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

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Introduction

An important factor in the choice of arbitration as the appropriate method to resolve a particular international commercial dispute is the neutrality of the process. This neutrality extends to procedure, language, venue, applicable law and even the composition of the arbitral tribunal. With the benefits of speed and costs being put under question, neutrality is one of the prime selling points of arbitration alongside the expectations of finality, fairness and justice.

As a result of the above, the issues arising out of conflicts of interest in international arbitration have been of great concern to the arbitration community owing to the impact they have on the perceived legitimacy of the arbitral process. After all, the statement that "arbitration is only as good as the arbitrators" though cliché, is largely true. Efforts are therefore being made by the international arbitration community to address the issues of independence and impartiality of arbitrators keeping in mind the interests of legitimacy, preserving the clarity and predictability in international arbitration law and the unification of international practice with regard to the same. The most prominent effort in regulating this area comes from the International Bar Association, which has published the Guidelines on Conflict of Interest in International Arbitration, which impose the dual requirement upon the arbitrator to be both independent and impartial.

In this paper, we first propose to discuss the requirements and tests of independence and impartiality individually. We will then proceed to discuss the various tests employed to establish whether or not an arbitrator is biased and go on to propose the ideal method to deal with challenges against arbitrators for want of independence and/or impartiality.

The Standards

The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (hereinafter referred to as the 'IBA Guidelines') remind us that a fundamental general principle of international arbitration is that every arbitrator shall be impartial and independent of the parties during the entire arbitration proceedings. The dual requirements of independence and impartiality can not only be found in the IBA Guidelines but also in the UNCITRAL Arbitration Rules, the Model Law and several institutional arbitration rules besides national legislation.

Although this dual requirement is a generally accepted principle, the difficulty arises out of defining each of those concepts individually in the sphere of international arbitration. This is because although arbitration has been argued to be an autonomous body of freestanding international principles, it is still embedded in national legislations. Consequently, the definitions of these concepts would require the transposition of domestic legal standards to the arena of international arbitration. What then is the meaning of 'independence' and 'impartiality'?

The Objective Requirement of Independence

Independence of an arbitrator in international arbitration is defined by his relationship with the parties, which would impact his frame of mind and ultimately the result of the dispute. To elaborate, lack of independence can be said to arise from financial dealings, sentimental ties or group identification such as a common nationality, a professional or a social affiliation. Therefore, the independence of an arbitrator is a situation of law or fact that is largely capable of objective verification. Although such connections may not necessarily lead to bias the perception of possible bias, i.e., the apparent bias is too

dangerous to the process. The requirement of independence is ongoing and lasts throughout the existence of the proceedings.

The Subjective Requirement of Impartiality

It is comparatively harder to define impartiality, which refers to a state of mind of the arbitrator that may create actual bias in favour of one party over the other. The determination of impartiality is therefore necessarily subjective. The requirement of impartiality is believed to have a lifespan different from that of independence because it requires necessary erosion as the proceedings advance as the arbitrator develops a position in favour of one party. Impartiality would therefore end when a decision is made.

Due to the subjective nature of impartiality, and the impossibility of providing direct proof to establish impartiality, many have argued of dispensing of this requirement. They often rely on the 1998 ICC Arbitration Rules which provided for challenge due to "lack of independence or otherwise" but did not specifically mention the requirement of impartiality. This oversight seems to have been corrected in the 2012 Rules because it must be said that one can be impartial in spite of not being independent but being partial would defeat the purpose of his independence. In that context, one may even argue that the concept of impartiality encompasses the concept of independence.

The Better View: Therefore, the author argues that what seems like the dual requirement of independence and impartiality is only the idea of impartiality, which can be objectively established only to the extent of independence but is capable of extending to greater lengths depending upon the relevant circumstances of the case.

The Tests of Bias

The controversy with respect to the objectivity and subjectivity involved in the establishment of these concepts can be best explained by the various tests employed by courts across the world in determining challenges to the tribunal or one of its members for want of independence or impartiality.

The common denominator is the "justifiable doubts" threshold. Courts are often found to be asking whether justifiable doubts exist with respect to the independence and impartiality of the arbitrator when viewed from the perspective of a fair-minded, rational, objective observer. Of course, it continues to be unclear whether justifiable doubts would be those where the reasonable man, *may* doubt, is *likely* to doubt or *would* doubt the arbitrator's freedom from bias.

It is undisputed among courts, scholars and practitioners alike that an arbitrator would be removed if there were proof of "actual bias". However, controversy seems to continue with respect to whether a member of a tribunal can continue to serve as an adjudicator if he "appears to be biased". Most jurisdictions would also remove an arbitrator for apparent bias; however, the distinctions in their practice pertain to how they establish apparent bias.

