considerable discussions, a general consensus on its practical meaning, including the content of arbitrators' disclosure obligation, is still not reached.

This contribution intends to offer some thoughts on the matter, possibly together with practical indications, having regard to the traits and actual dynamics of international arbitration. The following points will be addressed: (*i*) independence and impartiality: an intuitive meaning; (*ii*) the double requirement in the context of international arbitration; (*iii*) standards for disclosure and disqualification; and (*iv*) conclusion.

Independence and impartiality: an intuitive meaning

In order to be an effective instrument to settle international disputes arbitration must necessarily offer the fundamental guarantee of fairness on which every adjudication process rests upon, namely that the decision makers be unbiased. Virtually all arbitration legislations and institutional rules call for what is often referred to as the double requirement of independence and impartiality.

Impartiality and independence seems so inextricably related that one can difficultly stands on its own.

Impartiality consists of the fair and unbiased state of mind expected from decision makers. The lack of such subjective status is almost exclusively to be inferred from relations and factual circumstances likely to result in the decision maker's partisan state of mind. Independence could be defined as the absence of factual situations capable of undermining the decision maker's impartiality. So designed, impartiality and independence are two facets of a single guarantee of "neutrality".

The impartiality and independence requirements seem to have a quite intuitive meaning, one could say the same elaborated on for centuries in relation to domestic judges. However, as will be shown, arbitration and domestic proceedings are reasonably not on the same foot. The features of international arbitration suggest, or perhaps even mandate, to apply an autonomous standard to assess arbitrators' independence and impartiality.

The double requirement in the context of international arbitration

Arbitration is by its very nature consensual and based on party autonomy. You are all familiar with the fundamental role played by party autonomy in the constitution of the arbitral tribunal. Considering a three-member arbitral tribunal, a party is generally entitled to select a co-arbitrator of its choice and concur to the appointment of the president of the tribunal.

The parties' right to select arbitrators, evidently foreign to domestic litigation, is one of the peculiar traits of arbitration and is all the more significant since international arbitration often involves parties from very different cultural backgrounds and legal systems, which would be more comfortable with arbitrators belonging to their own

traditions and therefore possibly more sensitive to the parties' respective expectations. Moreover, the parties' confidence in the arbitral process is enhanced by the possibility to choose arbitrators reputed for their expertise in particular fields (*e.g.* construction, post-M&A, energy or investment disputes). A preliminary point seems easy to strike: the relation between a party and the arbitration of its choice, and sometimes the president of the tribunal, is strongly based on what is termed *intuitus personae*.

A look at the actual dynamics of international arbitration may provide further guidance. It is worth to notice that the arbitrators' community is a relatively "close-knit-community". Due to their reputation and established expertise, the same persons are recurrently called to act as arbitrator or counsel in different proceedings, sometimes facing legal issues or factual patterns similar to those previously addressed in other cases. From the above considerations seems possible to derive some points arguing for the development of standards of independence and impartiality in international arbitration specific to it.

First, the required standard of independence cannot go so far to impose to an arbitrator to be foreign to the culture and legal tradition of the party appointing him or her. Conversely, for a party-appointed arbitrator the sensitiveness or belonging to the culture of the appointing party is a value to be brought into the proceedings. Insofar as a party-appointed arbitrator is able to remain open-minded, his or her background should be used to convey to the tribunal the expectations of a party and, in turn, render most effective the decision-making process. Therefore, sensitiveness to the culture of the appointing party cannot be *per se* a reason to refuse the appointment or disqualify a party-appointed arbitrator.

Second, the substantial weight in the actual practice of international arbitration of either party's right to select an arbitrator on the basis of the *intuitus personae* necessarily calls for the other party's acceptance of certain possible relations typical of a relatively small community of arbitrators and counsel. This does not mean that a party has to accept a partisan arbitrator appointed by the other party. Rather, it points to a flexible standard of independence, less demanding than that required to national judges in the context of domestic proceedings.

Some practical examples may clarify this last point. Consider the situation in which an arbitrator is repeatedly nominated by the same party in different cases. I believe that every attempt to set out numerical thresholds related to the appointments (*e.g.* three times in the last two years) to determine if the arbitrator lack of independence towards the party that repeatedly nominates him or her is misconceived. Indeed, the outstanding expertise and reputation of a given arbitrator may be the only, and perfectly legitimate, reasons explaining the multiple appointments. A bulk of circumstances should instead be weighted: for instance, whether the arbitrator has been repeatedly appointed to deal with similar disputes in the field of his or her expertise or the cases involve completely different matters; the relations between the arbitrator and the counsel for the appointing party, be the latter the same or not in the different cases; whether the arbitrator has also acted as counsel for the appointing party in the past.

