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

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Introduction

It is a fundamental and universally recognized principle in arbitration that an arbitrator must be independent and impartial of the parties and the dispute. The essays, however, are not structured to address in details every aspect of such a *Magna Carta* of international commercial arbitration (as Professors Julian M. Lew and Loukas Mistelis have concluded). Instead, the essay shall first provide an overview of the "independence" and "impartiality" of the arbitrator and a comparison between "partiality" and "sympathy" of arbitrators towards the position of the parties to clarify the scope of double requirement. After that, the essay shall approach the standard to decide "independence" and "impartiality" – which is the most problematic issue relevant to the double requirement for arbitrators to be independent and impartial. Some humble thoughts on the issue shall conclude this essay.

Definition of "Independence" and "Impartiality"

"Independence" and "Impartiality" are conceptually different. It is generally considered that "dependence" refers exclusively to questions arising out of the relationship between an arbitrator and one of the parties, co-arbitrators or witnesses. "Dependence" is also relating to the assessments of facts whether the arbitrator have any interests in the outcome of the disputes. "Independence", therefore, is an objective qualification. Whereas, "Impartiality" is considered to be a subjective qualification as it refers to the state of mind of the arbitrator as unbiased and disinterested. "Impartiality" is widely recognized as more abstract than "Independence".

It follows that there is no "buy one get one free" approach for independence and impartiality despite their regular overlap in practice. Indeed, it has been evident for more than once that independent arbitrator may still possibly favor one party and *vice versa*. For example, in the case *Owners of the Steamship Catalina & Owners of the Motor Vessel Norma*, one independent arbitrator was disqualified for once commenting "*Italians are all liars in these cases and will say anything to suit their book. ...But in my experience the Norwegians generally are a truthful people*". Another instance would be the LCIA case Reference No.UN3490 where one independent arbitrator calling the counsel of respondent a thief, alleging him for breaking in and stealing grapes from arbitrators' break out room.

On the other hand, one arbitrator may still remain impartial despite certain relationship with one party. Dignity, reputation and professionalism of an arbitrator are three among various barriers preventing external factors to affect the judgment of the arbitrator. One endorsement of such view can be found in the 1998 version of LCIA Rules where the LCIA decided that impartiality instead of independence was the appropriate requirement, because an arbitrator who lacked "independence" in the most restrictive sense might still be impartial.

Furthermore, the possibility that the arbitrator may not be aware of one relationship at all should not be excluded either, with one notable instance being the case *Schmitz v. Zilveti* where the chairman of the tribunal failed to know, thus failed to disclose that his law firm had represented the parent company of Zilveti. In setting aside the arbitral award, the US Court of Appeal for the Ninth Circuit reasoned that though the failure to investigate did not create actual bias, nondisclosure of conflict of interest that the arbitrator should have

known still constituted reasonable impression of partiality on the side of the arbitrator. Without entertaining the discussion sparkled by the finding of the Ninth Circuit in this essay, the case *Schmitz v. Zilveti* perfectly illustrate that one arbitrator can stay completely impartial in his state of mind while the objective facts may justify a lack of independence.

The conceptual difference may to a certain extent create functional difference between "impartiality" and "independence". As rightfully concluded by Professors Julian M. Lew and Loukas A. Mistelis in their treatise *Comparative International Commercial Arbitration,* impartiality ensures that justice is done while independence ensures that justice is seen to be done.

Partiality and Sympathy

The arbitrator, as introduced above, is not allowed to be non-neutral or to be under circumstances that give rise to justifiable doubts about his impartiality and independence. However, parties in arbitration are allowed, and even encouraged, to choose the arbitrator who will best understand their cases. In such cases, partiality should be clearly distinguished with the term "sympathy" or the so-called "lack of neutrality".

First of all, the two terms are different in definition. The "sympathy" towards one party's case only means that from the legal, social and cultural background, the arbitrator may be favorably disposed towards the appointing party. In contrast, partiality is constituted by bias in favor of, or prejudice against, a party or its case and encompasses a willingness to decide a case in favor of the appointing party regardless of the merits or without critical examination of the merits. Extensively, the concept of "Predisposition", one part of the

concept "sympathy", should not be mistaken with the concept of "Prejudgment" or "Predetermination" which constitutes "partiality".

Second and most important, partiality and sympathy do have the same legal effect. Partiality is one of the fundamental grounds that lead to the disqualification of one arbitrator. Meanwhile, "sympathy" is arguably acceptable and may even be necessary to fulfil the special functions of a party appointed arbitrator in a transnational arbitration. As long as the arbitrator does not let this override their professional judgment, the qualification of such arbitrator is safeguarded.

The fact that sympathy is acceptable and even encouraged is reasonable. In arbitration, domestic or international, as in other aspects of business life, parties often feel most comfortable when they are on familiar ground. The freedom to choose an arbitrator who shares with that party the same background, tradition and culture, should therefore be respected. Professor Martin Hunter shared his words of wisdom:

[w]hen I am representing a client in arbitration, what I am really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.

