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Standards of independence and impartiality in the context of international commercial arbitration

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Abstract:

In this day and age, international commercial arbitration is widely regarded as an effective alternative dispute resolution mechanism, voluntarily chosen by a majority of parties. However, a pertinent question arises: why do an increasing number of international businesses prefer international commercial arbitration over national courts to resolve commercial cases? Apart from the efficiency and convenience that international arbitration provides, the arbitrator's professional ethics play a crucial role in maintaining the credibility and legitimacy of the process. Therefore, to bolster parties' trust in international arbitration, it is imperative to uphold the requirement of independence and impartiality of arbitrators throughout the arbitration procedure. Specifically, the arbitrator plays an important role in giving effective awards in the arbitral proceeding. Hence, each arbitrator is required to be independent and impartial so that the arbitrator's award is not questioned on the ground of lacking fairness. Furthermore, in order for the appointment process to operate smoothly, the independence and impartiality of arbitrators will be challenged in the relationships with the parties or the parties' lawyers.

Keywords: **impartiality, independence, international commercial arbitration.**

Classification number: **6**

1. Introduction

According to the United Nations (UN), one of the essential aspects of the rule of law is the independent administration of justice [1]. This obligation is a recognized principle in European arbitration law [2]. Clearly, adjudicators have the responsibility to remain independent and impartial in their adjudicative functions. The independence and impartiality of arbitrators stem from their obligations to the parties in an arbitration agreement, wherein the parties are free to select their own arbitrator, and these arbitrators must maintain their independence and impartiality in settling the dispute. However, in cases where arbitrators violate any of these obligations, they will be removed from the dispute, and the award will be annulled.

Furthermore, to ensure equal footing in arbitration proceedings, the majority of states require the arbitration mechanism to guarantee that independence and impartiality are not affected by external factors, maintaining "neutrality and distance" from the parties involved. Nations will accept arbitration as an alternative dispute resolution system only if this obligation is strictly enforced. Recognizing the importance of this obligation in arbitration proceedings, this paper aims to address two main questions: Firstly, what are the standards of independence and impartiality in the context of international commercial arbitration? Secondly, what are the common challenges in the appointment of an arbitrator? To answer these questions, the paper will primarily rely on desk research, particularly through academic papers and legal journals in the field of commercial arbitration.

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2. Basic concepts

Although the concepts of "independence" and "impartiality" may seem similar at first glance, it is essential to clarify their significant differences. Surprisingly, many arbitration laws or rules lack a precise definition of these terms. Various national arbitration laws attempt to regulate the "independence" and "impartiality" of arbitrators in different scenarios. For instance, the new Swedish arbitration law [3] as an example, Section 8 provides a list of instances in which the required "impartiality" is required, but it is still insufficient. Similarly, Article 34 of China's arbitration law [4] outlines circumstances under which an arbitrator must withdraw from the arbitration due to a lack of independence or impartiality. These circumstances include situations where the arbitrator "is a party or a close relative of a party or of a party's representative" or "has some other relationship with a party to the case or with a party's agent which could possibly affect the impartiality of the arbitration". In the Law on Commercial Arbitration of Vietnam, Article 4 unambiguously requires that "Arbitrators must be independent, objective, and impartial and shall observe the law". Moreover, both Codes of Ethics and rules on the nationality of the sole arbitrator or chairman[5] address the fundamental concepts of "independence" and "impartiality". Nevertheless, it is evident that despite these guidelines, the lack of clarity surrounding these concepts has led to varying interpretations of their actual content. Besides, according to the Law on Commercial Arbitration of Vietnam, Article 4 also provides clearly that "Arbitrators must be independent, objective and impartial and shall observe law". Last but not least, the content of the basic concepts of "independence" and "impartiality" are covered in both Codes of Ethics as well as the rules on the nationality of the sole arbitrator or the chairman [5]. However, it is not difficult to realize that regardless of these guidelines, the ambiguity of these concepts has resulted in varying viewpoints on their actual content.

2.1. The concept of "impartiality"

Impartiality refers to the arbitrator's ability to maintain a stance free from bias or predisposition towards any of the parties or the issues in a given dispute [6]. Given that impartiality involves not only a subjective standard but also a state of mind, it becomes challenging to definitively ascertain whether this standard is genuinely met or merely perceived. In general, arbitrators' impartiality is characterised by their ability to carry out their functions without practical bias, thus mitigating significant challenges that may arise during proceedings. Consequently, arbitrators view their impartiality as a duty rather than a privilege [7].

