Arbitrator Ethics: Developments

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The plurality of rules and standards governing obligations of independence, impartiality and arbitrator disclosure continues to give rise to considerable uncertainty for arbitrators practising in Europe and elsewhere. While the promulgation of the IBA Guidelines on Conflicts of Interest in International Arbitration has been a helpful development in trying to promote a cohesive development of practice in this area, they have not been universally accepted or adopted and do not override institutional rules and national laws applicable in this sphere. The competing concerns in this area include that of safeguarding an arbitrator's impartiality and independence along with the fairness of an arbitration, weighed against the greater scope for arbitrator challenges that come with enhanced disclosure, coupled with the delay and uncertainty to the arbitration process that this can entail. Perhaps because of the lack of clarity in this area, or because challenges to arbitrators are being used more often for tactical reasons, indications are that arbitrator challenges, whether meritorious or otherwise, are increasing.[1] Clearly, the issues arising out of arbitrator independence and impartiality, and arbitrator disclosure more generally, are international in nature and arbitrators practising in Europe need to be familiar with developments elsewhere. This article addresses some of the developments in this area to see if it is possible to discern developing trends of relevance to the European arbitration community.

Arbitrator availability

One development likely to be welcomed by users of arbitration keen to avoid undue delay and expense in arbitration proceedings is the ICC Court's indication that it will take a tougher stance on arbitrator availability.[2]

The ICC Court decided that from 17 August 2009 prospective arbitrators must disclose details about their availability as well as their independence in the revised 'ICC Arbitrator Statement of Acceptance, Availability and Independence'.[3] This statement now requires prospective arbitrators to provide a significant amount of disclosure regarding their current pending cases, whether as chairman or sole arbitrator, as co-arbitrator or as counsel, and any other professional engagements that might impact on their conduct of the reference. In addition, prospective arbitrators are required to confirm, among other things, that they can devote the time to conduct the arbitration diligently, efficiently and in accordance with the time limits set out in the ICC Rules. The greater transparency sought by the ICC by way of this disclosure is aimed at encouraging prospective arbitrators to reflect more carefully on their availability before accepting office and to ensure disputes will be resolved as promptly as possible, as the parties are entitled to expect. The ICC has also indicated that a failure by ICC tribunals to observe the time limits provided for in the ICC Rules, or otherwise confirmed under the Rules, may be reflected in the fees fixed by the ICC Court at the end of the proceedings; this potential penalty is also acknowledged by a prospective arbitrator in his or her statement of availability.

The requirement that prospective arbitrators should consider their availability to conduct arbitration proceedings diligently is by no means new. The 1987 IBA Rules of Ethics for International Arbitrators advises prospective arbitrators to accept appointments only if they are able to give the proceedings the time and attention that the parties are reasonably entitled to expect.[4] National arbitration laws also reflect arbitrators' duties in respect of their diligent conduct of proceedings.[5] The ICC Rules themselves provide for the ICC Court to remove arbitrators who fail to fulfill their functions within the prescribed time limits,[6] as do the LCIA Rules.[7]

Only time will tell how disclosure of availability will work in practice, and no doubt this will be something that the ICC will monitor. Busy prospective arbitrators may find the disclosure requirements onerous or the disclosure itself may prove to be of historical interest only in light of commitments agreed to after appointment. The sanctions for failure to provide comprehensive disclosure remain unclear, although no doubt the truth will out during the course of the arbitration, which may then be reflected in the fees fixed by the ICC Court or even, in extreme situations, the arbitrator's removal.

The ICC Court's decision to require additional disclosure in respect of arbitrator availability is, nevertheless, a welcome reminder to prospective arbitrators of the parties' expectations regarding the conduct of proceedings, and the potential consequences if they fail to meet such expectations. The additional disclosure should mitigate the risk of unreasonable delay in the conduct of ICC arbitrations. Other arbitral institutions will no doubt consider whether they ought to follow where the ICC has led.