The willingness to accept certain level of sympathy is evident in practice, notably in Sunkist case where the Court of Appeal for the Eleventh Circuit acknowledged that there is a difference between positive bias and general sympathy for the party who appointed the arbitrator, and "such distinction between so called "lack of neutrality" and "neutral" arbitrators is eminently sensible and reflects the prevailing thinking ... that a balance

should be sought between the ideal of independence and the realities of the world of arbitration"

The Unpredictable Standard of Independence and Impartiality of Arbitrators

The existence of the requirement for arbitrators to remain independent and impartial is obviously provided for in almost every arbitration rules and laws. The definitions of "independence" and "impartiality", as humbly explained above, are subject to a certain level of consistency. However, such existence and definition are merely the legal grounds for the parties to file a challenge of arbitrator. What remains complicated and uncertain is the test applicable to decide whether there are justifiable doubts as to the independence and impartiality of the arbitrators.

As Professors Alan Redfern and Martin Hunter have explained: the two qualifications are "*parallel tools for assessing the potential for actual or apparent bias. They are rarely used on their own, individually, but are usually joined together as a term of art*." Whenever an allegation of bias is set forth, both impartiality and independence of the arbitrators are put under the microscope, which means that a relationship, a purported pre-judgment, alleged misstatement, nondisclosure or aggressive comment etc. are all aspects that should be taken into account cumulatively to decide whether the requirement of independence and impartiality was substantially deprived of.

One of, if not the most problematic aspect in determining would be the relationship

between the arbitrator and the parties or the dispute. Obviously, even when one relationship falling within the same categories as provided in the IBA Guidelines on conflict of interests, the proximity and intensity of such relationship may varies from case to case, from person to person. One relationship may infer either admiration or animosity, or as previously analyze, infer nothing at all if the arbitrator is an honest, dignified and professional person. All in all, this "minefield" of impartiality and independence (the wording as used by Professor Leon Trakman) calls for a uniformed standard to deal with challenge for impartiality and independence of arbitrator which provide a reasonable balance between predictability and flexibility, which regrettably has not been the case until now.

For example, it is beyond the understanding of this writer as to why nearly 45 years after the case *Commonwealth Coatings Corp. v Continental Casualty Co.*, "*the U.S. federal circuit courts are split as to which is the correct standard of evident partiality*" (as commented by Professor Gary Born). To be more specific, The Fifth, Eighth, Tenth and Eleventh circuits have adopted standards akin to that of the Ninth Circuit – that there exists a "reasonable impression" of bias (which is comparable to the appearance of bias test). The First, Third, Fourth, Sixth and Seventh Circuit have adopted standards akin to that of the Second Circuit – that a "reasonable person would have conclude" there was bias. It follows that a challenge of arbitrator on the same ground may be successful in the Ninth Circuit while being dismissed in the Second Circuit, which arguably sending out the message that justice is in the eyes of the beholder (and the location of the beholder!). Another illustration would be how international courts deal with non-disclosure of

situation in the Green List of the IBA Guidelines. In the case *ASM Shipping v TTMI* in 2006, which also marked the debut of the IBA Guidelines in English High Court, the Court set aside an award as the arbitrator failed to disclose that he was an arbitrator in a previous arbitration, which involved one same witness in the arbitration at hand. Notably, the arbitrator has never before met the witness, even in the previous arbitration – and it is highly doubtful that there was a "relationship" at all between witness and the arbitrator. Even if there were one, the situation could be given the green light anyway under the IBA Guidelines. Elsewhere, in dealing with the comparable set of facts in OAO NK Rosneft v. Yukos Capital S.a.r.l (2007) and in Erick van Egeraat Associated Architects B.V. v. Capital Croup LLC (2009), where the two challenged arbitrators were speakers at the conference sponsored by counsels of the parties, the Russian Court had literally issued two contrary findings: justifiable doubts as to the arbitrator‟s impartiality and independence was held in the former case – while the same cannot be concluded in the later one.

Concluding Remarks

In conclusion, while the double requirement for arbitrator to be impartial and independence are one fundamental principle of international arbitration are universally recognized and the content of such requirement are relatively consistent, observing the compliance with such principle in practice, i.e. the standard to determine impartiality and independence of arbitrator, has proved to be much more complicated.

The writers humbly propose that possible promulgation of domestic version of the IBA Guidelines tailored to local circumstances in each jurisdiction would be the starting points for a cohesive standard for determining the independence and impartiality of an arbitrator.

Or else, a publication of decisions on challenge of arbitrator such as that of the LCIA could equally helpful. Such collection/local guidelines are soft provision that may become more and more binding as it applies. Internationally, the introduction of the IBA Guidelines on Conflicts of Interests and the three non-exhaustive lists might have defined the contours of what are "circumstances that may give rise to justifiable doubts as to the arbitrators‟ independence and impartiality" – though regrettably, there is no guidelines for bad faith challenge as well as no panacea for plain wrong and overly strict interpretation of the Court in deciding a challenge of arbitrator. The task of walking the tight rope in balancing the diversity of practice and predictability of legal provision concerning the standard of impartiality and independence are therefore not reserved for perfectionists.