However, arbitrators still grapple with distinguishing between impartiality and neutrality, a distinction governed by the AAA Code of Ethics [8]. In certain arbitrations, appointed arbitrators are not explicitly required to be neutral. This, however, does not imply that arbitrators may compromise their impartiality. Rather, it suggests that, depending on the legal, social, or cultural context, arbitrators may align themselves with the appointing party to fulfil their role as party-appointed arbitrators when parties come from diverse nations. Thus, a lack of neutrality can be tolerated as long as it does not interfere with impartiality [9]. For instance, the arbitrator's nationality is a contentious issue. Some argue that if the arbitrator shares the same nationality as one of the parties, it may imply bias. Conversely, others contend that the arbitrator's nationality does not affect their impartiality; instead, it may even have positive implications. For instance, the shared nationality could enable the arbitrator to serve as an interpreter and facilitate communication with the party in the event of the arbitrator's award being accepted [5]. Besides, the Model Law [10] outlines that the arbitrator's nationality should not be a decisive factor in preventing them from serving as an arbitrator in the arbitration, unless the parties agree otherwise [11].

2.2. The concept of "independence"

The concept of independence requires that arbitrators have no relationships or connections with any of the parties, whether current or past, direct or indirect [6]. Independence is not related to an arbitrator's state of mind, but rather to their positions or relationships with the parties, including social and financial aspects. Unlike impartiality, "independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of bias or predisposition toward one of the parties [12]". Therefore, independence is evaluated as an objective test.

The lack of independence can be influenced by various factors, such as the relationship between the arbitrator's law firm and a party or a witness party. Notably, a longstanding connection between the arbitrators' law firm and the counsel's law firm often raises concerns about the arbitrators' independence. However, the assessment of arbitrators' independence should consider the timing and extent of the relationship between arbitrators and counsels, as well as their law firms. When the counsel's law firm handles only a few unrelated issues to either party, or when both the arbitrator and the counsel do not act on behalf of their law firms participating in the proceedings, the arbitrator's independence should remain unaffected [13].

A particular challenge to independence arises when an arbitrator is appointed to resolve the same matters in different cases. While familiarity with the issue may save time and money, it can also lead to biases in later arbitration proceedings due to preconceived arguments. Consequently, some arbitrators may lose their objective judgment and independence when evaluating crucial facts in subsequent arbitrations.

Moreover, if one of the parties is a state, a state entity, or a person employed by a government entity, the arbitrator's independence may be called into question. Generally, apart from judges and law professors, most employees lack the necessary independence, as they may not possess the required training or practical experience to serve as arbitrators. This concern may arise in arbitration proceedings involving disputes between directors of state-owned enterprises and other state entities.

While "impartiality" and "independence" are interrelated, an arbitrator can be impartial but not entirely independent and still qualify. However, an arbitrator who lacks impartiality despite being independent must be disqualified. Therefore, the gold standard in selecting party-appointed arbitrators in arbitration proceedings must prioritize impartiality [14].

3. The importance of "impartiality" and "independence"

3.1. Ethical ground

It has been argued that every legal action contains a moral component, emphasizing the significance of fairness, independence, and impartiality of judges and arbitrators in the proceedings. In society, arbitration is considered one of the most ethical institutions for resolving labour-related issues, with arbitrators holding the ethical authority to discern what is correct, beneficial, or detrimental [15].

While disputing parties have the freedom to choose their arbitrators in the arbitration process, this does not grant them the right to interfere with the judicial process or compromise the ethical norms of arbitrators. Therefore, to ensure the fairness of arbitration proceedings, both "impartiality" and "independence" are essential criteria, as "impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done" [5].

3.2. Party expectations

The primary purpose of arbitration is to expedite the resolution of international disputes and promote the globalization of world trade. As such, parties

Arbitrators have a duty to sign a written statement of independence before their appointment.

involved in arbitration hope for fair, prompt, and cost-effective settlements. However, if an arbitrator exhibits bias, these expectations can be shattered. An unfair award not only inflicts moral harm but also damages the confidence of the community, particularly the parties engaged in the arbitration [16]. To uphold the reputation of arbitration, the process must be built upon parties' trust, which necessitates arbitrators' adherence to professional ethics and the integrity of the arbitral institution itself as an alternative dispute resolution mechanism.

