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Grounds of the Challenge of Arbitrators: The Difference between Independence and Impartiality

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ABSTRACT

The importance of arbitration as an alternative method for resolving commercial and investment disputes is increasing day by day. The effectiveness of arbitration and the enhancement of the litigants' confidence in the arbitral process depend mainly on the fairness, integrity and quality of the arbitrators. Maintaining this effectiveness requires an effective methodology that guarantees the integrity (independence and impartiality) of arbitrators. Most national laws and international agreements stipulate that the lack of impartiality and independence of arbitrators is a reason to challenge them. A large number of national and international legislations use both terms, impartiality and independence, to express the same connotation, while the two terms are not identical in semantics.

The present paper examines the difference between impartiality and independence and what is the impact of this difference on the process of challenging arbitrators and on the level of evidence.

I. INTRODUCTION

Based on the fact that the parties have an agreement to arbitrate their dispute, it does not deprive them of the right of a fair trial, which is a basic right embodied in The European Convention on Human Rights and stated in Art. 6 of it [3]. principle of a fair trial is essential for any legal society[4].

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[3] Article 6 of European Convention on Human Rights: Right to a fair trial:
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. See Wedam-Lukic, Dragica ,Arbitration and Article 6 of The European Convention On Human Rights, The International Journal of Arbitration, Mediation and Dispute Management, 1998.
[4] Cf. ALEXANDER J. BĚLOHLÁVEK, ARBITRATION LAW OF CZECH REPUBLIC: PRACTICE AND PROCEDURE, New York: Juris 18 (2013).

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Parties in arbitration have the right to an independent and impartial arbitrator. Similarly, to the right to an independent and impartial judge in court proceedings, In the same way as the parties to a court case should be given an effective instrument to remove the judges in certain situations, the parties to arbitration should be given an effective tool to remove the arbitrator in certain circumstances. Because arbitration is a private form of adjudication, the final judgement must be the product of an unbiased procedure in which all parties have been heard fully. Removable should be accessible if a party of a dispute has suspicions about the arbitrator's impartiality and independence, which might rise to distrust in that arbitrator. 'Challenge procedures,' are provided in national laws, international conventions, and arbitral institutions, may in different terms[5], but the content and the purpose should be the same, that enabling the parties of the dispute to use arbitrators' challenge procedures when they have justifiable doubts about their impartiality and independence. At the same time, the parties cannot relinquish their right to challenge arbitrators in advance[6]. Challenging an arbitrator is a key feature of the fair trial concept and a necessary component of the international arbitration procedure' integrity. Because of the significance placed on the arbitrators' independence and impartiality, the waiver of the right of use challenge procedures should be considered against the national law and the public policy of a state. But on the other hand, arbitrators challenge procedures can be used to halt arbitration proceedings and 'frustrate the aims of arbitration within the framework of obstructive techniques.' Furthermore, challenges might be used to "threaten or warn the arbitrators."[7]

Because of the huge importance of impartiality and independence of arbitral tribunals for the purpose of a fully fair trial or for the purpose of impeding the arbitral process, many national laws and international conventions use both terms to indicate the same meaning, whereas the sensitive issue such as the challenge of arbitrators needs to be examined accurately and

[5] The English Arbitration Act of 1996 refers to 'removal of an arbitrator' if circumstances exist that give rise to justifiable doubts as to their impartiality. English Arbitration Act 1996, ch. 23, § 24.
-The Rules of Arbitration court attached to the Chamber of Commerce of the Czech Republic and Agricultural Chamber of the Czech Republic refer to the procedure of 'excluding an arbitrator'. Section 24 Subsection 2 Rules of Arbitration Court attached to the Czech Chamber of Commerce and Agricultural Chamber of the Czech Republic.
- In the official translation of the Arbitration and Dispute Resolution Act of Indonesia from 1999 the term 'recusal' is used when talking about challenging arbitrators.9 Art. 22 Arbitration and Dispute Resolution Act of Indonesia Law No. 30 of 1999.

[6] W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT. COMP. LAW Q. 26–52 (1989), https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/challenge-and-disqualification-of-arbitrators-in-international-commercial-arbitration/997CEC7D38AD017ECECE45089DD8EFEB.

[7] Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 LAW PRACT. INT. COURT. TRIB. 153–177 (2014), https://brill.com/view/journals/lape/13/2/article-p153_1.xml.

precisely.

