

International Commercial Arbitration



What obligations do the parties and the arbitrators owe to each other?



What protection does law offer each group?

Arbitrators are empowered by the parties to decide their dispute. Judicial power is the principal characteristic of their role and enables arbitration to be distinguished from superficially similar concepts such as expert proceedings, conciliation and mediation. They derive their authority from law and jurisdiction from or based on the will of the parties. However, not only do the national legislators set limits inside which an arbitrator must act, but international customs, usages and conventions also play an important role.

Requirements/Obligations Imposed on Arbitrators

- **Independence and impartiality:** Most national laws, international conventions and arbitration rules provide that arbitrators must be independent and impartial.¹ On occasions, the courts have also required neutrality² or objectivity on the part of the arbitrators. The UNCITRAL Model Law has added impartiality as a condition, apart from independence of the arbitrator (Art. 12(2)) and was followed in that respect by the Netherlands Code of Civil Procedure (Art. 1033(1)), the

¹ See THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS (ICC PUBLICATION No. 472, 1991) Aldo Berlinguer, impartiality and independence of arbitrators in international practice, 6 AM.REV.INT'L ARB.339 (1995) D. Bishop and L. Reed , practical guidelines for interviewing, selecting and challenging party-appointed arbitrators in International Commercial Arbitration, 14 ARB. INT'L 395 (1998)

² The distinction between neutral and non-neutral arbitrators has been approved by the United States courts and was confirmed and clarified in the Code of Ethics for arbitrators in Commercial Disputes, jointly adopted in 1977 by the AAA and the American Bar Association. Arbitrators' obligations of independence and impartiality were set forth in six canons, with a seventh canon covering "ethical considerations relating to arbitrators appointed by one party"

Tunisian Arbitration Code (Art. 57), the German Arbitration statute of 22 Dec, 1997 (Art.1037 of the ZPO). The English Arbitration Act only contains the requirement of impartiality (Sec. 24(1) (a)), as does the 1999 Swedish Arbitration Act (Sec. 8). The ICC Rules (Art. 7(1)) only requires arbitrators to be independent from the parties involved.³ Independence is a situation of fact or law, capable of objective verification. It is dependent on various factors, such as past or present relations with any of the parties to the dispute, whether personal, business or any other relationship, which is reasonably likely to affect the independent exercise of mind by the arbitrator. Impartiality on the other hand is more a mental state, which will necessarily be subjective. It amounts to the absence of risk of bias on the part of the arbitrator towards one of the parties. The impartiality of an arbitrator is often disputed on the grounds that he or she is already familiar with the dispute or a connected dispute from a previous arbitration.

- **Duty of disclosure:** Any person asked to assume functions of an arbitrator must inform the parties and the appointing authority or the arbitral institution of all the circumstances, which from the parties' view might be likely to affect his or her independence or impartiality.⁴ All arbitrators are

³ See Michel A. Calvo, The Challenge of the ICC arbitrators: Theory and Practice, 15 J. Int'l ARB.63 (Dec 1998)

⁴ The UNCITRAL Model Law, Article 12, Canada's federal and provincial arbitration laws, the Tunisian Arbitration Code of 1993 (Art.57) and the 1997 German Arbitration

obliged to act equitably and impartially and to treat the parties equally throughout the proceedings and give proper opportunity to the parties to argue their case. They must complete their functions within the legal or contractual deadlines that they have been given; if the arbitrator fails to deliver an award in the time given, he must apply to the competent court to

Quick Points

Requirements/Obligations Imposed on Arbitrators

- Independence and impartiality
- Duty of disclosure

Rights of the Arbitrators

- Right to remuneration
- Arbitrator's moral rights

Protection that Law Offers Each Group

- Protection of law available to the parties in case of breach of obligation of arbitrator, to be independent and impartial:
- Protection of law available to arbitrators: principle of immunity:
- Liability for failure to comply with Duty of Disclosure and for wilful violation of their obligations:

Remedies for Non-Compliance with Arbitrator's Obligations

obtain an extension of the deadline. If the arbitrator fails to apply, he must be personally liable. The arbitrators are also obliged to carry out their function diligently. If the arbitrator fails to participate in the hearings or deliberation, he would be in breach of his duty to act diligently. If they do so in order to obstruct the proceedings in the interest of party who appointed them, they will be liable for wilful misconduct. Also, arbitrators are obliged to pursue their functions till the final award is made and they

Law (Art. 1036 (1) of the ZPO)

cannot resign without proper grounds. This rule is commonly found in many statutes like the French law (Art. 1462 of the New Code of Civil Procedure), Italian law (Art. 813 of the Code of Civil Procedure) and the Dutch law (Art. 1029 of the code of civil procedure). Lastly, the arbitration rules and code of ethics generally specify the duty of confidentiality of the arbitrators. This is reflected in Article 34 of the AAA International Arbitration Rules (similar to Art.30.2 of the 1998 LCIA Rules).

Rights of the Arbitrators

- **Right to remuneration:** The arbitrators are entitled to remuneration from the parties who appoint them to decide the dispute; remuneration is made by way of payment of fees. The Italian Code of Civil Procedure states that arbitrators are entitled to be reimbursed in respect of their expenses and to receive fees for the work which they have carried out, unless they have waived such rights. Article 84 of the Code states that if the parties do not accept the assessment and fees, and the expenses carried out by the arbitrators, they will be determined by the court; a similar provision exists in Belgian law. It is a well established rule of common law that an arbitrator has a lien over the award against the payment of fees and so has a right to bring an action for fees. The IBA Rules of Ethics prohibit any unilateral financial arrangement between an arbitrator and the appointing authority as a safeguard for independence of all arbitrators.