3.3. International recognition

International arbitration awards typically carry greater international recognition compared to judgments rendered by national courts. To uphold and secure the legitimacy of arbitration awards worldwide, judicial independence is crucial. Arbitrators are required to possess both intellectual qualifications and the moral integrity of a judge, enabling a fair and effective arbitration process. However, a common challenge faced by international commercial arbitration is the lack of authorities to regulate arbitrators' conduct [17]. This shortcoming may be exploited by some arbitrators, leading to awards made in an "ethical no man's land" [17], resulting in a decline in the international recognition of the arbitral institution.

4. Common challenges of an arbitrator's appointment

The number of challenges in arbitration has increased in recent times, mainly because parties are increasingly unwilling to accept arbitrators lacking independence or impartiality. For instance, doubts may arise about an arbitrator's independence or impartiality if they fail to disclose relevant relationships, leading to legitimate concerns. Consequently, such challenges can cause delays,

escalate the cost of arbitration proceedings and appointment processes. This paper will explore several challenges in the context of arbitrator's appointments to better understand how to contest decisions effectively.

4.1. Relationship between the arbitrator and the parties

The existence of a relationship between the arbitrator and the parties can arise in various circumstances. *The IBA Guidelines on Conflicts of Interest in International Arbitration* [18] *(the IBA Guidelines)* delineate certain scenarios wherein arbitrators may be disqualified due to their connections with the parties. Notably, a prominent example is when "the arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case"[1] [18], In such cases, the arbitrator's appointment will be challenged. For instance, in an ICSID case [12], an arbitrator served as a non-executive director of an investment bank. During the appointment process, concerns were raised that this bank had invested in a project involving two of the claimants. The arbitrator contended that she had no knowledge of the investment and was not involved in any business decisions in her capacity as a non-executive director. Consequently, she was deemed fully independent from the disputing parties. Therefore, it is essential to qualitatively consider and evaluate the alleged relationship between the arbitrators and the parties to accurately determine whether it raises concerns about the arbitrators' independence and the subsequent arbitration awards.

Another form of relationship can arise based on the arbitrator's advice provided to one of the parties. *The IBA Guidelines* also furnish specific examples of this connection, wherein the arbitrator regularly offers legal advice or expert opinions to the parties or their affiliates[2] [18]. If this advisory role leads to "the arbitrator or his or her firm derives significant financial income therefrom"[3] [18], it may impact the outcome of the arbitration proceedings.

4.2. Relationship between the arbitrator and the parties' lawyers

The appointment of an arbitrator may face challenges when a relationship exists between the arbitrator and one of the parties' counsels. Several factors determine whether such a connection exists between the parties' lawyers and arbitrators. *The IBA Guidelines* highlight this issue, with paragraph 2.3.3 of the Waivable Red List specifically addressing an arbitrator's relationship with the parties' lawyers, particularly when they work in the same law firm. Additionally, if the arbitrators "have been appointed on more than three occasions by the same counsel"[4] [18], or the same law firm, it indicates a relationship with one of the counsel.

However, not all connections raise reasonable doubts about the arbitrator's independence and impartiality in the minds of the parties. For instance, in the case of Tesco v Neoelectra Group [19], the Lyon Court of Appeal refused to annul the award made by the French Court, even though doubts were raised about an arbitrator's independence and impartiality due to a professional relationship with Neoelectra's counsel. Notably, this relationship existed before the lawyer started working at the law firm, and it was clarified that the lawyer functioned in the dispute as a self-employed individual rather than on behalf of her law firm. Consequently, this connection was unlikely to raise doubts among the parties.

Moreover, when the arbitrator and counsel both belong to the same barristers' chambers, questions may arise about their potential relationship. In such cases, *the IBA Guidelines* emphasize the necessity of disclosing any challenge when "the arbitrator and

[1]The IBA Guidelines, para 1.3 of the Non-Waivable Red List.

[2]The IBA Guidelines, para 2.1.1 of the Waivable Red List.

[3]The IBA Guidelines, para 2.3.1 of the Waivable Red List.

[4]The IBA Guidelines, para 3.3.8 of the Orange List.

another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers"[5] [18] as this can serve as a clue to determine the connection between the arbitrator and the parties' lawyers.

4.3. Related proceedings for challenges

In practice, parties often fail to agree on a specific procedure for challenges, leading to the submission of challenges directly to party autonomy. Consequently, proceedings for challenges are governed by the provisions of the Arbitration Rules and the Arbitration Laws.