The present paper examines the difference between independence and impartiality and how this difference will affect the arbitrators' challenge procedures and on the level of proof required to establish both grounds.

II. GROUNDS OF THE CHALLENGE OF ARBITRATORS

In general, there are two main kinds of grounds for challenging arbitrators; the first kind emerged from the principle of integrity. Another kind emerged from the principle of quality[8].

The principle of integrity implies the need for independent, impartial, neutral and unbiased arbitrators. The principle of quality implies the need for qualified arbitrators. The first principle is more connected with the personality of arbitrators and their correlation with the dispute or the parties of the dispute from the side of personal benefits, while the second principle is more connected with the subject and crux of the concerned dispute from the view of qualification of arbitrators for making the decision. As a result, Doubts regarding impartiality or independence of arbitral tribunal' members aren't the sole basis of arbitrators' challenge. Other objective reasons for disqualifying arbitrators may exist, whereas nothing is to be verified regarding the relationship between arbitrators from one side and parties or personal interests of dispute from another side. These reasons related to disqualification for the challenging of arbitrators are often divided into four categories: Special credentials, nationality, capacity, and misconduct, all worth consideration[9].

Special credentials are usually existed in the parties' arbitration agreement or specified in the agreed-upon norms and provisions or exist in the country of arbitration seat' national arbitration law. Special credentials are some conditions and requirements that should be provided by arbitrators. Otherwise, that will be led to the ineligibility of arbitrators[10]. Ineligibility of arbitrators can be provided in the same manner regarding conditions and requirements related to arbitrators' nationality, especially in international disputes[11]. The capacity of arbitrators can

[8] Guillermo Aguilar Alvarez, *The Challenge of Arbitrators*, 6 ARBITR. INT. 203–225 (1990), https://academic.oup.com/arbitration/article/6/3/203/193532.

[9] Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, 20 J. INT. ARBITR. (2003), https://heinonline.org/HOL/Page?handle=hein.kluwer/jia0020&id=337&div=&collection=.

[10] According to UNCITRAL Model Law Art. 12 paragraph 2, an arbitrator may be challenged only if circumstances exist that raise reasonable doubts about their impartiality or independence, or if the arbitrator lacks qualifications agreed upon by the parties. Art. 15 paragraph 1 SCC Rules or Section 18 paragraph 1 DIS Rules apply mutatis mutandis.

- According to Art. 14 paragraph 1 of the ICSID Convention Persons appointed to serve on the Panels must be of high moral character and acknowledged competence in the domains of law, business, industry, or finance, and must be able to exercise independent judgement.

[11] Rule 3 of the ICSID Arbitration Rules states that none of the arbitrators must have the same nationality as either party or be a national of either party.

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be divided into two kinds, legal capacity (de jure impossible) and physical or mental capacity (de facto impossibility). Legal capacity (de jure impossible) such as the arbitrator may not fulfil the legal requirements for appointment or incompatibility of the arbitrator's career with other functions. Physical or mental capacity (de facto impossibility) such as the arbitrator's inability to perform the office due to an obstacle resulting in a physical or mental incapacity to conduct the hearings. When an arbitrator dismisses or simply go wrong to perform and conduct the procedures correctly (arbitrator default/misconduct) for reasons other than medical or legal incapacity that what can be called 'truncated tribunal or arbitrators' according to some international organisations or institutions[12]. Misconduct of arbitrators, although it is accorded by arbitrators with legal and medical capacity, it is a visual and real situation tainted with the vagueness of reasons which lead to the same. Consequently, the method of combating these situations will be different. Instead of challenging procedures for reasons of bias, dependence or disqualification, the method to remove the arbitrator with misconduct is called 'release from appointment.' However, certain arbitration rules provide that the procedure for challenging an arbitrator must be followed[13].

III. DIFFERENT CRITERIA FOR EVALUATION OF IMPARTIALITY AND INDEPENDENCE BETWEEN ARBITRAL PROCESS AND JUDICIAL PROCESS

The lack of independence and impartiality of arbitral tribunal are the most difficult challenges arbitrators may face. In contrast to court processes, the independence and impartiality of arbitral tribunal' members must be assessed in light of the arbitrator's stance. Unlike ordinary courts, where cases are delegated to judges by rules previously constituted to determine the competent judges in the different cases (the principle of 'lawful judge') and judges are remunerated by the state, arbitrators are chosen or nominated by the parties and remunerated by them even if they do not act as their representative. The power of a judge comes directly from the state, but the power of an arbitrator comes from a contractual correlation between the parties[14].