ABA's abandonment of draft disclosure guidelines

While the ICC has moved for additional disclosure in respect of arbitrator availability, in what may prove to be a high water mark for the principle of 'disclose early, often and in writing', the ABA appears to have abandoned attempts, for now at least, to adopt a best practice checklist for arbitrator disclosure with regard to independence and impartiality. A subcommittee of the ABA spent a number

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1 G Nicholas and C Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: a Proposal to Publish', *Arbitration International*, Vol 23, No. 1 (2007) argue that the number of arbitrator challenges in international arbitration is growing. On the other hand, M W Bühler and T H Webster in 'Handbook of ICC Arbitration' (2008), posit that 'there is no clear trend over the past five years of an increase in the number of challenges, let alone of successful challenges'. (pages 169 to 170).

2 'ICC takes tougher stance on arbitrator availability' ICC Press Release (August 2009).

3 Article 7(2) of the ICC Rules of Arbitration.

4 Article 2.3.

5 See, for example, sections 1(a) and 33 of the English Arbitration Act 1996.

6 Article 12(2) of the ICC Rules of Arbitration.

7 Articles 10.1(b) and 10.2 of the LCIA Arbitration Rules.

of years developing a disclosure checklist in an effort to address the problem of the different statutes, standards, cases and ethics codes applicable to arbitrator disclosure. While the draft checklist has not been adopted by the ABA as policy, it has been published by the ABA as a white paper with the intention now of confining the application of the checklist to domestic commercial disputes.[8]

In earlier forms, the draft checklist had drawn strong criticism from the international arbitration community for being overly prescriptive and requiring excessive disclosure, with the effect not of supporting the arbitral process, but of undermining the finality of arbitral awards by encouraging post award challenges. The international law working group of the ABA were particularly critical of the draft best practice checklist believing, among other things, that the checklist would be at odds with international arbitration practice, that the approach adopted in the IBA Guidelines would add to the existing confusion arising from the proliferation of conflicts rules and guidelines in this area, and would result in differing disclosure by US qualified and European qualified arbitrators on the same tribunal and would, ultimately, diminish the US as a venue for international arbitrations.[9]

While the indication now is that the application of the draft guidelines, if any, will be confined to domestic US arbitrations, concern has previously been expressed about differing standards applying in the US to domestic and international arbitrations. Difficulties arise in defining 'international' in these circumstances and the inference that arbitrator disclosure in international arbitrations would be something less than best practice. It remains to be seen whether the draft checklist will gain any traction within domestic US arbitration even though it is not formally adopted by the ABA as policy, and what, if any, consequences there will be for arbitrator disclosure in European or international arbitration.

ICSID decisions on arbitrator independence

Notwithstanding the differences in the applicable principles (perhaps of no more than emphasis) and differences in procedure, decisions in ICSID proceedings continue to provide a useful public source of guidance to the arbitration community in considering arbitrator ethics in this area.

The general principles that apply to arbitrator independence in ICSID proceedings are that arbitrators should be able to exercise 'independent judgment'[10] and 'judge fairly as between the parties'[11]. It is arguable the extent to which these principles differ materially or at all from the usual principles of independence or impartiality, or both, adopted elsewhere. An ICSID tribunal has proceeded on the basis that both concepts are covered by the terms of the ICSID Convention.[12] A prospective arbitrator's duty to disclose includes circumstances 'that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party'.[13] This duty appears broadly similar to that applicable under the ICC Rules[14] and the IBA Guidelines,[15] and is arguably broader than that which applies under other rules.[16] The threshold for removal of an arbitrator in proceedings under the ICSID Convention is relatively high, requiring circumstances indicating a 'manifest lack' of the qualities required under[17] the ICSID Convention.[18] One peculiarity of the challenge procedure under the ICSID Convention (which is sometimes criticised for giving the appearance of cronyism) is that arbitrator challenges can be determined by the remaining members of the tribunal.