Rules of the arbitration rules: Typically, a challenge proceeding requires the parties to submit a reasoned application to the institutional arbitration, which is then open to comments from the other parties and the arbitration tribunal. If the challenged arbitrator does not voluntarily resign, and the parties cannot agree on a replacement arbitrator, the institutional arbitration must make a decision. For instance, under *the LCIA Arbitration Rules*[6] [20], if all other parties agree in writing to the challenge within 14 days of receiving the application, the LCIA Court will "revoke the appointment of that arbitrator"[7] [20]. Similarly, according to the UNCITRAL Rules, a written agreement on the challenge must be sent to all parties and all members of the arbitration tribunal within 15 days. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be determined by an appointing authority. Consequently, decisions made by the institution or the appointing authority are final, even if the challenge is rejected.

Provisions of the arbitration laws: Most arbitration laws provide challenge procedures when the parties do not agree on a tailored challenge procedure. For instance, *the UNCITRAL Model Law on International Commercial Arbitration* [10] (*the Model Law*), stipulates that if the parties fail to agree on a procedure for the challenge, they must continue with the arbitration proceedings, even if they are aware that the challenged arbitrators lack necessary independence or impartiality [21].

Moreover, Article 13(3) of *the Model Law* allows the challenging party to "continue in the arbitral proceedings and make an award" in the case a request is pending. This provision aims to prevent delays and dilatory tactics when a challenged arbitrator is conducting the arbitration proceedings. However, some arbitration laws may restrict a party from continuing court challenge proceedings until the arbitrator proceedings are completed. Consequently, the court may only address the independence and impartiality of arbitrators at the post-award stage.

4.4. Prior proceedings and previously expressed opinion

The Model Law specifies that "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence" [22]. For example, in the case of National Grid PLC v Republic of Argentina [23], the respondent expressed concerns about a specific statement that could cast doubts on the arbitrator's independence and impartiality. However, challenges based on an arbitrator's prior publication of opinions on an issue do not always result in a challenge being upheld. In an ICSID case [24], it was argued that if an arbitrator has previously expressed a general opinion on a legal issue also present in the current arbitration, it does not necessarily create conflict problems. Moreover, establishing bias solely based on a previously published opinion is insufficient, as professional arbitrators consider the facts and arguments presented by the parties in the specific case.

[5]The IBA Guidelines, para 3.3.2 of the Orange List.

[6]The LCIA Arbitration Rules (effective October 1, 2020).

[7]The LCIA Arbitration Rules, Article 10(4).

5. Disclosure obligations

In the realm of international arbitration rules, disclosure plays a pivotal role in determining an arbitrator's independence. It is incumbent upon arbitrators to diligently disclose any pertinent facts that may impact their impartiality and independence during the arbitral process [6]. In particular, *the Model Law* regulates the disclosure obligations as follows: if the person is appointed as an arbitrator, "he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" [22]. Similarly, the ICC Arbitration Rules [25] stipulate that prospective arbitrators must not only sign a written statement of independence before their appointment but also provide written disclosure of any issues that "might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties" [26]. The Secretariat then shares this information with the other parties involved.

In practice, when a person is appointed as an arbitrator, they informally disclose relevant facts and circumstances to the prospective clients. If the potential party accepts the arbitrator based on the argument that these facts do not compromise their independence, the arbitrator will formalize the disclosure in a statement sent to both parties. As such, when arbitrators have fulfilled the requirement of disclosing all issues that could affect their independence and impartiality and there are no objections, any subsequent challenge to the arbitrator based on these circumstances is rendered void.

6. Conclusions

Undoubtedly, international commercial arbitration has emerged as an increasingly vital mechanism in the dispute settlement system. Parties are increasingly recognizing its advantages, such as neutrality, confidentiality, and cost-effectiveness compared to litigation in national courts. However, this system necessitates decision-makers to ensure unwavering independence and impartiality throughout the arbitration proceedings.

The preservation of arbitrators' independence and impartiality stands as one of the fundamental tenets of international arbitration. As a result, several arbitration laws and rules include provisions to safeguard the independence and impartiality of arbitrators' awards, thereby upholding the ideal of a neutral arbitrator in resolving disputes in the realm of international commercial arbitration.

COMPETING INTERESTS

The author declares that there is no conflict of interest regarding the publication of this article.

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