As a result, the arbitrators are functioning as the parties' "agents or mandataries." It may be evident in the fact that arbitrators appear to side with the party who nominated them, particularly because of the arbitrator's agreed remuneration and, in certain cases, from handling

[12] When discussing the truncated tribunal, see WIPO Arbitration Rules Art. 35, which relates to a failure to engage in the Tribunal's activities.
[13] UNCITRAL Arbitration Rules Art. 12 paragraph 3
[14] Nathalie Bernasconi-Osterwalder Lise Johnson Fiona Marshall & Background Papers, *Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel*, IV ANNU. FORUM DEV. CTRY. INVEST. NEGOT. (2011), www.iisd.org.

routine issues exclusively on behalf of one party. Despite this, when asked about arbitrators, several countries cite the norms governing the independence and impartiality of state courts. This may not always be suitable since, unlike a state judge, the arbitrator is chosen by the party[15].

IV. INDEPENDENCE AND IMPARTIALITY

At first glance, there may be no difference between independence and impartiality; at least it is difficult to imagine that difference, it may be because both characters emerged from the same resource (principle of integrity) and seek the same objective (fair and just trial or process). As a result, the phrases impartiality and independence are frequently used interchangeably in legislation and case law.

(A) The difference between independence and impartiality

The variation between independence and impartiality is that independence is an 'objective' criteria that can be verified, whereas impartiality is a 'subjective' estimation of a person's inside mindset or state of mind that could only be observed from the exterior in the arbitrator's conduct. Generally, impartiality relates to the arbitrator's mental stance toward the parties, their lawyers, or the issue in concern. The term "independence" refers to an arbitrator's dearth of linkages or connections with any of the parties or their agents.

Well as involvement in the case or previous involvement in a comparable case. Impartiality implies the necessity for utmost neutrality in the arbitrator's decision-making, whereas independence reflects an objective status. In other words, it can be said that independence is the reason, and impartiality is the result. If an arbitrator was partial, that necessitates that S/he is dependent, but it does not necessitate that S/he is partial if S/he was dependent. As a result, independence and impartiality of arbitral tribunal are the two pillars upon the unbiased trial stands; in other words, they are the two faces of one coin. That coin can be called "the lack of bias".

In many legislations and acts, impartiality and independence are frequently used interchangeably. As a result, these national laws do not distinguish between impartiality and independence, preferring instead to the principles that apply to state judges, such as Austrian law. Some laws focus solely on impartiality, such as English law[16] or independence, such as

[15] Koch, *supra* note 7.

[16] English courts hold that arbitrators and judges must adhere to the same standard of impartiality, cf. Gillian Eastwood, A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators, 17(3) ARB. INT'L (2001).

Swiss law. As a reference to that, every concept includes or covers the other.

Despite the mentioned above, the concept of arbitrator independence and impartiality in several national legislation is considerably different[17]. Some national laws use the term "lack of bias" rather than "impartiality" or "independence," and judicial procedure norms do not apply (e.g., Czech law). Certain national laws distinguish between impartiality and independence (e.g., German or French law)[18].

The International Bar Association' Rules of Ethics for International Arbitrators (IBA) take an intriguing stance on the distinctions between dependence and partiality: 'Partiality arises where an arbitrator favour one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties or with someone closely connected with one of the parties[19].

(B) Standard of evidence

Based on what was previously mentioned, independence is an objective standard, while impartiality is a subjective standard. This distinction between independence and impartiality has implications for the criterion of proof for each of the two cases.

Independence is a material state indicated by facts and realities. Impartiality is a moral or emotional state that cannot be proven abstractly but rather appears through behaviour. It can also be said that the proof of dependence is direct, while the proof of partiality is indirect.

The dependent arbitrator is the one who has a commercial relationship or other kinds of relationships with one of the parties to the dispute or the dispute itself. In both cases, this relationship involves narrow personal interests, financial or non-financial, and this relationship is a material and real relationship that can be proven through documents and material evidence, for example, such as showing the contract or agreement that expresses this relationship.