These principles, and the wider issues of arbitrator independence and impartiality, were considered in two arbitrator challenges arising out of the *Suez and Others v Argentina* proceedings. The first challenge concerned partiality and issue conflicts.[19] Argentina sought to challenge one of the arbitrators on the basis that she had participated in a tribunal that had rendered an award in another ICSID arbitration where the reasoning in the earlier award was so flawed that it indicated a prima facie lack of impartiality, and therefore rendered her entirely unreliable. While the remainder of the tribunal rejected the challenge on the basis that it was made out of time, they also rejected the substance of the challenge. The remainder of the tribunal took the view that, as with judges in national courts, an arbitrator may take views with which one of the parties may disagree but that such disagreement was not evidence in and of itself of a lack of independence and impartiality; a judge or arbitrator may even be wrong on a point of law or a finding of fact but still be independent and impartial. The remainder of the tribunal certainly did not consider themselves in a position to, or that it would otherwise be appropriate to, review the substance of the earlier award. The remainder of the tribunal concluded that simply because the challenged arbitrator participated in an earlier award which had decided certain issues contrary to the interests of one of the parties to the references before it did not mean that she could not be impartial. They considered that to have concluded otherwise would have serious negative consequences for any adjudicatory system.

The second challenge concerned arbitrator independence. Shortly after the first challenge described above had been deter-

8 http://www.abanet.org/dispute/docs/DisclosureChecklist.pdf.

9 http://meetings.abanet.org/webupload/commupload/IC730000/relatedresources/ABA.International.Section.Working.Group.Comments-3_16_final.pdf.

10 Article 14(1) of the ICSID Convention.

11 Rule 6(2) of the ICSID Rules.

12 In the decision in *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. ARB/03/17, and *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No. ARB/03/19 rendered on 22 October 2007 the tribunal compared the English language version of article 14(1) with the Spanish version which referred to 'impartiality of judgment' and, since both language versions were equally authentic, proceeded on the basis that the treaty standard covered both independence and impartiality.

13 Rule 6(2) of the ICSID Rules.

14 Article 7(2) of the ICC Rules of Arbitration.

15 See General Standard 3 of the IBA Guidelines which adopted the approach of article 7(2) of the ICC Rules of Arbitration.

16 See article 12(1) of the UNCITRAL Model Law which requires prospective arbitrators to 'disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence' and article 5.3 of the LCIA Arbitration Rules which requires prospective arbitrators to disclose any 'circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence'.

17 Article 14(1) of the ICSID Convention.

18 Article 58 of the ICSID Convention. See also the decision in *Suez, Sociedad General de Aguas de Barcelona SA*, and *InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. ARB/03/17, and *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No. ARB/03/19, rendered on 12 May 2008 and C H Scheruer, 'The ICSID Convention: A Commentary', *Cambridge University Press* (2001) page 1202.

19 *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. ARB/03/17, and *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No. ARB/03/19, 22 October 2007.

mined, Argentina initiated a second challenge against the same arbitrator alleging a lack of independence[20] (and made similar challenges in other unrelated ICSID proceedings against the same arbitrator and on similar grounds[21]). In short, Argentina alleged a manifest lack of the qualities needed of an ICSID arbitrator on the grounds that the arbitrator had been made a director of a Swiss bank, which was a shareholder in each of the claimants (of between 1.3 per cent and 2.4 per cent) and that she had failed to disclose this fact as required to do so under the ICSID Rules. The remainder of the tribunal rejected the notion that the challenged arbitrator's directorship of the Swiss bank concerned indicated a manifest lack of independence and impartiality:

- the relationship was remote;
- there was no frequency of interaction between the challenged arbitrator and the claimants;
- the challenged arbitrator derived no benefit or advantages and was in no way dependent on the claimants as a result of the alleged connection; and
- the relationship was not material in the sense that the challenged arbitrator derived no economic benefit from the connection.

The remainder of the tribunal was keenly aware that arbitrators may have tenuous connections with the parties of the 'six degrees of separation' sort, for example, through pension funds or mutual funds, but the fact of a connection did not of itself render an arbitrator impartial or lacking in sufficient independence; the alleged connection needs to be evaluated qualitatively.

As for the failure to disclose, the remainder of the tribunal considered that in certain circumstances a failure in and of itself might give rise to sufficient doubts as to an arbitrator's impartiality. The remainder of the tribunal determined that an arbitrator in ICSID proceedings was required to disclose a fact only if she reasonably believed that such a fact would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person. On the facts, the challenged arbitrator did not know of the relationship and had been diligent in checking potential conflicts with the Swiss bank involved, which had not identified any conflicts relevant to the references concerned. Having not been put on any notice of a potential relationship, she was not under any duty to enquire further.