- **Arbitrator's moral rights:** Arbitrators can legitimately expect the parties to cooperate throughout the proceedings. This principle is self-evident as a general principle, yet it is not explicitly mentioned in most of the

rules of arbitral procedure. They have the right to pursue their brief until its conclusion and can only be dismissed with the consent of the parties. The confidentiality of the arbitral process is a right that an arbitrator can exercise against parties, any arbitral institution and even third parties (subject to review by courts). There is no document proclaiming these rights and few of them may be found in any institution's rules; they are in fact inherent in an arbitrator's role.

Protection that Law Offers Each Group

- **Protection of law available to the parties in case of breach of obligation of arbitrator, to be independent and impartial:** The party making such a claim has two possible remedies; it can challenge the arbitrator or seek to have the award set aside (if the award has already been made when a party becomes aware of the circumstances affecting the arbitra-

"If the party was aware of such facts and circumstances at that time, it will be presumed to have waived that right to rely on them"

tor's independence and impartiality). However, a party bringing the claim must demonstrate that the facts and circumstances on which it relies were not known to it prior to the appointment of the arbitrator. If the party was aware of such facts and circumstances at that time, it will be presumed to have waived that right to rely on them. This rule reflects a principle widely accepted in international arbitration and is described by UNCITRAL as a waiver

of a party's "right to object".⁵

- **Protection of law available to arbitrators: principle of immunity:** The word "immunity" in the present context is used by courts and authors in common law countries to highlight the principle that arbitrators cannot be held liable for the manner in which they perform their judicial functions. This is intended to serve the public interest by guaranteeing that arbitral justice can function properly. A survey covering thirteen countries⁶ suggests that the United States is the only country in favour of absolute immunity. The countries like Austria, England, Germany and Norway only grant limited immunity. Legal systems which afford arbitrators no immunity, include Spain, where the Arbitration Statute of 5 December, 1988 provides that arbitrators can be sued for the loss caused by misrepresentation or fault on their part (Art.16(1)). The Austrian Code of Civil Procedure also admits such liability in the event of an unjustified default or delay (Art. 584(2)).

- **Liability for failure to comply with Duty of Disclosure and for wilful violation of their obligations:** There's no doubt that where an award is set aside because of the arbitrator's fault, the parties' expenses and costs incurred in the course of arbitral proceedings are wasted and that loss is recoverable. In addition to award of costs against the arbitrator in the court proceedings, the courts can also order the arbitrator to indemnify the parties of all or part of the costs incurred in their defence in the arbitral proceedings. The courts can also award damages for the costs of the new arbitral

⁵ Art.4 of the UNCITRAL Model Law

⁶ THE IMMUNITY OF ARBITRATORS (Julian D.M. Lew ed., 1990)

proceedings required after the setting aside of the award as a result of the arbitrator's conduct.⁷ Even the United States courts make exceptions for wilful misconduct.⁸ In England, the Arbitration Act, 1996 removes arbitrator's immunity when it is established that they acted in bad faith⁹ and allows them to be held liable for losses resulting from their resignation.

Remedies for Non-Compliance with Arbitrator's Obligations

A party is entitled to challenge the validity or enforceability of the award where the arbitrator has failed to observe the principles of equality or due process, or if they have made the award after the applicable deadline has expired. The most effective way of dealing with the delaying tactics of the arbitrators resigning in the midst of the arbitration proceedings is to continue with a truncated tribunal without replacing the resigning arbitrators. Article 11 of the AAA is to this effect. However, another method is for replacement arbitrator to be directly appointed by the appointing authority or the competent court. Article 11 of the 1998 LCIA Rules and Art.12.4 of the 1998 ICC Rules, Sec 16 of the 1999 Swedish Arbitration Act and Art.813 of the Italian Code of Civil Procedure have adopted this approach.

Arbitrators can be removed if they become unable or refuse to pursue their functions and especially where it is established that they have acted negligently or are guilty of misconduct. Only agreement of the parties is required for their removal in this

⁷ See CA Paris, Oct.12, 1995, VanLuijk

⁸ Lundgren v freeman, 307 F.2nd 104 (9th Cir. 1962)

⁹ secs.29 (1) and (3) and 25

case. An arbitrator will be dismissed, where he fails to satisfy the qualities required of persons acting in a judicial capacity. Dismissal is generally sought by one party only and in the event that the challenge is contested; the matter is decided by arbitral institution, the appointing authority or the courts.



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Criminal liability may arise when an arbitrator commits a breach of his obligation to act as independent and impartial judge. Certain legal systems impose special forms of criminal liability, e.g. in case of passive corruption.¹⁰ Although in their judicial capacity, arbitrators enjoy a degree of immunity, which prevents them from being sued in respect of errors, yet a fault committed in conducting the arbitral proceedings constitutes a breach of contract, and arbitrators are accountable for such breaches under the ordinary law of contract. The 1998 LCIA Rules states that arbitrators are

¹⁰ See Final Report on the Status of the Arbitration Appendix II—Comparative Synthesis of Current Substantive Law in various Countries, ICC BULLETIN, Vol.7, No. 1, at 37, 39 (1996)

not liable for "any act or omission" in connection with any arbitration conducted in accordance with those rules, but that they can be liable for the consequences of "conscious and deliberate wrongdoing". The arbitrator may be imposed pecuniary liability, in case he fails to perform his duties

properly. Payment of his fees may be suspended or a party may claim its restitution.

Conclusion

We may have many different approaches to comprehend the unique relationship between an arbitrator and the parties involved, whether contractual, status approach or the like, but in essence the nature of rights and obligations that they have against each other flows inherently from the unique nature of dispute resolution mechanism of arbitration itself. **HLM**



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