As for impartiality, it is not a factual or material situation that cannot be proven abstractly and directly through physical evidence. partiality can only be proven through behaviour; for example, an arbitrator refused to obligate one of the parties to provide evidence for what he claims on the pretext that he is not obligated or consider the evidence presented by one of the parties sufficient despite its weakness, this behaviour may be considered evidence or indication

[17] CHRISTOPH LIEBSCHER, THE HEALTHY AWARD, The Hague: Kluwer law International 347 (2003).
[18] R Zahradníková - CYArb-Czech (& Central European) Yearbook Of & , *Challenge Procedure in Institutional and Ad Hoc Arbitration Under the New Regulations in the Revised UNCITRAL Arbitration Rules*, PAPERS.SSRN.COM (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400381 (last visited Jan 19, 2022).
[19] Article 3 paragraph 1 (Elements of Bias) IBA Rules of Ethics.

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of partiality.

As it was previously mentioned, independence and impartiality are two sides of the same coin, which is "lack of bias", and that the dependent arbitrator is not necessarily partial, but the partial arbitrator is necessarily dependent.

It is possible to conclude that merely the existence of a previous relationship between the arbitrator and a party, whether it is related to the dispute at hand or not. This alone does not amount to the level of evidence of bias, even if it does rise to the level of sufficient suspicion, but it is not conclusive evidence to remove the arbitrator.

Conclusive evidence of bias needs documents that prove the fact of lack of independence and apparent behaviour that indicates partiality. But due to the sensitivity and importance of this issue, most national and international legislations do not require the level of conclusive evidence, but rather suspicions of the existence of this bias are sufficient to remove the arbitrators.

V. ACTUAL BIAS

apparent bias is frequently argued. It is based on facts or behaviours that suggest that there may be grounds for prejudice. Not only hypothetical but objective and fairly obvious circumstances are required. But what the situation will be if the arbitrators were biased with no circumstances or evidence to make suspicions about their impartiality or independence? This is what can be called "actual bias" in this case; there is no need to say that, like any other incident without evidence, the research for evidence will be crucial for a ruling based on that incidence.

In the light of the objective of keeping of effectiveness of arbitration and fostering of trust of disputants of it. It is worth noting that discussing of actual bias of arbitrators is important, especially if it is taken into consideration the feature of arbitration, as the tribunal members, unlike judges, are selected by parties that give different standards for assessing independence and impartiality of tribunals[20].

Parties as the resource of appointment of arbitrators, every party will keep observation on the conduct of another party-appointed arbitrator[21]. Arbitrators, originally or with experience, learned the skills of how to justify the suspicions around their lack of bias and how to make

[20] According to Canon X of the American Arbitration Association (AAA) Code of Ethics for Arbitrators in Commercial Disputes: arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness.

[21] According to Martin Hunter, well known professor of international arbitration, 'a party-appointed arbitrator should therefore combine a maximum predisposition towards the party that nominated that arbitrator with a minimum appearance of bias'.see Christopher Koch, Standards and Procedures for Disqualifying Arbitrators, 20(4) JOURNAL OF INTERNATIONAL ARBITRATION 325-353 (2003).

their biased directions appear more reasonable and legitimate. On the other hand, the narrowing down on the arbitrators makes them sensitive to give any opinion or any idea about their direction lest charging of bias by the parties which will have a negative effect on the whole process[22]. The arbitrators do not have to be actively prejudiced (actual bias), they should be in good faith, reasonable, legitimate, and they should positively justify the suspicions about their impartiality and independence[23].

VI. CONCLUSION

Finally, it is worth pointing out that the arbitral process as a type of adjudication has the advantages that distinguish it from the judicial process, and perhaps one of the most important of these features is flexibility and speed in settling disputes.

These features should have an impact on the issue of challenging the arbitrators, so it is not necessary, in our view, that arbitration should follow the rigid judicial approach used in the issue of challenging judges, which is ruled by binding and constant laws. The flexibility of the arbitral process requires following an ethical and customary approach to be used in the issue of challenging arbitrators, which can be called "the principle of satisfaction" stemming from the consensual nature of the arbitral process. The principle of satisfaction requires that merely raising doubts about the arbitrators' lack of bias harms the arbitral process as a whole, regardless of whether the evidence of these doubts is sufficient, but these doubts should only be serious, not intended to prolong the dispute or thwart the arbitral process in settling.

If these doubts are serious, then their mere existence requires the arbitrator to move towards abandoning his arbitral mission based on an ethical and not a legal principle. An arbitrator's tenacity to his arbitral mission despite the presence of serious doubts about his integrity hurts the ethics of the arbitral process.

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[22] Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, SSRN ELECTRON. J. (2010).
[23] Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'real danger test'*, KLUWER LAW INTERNATIONAL BV, THE NETHERLANDS (2009).

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