A differently constituted ICSID panel came to similar conclusions in respect of similar challenges made in relation to the same arbitrator applying a proportionality principle.[22] The arbitrators in that case noted that in an increasingly interdependent and complex world it will not be difficult for a party to construct some theory for most scenarios that would suggest some influence on an arbitrator, but to permit the removal of arbitrators on such grounds would damage the stability and efficiency of the arbitral process. The arbitrators concluded that the costs of such an absolutist perspective clearly outweighed the advantages.

European decisions on arbitrator independence

Recent decisions before European courts have also considered issues of arbitrator independence and disclosure. In *Tecnimont SpA v J&P Avax*[23] the Paris Court of Appeal considered an application to set aside an ICC award arising out of the connections between the chairman, who was from the Paris office of an international law firm, and one of the parties. It became apparent during the course of the arbitral proceedings that the chairman's firm had quite extensive connections with the group of companies of which one of the parties, Tecnimont, formed part. The Court of Appeal considered that any facts or circumstances that may affect an arbitrator's judgment and raise a reasonable doubt in the minds of the parties as to his or her independence and impartiality, which are the very essence of his adjudicative function, should be disclosed to the parties, and that this obligation was continuing.[24] Given the extent of the connections between the chairman's firm and the group of companies of which Tecnimont formed part, the Court of Appeal concluded that sufficient doubt as to the arbitrator's independence had been raised and set aside the award accordingly.[25]

In *Korsnäs Aktiebolag v AB Fortum Värme med Stockholms stad*[26] the Svea Court of Appeal considered the issue of repeat arbitrator appointments by the same firm. The respondents had appointed a well-known Swedish arbitrator who had been appointed as arbitrator by the firm representing the respondent on two other occasions over the preceding three-year period. This matter is not covered by the relevant section[27] of the Swedish Arbitration Act,[28] which provides a non-exhaustive list of circumstances that may diminish confidence in an arbitrator's impartiality. The Svea Court of Appeal instead referred to the IBA Guidelines where repeat appointments are addressed in the Orange List[29] and rejected the challenge on the grounds that the number of appointments made over the preceding three-year period were not such as to call into question the arbitrator's impartiality.

Chambers revisited

The issue of conflicts arising from an arbitrator and counsel from the same set of London chambers was revisited in the ICSID case of *Hrvatska*,[30] which has caused some excitement among the international arbitration community in London and, perhaps, elsewhere. In *Hrvatska* the president of the tribunal was a 'door tenant' of the same set of chambers as counsel for the respondents. A peculiarity of this case was that the challenge was not to the president con-

20 Decision dated 12 May 2008.

21 *Electricidad Argentina SA and EDF International SA v The Argentine Republic*, ICSID Case No. ARB/03/22, and *EDF International SA, SAUR International SA and Leon Participaciones Argentinas SA v The Argentine Republic*, ICSID Case No. ARB/03/23.

22 *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v The Argentine Republic*, ICSID Case No. ARB/03/23.

23 *Société Tecnimont SpA v J&P Avax SA*, (Paris Court of Appeal, 12 February 2009), RG 07/22164.

24 Id. '[…] le lien de confiance entre l'arbitre et les parties devant être preserve continûment, celles-ci doivent être informées pendant toute la durée de l'arbitrage des relations qui pourraient avoir à leurs yeux une incidence sur le jugement de l'arbitre et qui seraient de nature à affecter son indépendence […]'

25 Id. '[…] [C]es activités, prises dans leur ensemble [...] établissent l'existence d'un conflit d'intérêts entre le président du tribunal arbitral et l'une des parties à l'arbitrage […] [q]ue, par suite, en raison du défaut d'indépendance de l'arbitre, le tribunal arbitral a été irrégulièrement composé […] il convient d'annuler la sentence […]'

26 *International Financial Law Review* 'Sweden: Two different arbitration cases' (1 April 2009) provides commentary on *Korsnäs Aktiebolag v AB Fortum Värme samägt med Stockholms stad* (Svea Court of Appeal, 10 December 2008) and *Anders Jilkén v Ericsson AB* (Supreme Court of Sweden, 19 November 2007.)