The main tests to establish apparent bias are: (i) the reasonable apprehension test; (ii) the real possibility rest; and (iii) the real danger test. Under the first, a fair minded rational observer would have a reasonable apprehension that the impugned arbitrator was biased. The second requires the observer to believe that there was a real possibility that the arbitrator was biased and the third requires the court to find that any bias would cause real danger to the proceedings before proceeding to make a finding on whether or not

there was any bias. These three tests require different degrees of bias: one of possibility, another of likelihood and a third of certainty.

The Better View: The author here would argue that the appropriate test in international arbitration would be that of 'real danger'. This is because though impartiality and independence are fundamental requirements in arbitration proceedings, they often become an excuse to obstruct the process by way of insincere challenge applications, which clients push for as immediate corrective action when an unfavourable procedural award is rendered by a tribunal.

The Way Forward

The instances of challenge to arbitrators have increased significantly in the last few years. In the view of the author, this is not because arbitrators are becoming less impartial but more so because the arbitration community has laid down too many norms and guidelines and the community of practitioners has evolved the "black art" of challenges to arbitrators that obstructs unfavourable challenges on grounds that should be classified as de minimis. Not just that, Prof William Park has reminded us that everything is flux and what would have been seen as acceptable in one time may no longer be seen as acceptable, alluding to the temporal nature of normative requirements.

The IBA Guidelines in the Red, Orange and Green Lists serve well to guide courts and tribunals with respect to what factual circumstances are acceptable, questionable or impermissible, but these too cannot be exhaustive. If one is to find a balance between the increasing instances of bias while upholding the virtues of independence and impartiality, the 'real danger' test seems ideal as it requires its two arms to be satisfied:

(A) the assessment of impugned conduct in the eyes of the court; and

(B) the threshold of 'real danger'.

The author recommends the intellectual proposition of Gary Born who says that the parties can select the laws of a jurisdiction other than the law governing the arbitration agreement to govern the independence and impartiality of the tribunal. If the parties were to expressly agree upon the real danger test or as it is otherwise known, the Gough standard, it would be less questionable than a proposition such as waiving the right to challenge an arbitrator for want of independence or impartiality. The latter would lead to opponents recalling the aphorism that "justice should not only be done but seen to be done".

Another reason why the "real danger" test can be supported even keeping in mind the importance of the perceptions of the world at large for the legitimacy of arbitration, is that arbitration as a mechanism is private in nature and doesn't necessarily have to be held to the standard of a public adjudicatory process. If a fair-minded observer is locked out of the adjudicatory process that is held behind closed doors, it is not necessary to assess bias from his standard as long as it matches the standards of the parties.

One must also bring to light the fact that the arbitrator cannot be likened to a judge in all respects. He does not derive his power from the Hobbesian social contract but from the will of the parties. He is often chosen for his predispositions with respect to certain issues and for (as against in spite of) his experiences. The legal fiction of the arbitrator being a judge may have outlived its utility in that respect. A stricter test will not only serve the purpose of ensuring the impartiality of the tribunal but would also reduce the number of frivolous challenges.

Conclusion

Independence and impartiality are terms often used interchangeably. Some scholars also prefer one to be applied at the cost of the other. In this paper, an argument has been made that instead of dispensing one requirement in favour of the other, we need to view them in complementary light because after all, independence entails those external characteristics of an adjudicator that

would operate in ensuring the ultimate goal of impartiality which is the material state of mind required for fair and just resolution of the dispute.

The nature of arbitration is such that parties entrust to persons of their choice or those appointed by institutions or appointing authorities the task of resolving their disputes. This makes arbitrators judges of the dispute but does not give them a position equivalent to that of a judge of a state. Therefore, both kinds of adjudicators are required to be independent and impartial but in different ways. It can be argued that both can be held to those requirements but using different standards.

For arbitration is proposing to be an alternative to court litigation, it is important to keep in mind the perceptions of potential users when any policy decisions are taken. If the reputation of the institution of arbitration is to be protected and improved, it is necessary to strive tirelessly towards the worthy goals of perfect independence and impartiality as also perceived perfect independence and impartiality. With those interests in mind, the author proposed the use of the real danger test. If not amendable to tests applied by state courts, then to be expressly included in the arbitration agreement keeping in mind the parallel interests of the efficiency of the process.

The dual requirements of independence and impartiality are fundamental aspects of arbitration but the field itself is evolving and any standard must withstand temporal modifications. I have made only one such proposition.