A flexible approach should also be adopted to address the situations in which the arbitrator's alleged lack of independence and impartiality stems from the relations between the appointing party and other professionals practicing in the arbitrator's same law firm or in the chamber which the arbitrator belongs to. In my opinion it seems fair

to hold that occasional professional relationships between the appointing party and professionals somehow working with the appointed arbitrator are not *per se* sufficient to meet a proper standard in international arbitration to disqualify an arbitrator. The inquiry should be much more profound and focused firstly on how profits are allocated in the arbitrator's law firm (*e.g.* sharing system or not); whether the arbitrator and the relevant professionals work in different offices of an international law firm; how a chamber (which members do not share profits) promotes itself, for instance relying or not on its capability to provide related legal services offered by its members. A particularly careful analysis should then be devoted to ascertain the economic weight as a client to the arbitrator's law firm or chamber of the appointing party: relations of economic-dependency should be outright considered valid reasons to plead an arbitrator's lack of independence and, in turn, impartiality.

Another recurrent topic, especially in investment arbitration, is the so called conflict issue. As suggested by some scholars, a high standard should apply to challenge an arbitrator based on conflict issue. Indeed, it is completely unrealistic to believe that experienced arbitrators do not have particular views on several legal issues, have they or not expressed such views through academic articles. Moreover, opinions on legal issues rendered in publicly-available investment awards with reference to specific facts cannot amount to a pre-judgment on a new case involving similar legal issues insofar as the factual pattern and the circumstance of the case are not the same. A different approach would probably prevent experienced arbitrators from sitting in investment tribunals just after having rendered a single decision. It is all the more a non-sense considering the current case law on international investment law, which is controversial on many issues

and need contributions from well-established arbitrators in order to develop consistently.

From the examples set out above seems that tough rules on independence and impartiality do not suit international arbitration. However, it is equally true that a fairly complex analysis based on all the circumstances of the cases should be performed to assess the alleged potential lack of independence and impartiality. Although it is admittedly not an easy task, it seems necessary to avoid unmeritorious sacrifices of a party's fundamental right to appoint an arbitrator of its choice.

Standards for disclosure and disqualification

Most of times challenges to an arbitrator's independence and impartiality arise from the disclosure made by the challenged arbitrator himself or herself. It is debated whether the standard for disclosure imposed to arbitrators has to parallel the standard required for disqualification, which, as suggested, should be high.

Some institutional rules, as well as guidelines, require an objective standard for disqualification, *i.e.* justifiable doubts from a reasonable third party on the likelihood that the arbitrator may not be impartial and independent. Conversely, other instruments suggest that a subjective standard apply to arbitrators' disclosure obligation, precisely requiring disclosure of facts and circumstances capable of creating doubts in the eyes of the parties.

Although the issue is debated, some reasons seem to strongly support the position that an arbitrator should resist to disclose any fact capable of undermining his or her independence or impartiality in the eyes of the parties. Conversely, it seems more

appropriate to adopt an objective approach, with arbitrators disclosing only situations giving rise to justifiable doubts in the eyes of a reasonable third person. Indeed, the actual practice of international arbitration suggests that every disclosure from an arbitrator is likely to result in a challenge. Specious challenges are often deliberately employed only to delay the proceedings (with the ensuing costs) or try to deprive the counter-party of the co-arbitrator of its choice.

Moreover, empirical studies seem to point out that guidelines listing situations giving rise to doubts in the eyes of the parties, thus requiring disclosure under the subjective approach, have failed to achieve their purpose. Instead of reducing the challenges as expected, such guidelines have imposed high standards for disclosure resulting in a growing number of challenges. One could argue that abandoning the parties' perspective would deprive the parties of their right to know circumstances potentially relevant for a challenge. However, this argument could be overcome by adopting, in case of doubt, a general rule imposing disclosure to arbitrators. Briefly put, equating the standards for disclosure and disqualification may partly stem the tide of specious challenges to arbitrators.

Conclusions

This essay argues in favor of a standard of independence and impartiality specific to international arbitration. The adoption of a generally high standard to disqualify arbitrators, in the context of a deep analysis of all the circumstances of the case, together with the adoption of the same standard for arbitrators' disclosure, could represent the counter-measure to obstructionist challenges to arbitrators.

The argument that credibility of arbitration could be at risk if both standards for disclosure and disqualification rise seems not to be persuasive due to the potential role played by party autonomy. Should the players in arbitration not be satisfied with the above standards they could well impose higher requirements of independence and impartiality in their arbitration agreements. However, since it could eventually result in affecting the parties' fundamental right to select arbitrators, it is unlikely that the parties will follow such way and unmeritorious challenges to arbitrators could well be reduced.

Finally, in my opinion it would be desirable that ongoing discussions on independence and impartiality move forward with the involvement of the parties participating in international arbitration. Indeed, that could be useful to understand the parties' expectations on independence and impartiality and to identify a list of situations giving rise to reasonable doubts in the eyes of a reasonable third party, with the adjectivereasonable hopefully referred to a third party used to the dynamics of international arbitration.