27 Section 8.

28 SFS 1999:116.

29 Paragraph 3.3.7 – 'The arbitrator has within the past three years received more than three appointments by the same counsel or law firm.'

30 *Hrvatska Elektroprivreda d.d. v The Republic of Slovenia*, ICSID Case No. ARB/05/24.

tinuing on the tribunal; the parties were agreed that the president should not recuse himself. Instead the claimant sought an order that the respondents refrain from using the counsel in question. One further peculiarity of the case was that notice of the participation of the counsel in question in the proceedings was only provided at the eleventh hour, a matter of a couple of weeks prior to the main hearing.

The tribunal considered that it had the inherent power to take measures to preserve the integrity of the proceedings and granted the relief sought by the claimant. It is, however, difficult to draw any firm principles from this decision with regard to arbitrator independence and impartiality, and the tribunal was itself reluctant to lay down any 'hard-and-fast' rule about arbitrators and counsel from the same set of chambers. Much turned in *Hrvatska* on the facts of the case, most importantly the late disclosure of counsel's participation and an apparent reluctance of the law firm representing the respondents to respond to reasonable enquiries about counsel's prior involvement in the case which had given rise to an 'atmosphere of apprehension and mistrust'.

While reference was made by the tribunal to the relevant principles of the IBA Guidelines in this area,[31] no reference was made to other decisions before national courts that have considered similar issues.[32] Passing reference was also made by the tribunal to the common marketing frequently employed by chambers, but no detailed analysis was undertaken of the extent to which the president and counsel shared any common economic interest. One approach which the tribunal could have adopted, but did not, would have been to ask whether the president could have been successfully challenged for a 'manifest lack' of the qualities required under the ICSID Convention, and then considered whether the relationship between the president and counsel through chambers was sufficient to compromise the independence and impartiality of the president. If the tribunal had concluded that the president did not lack the qualities required given the chambers system, then it is more difficult to see why the respondents should have been denied their choice of counsel, notwithstanding the late notice of his participation or the claimant's lack of familiarity with the chambers system.

31 Paragraph 3.3.2 of the Orange List in the IBA Guidelines addresses the situation where an 'arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers'. See O L O de Witt Wijnen, N Voser and N Rao 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration' *Business Law International*, Vol. 5, No. 3 (September 2004), which states: 'the Working Group considers that full disclosure to the parties of the involvement of more than one barrister in the same chambers in any particular case is highly desirable. Thus, barristers (including persons who are 'door tenants' or otherwise affiliated to the same chambers) should make full disclosure as soon as they become aware of the involvement of another member of the same chambers in the same arbitration, whether as arbitrator, counsel, or in any other capacity.' (page 456).

32 See, for example, *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113 and *Kuwait Foreign Trading Contract & Investment Co v Icori Estero SpA*, (Paris Court of Appeal, 29 June 1991).

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Given the disparate statutes, standards, cases and ethics codes which apply to arbitrators' duties of independence and impartiality, it is perhaps always dangerous to try to draw common threads from recent developments. It would, however, seem that, by and large, the practice being adopted in relation to arbitrator independence and impartiality in Europe and internationally is one of robust common sense, avoiding an overly prescriptive and formalistic approach.[33] The approach adopted in the IBA Guidelines continues to be influential in this area but is by no means the only source of reference in determining issues of arbitrator independence and impartiality.

Whether in this context the days of arbitrators and counsel, or more than one arbitrator on a tribunal, being from the same set of chambers are numbered, is more difficult to assess. Rather than seeking ever more exhaustive disclosure by prospective arbitrators of real or apparent connections with the parties or the issues in dispute, the move by the ICC Court to seek disclosure by prospective arbitrators of their availability addresses a genuine and more commercial concern of users of arbitration that arbitrators should not over-trade and should have sufficient time to deal with the reference with reasonable diligence. Such a development has much to commend it.

33 In paragraph 6 of the introduction to the IBA Guidelines, the Working Group exhorted users of the Guidelines to apply them with 'robust common sense and without pedantic and unduly formalistic interpretation.'