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Article

The independence of arbitrators

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The author raises concerns over impartiality in multi-member arbitral tribunals.

In a multi-member arbitral tribunal it is not unusual for two or more members of the tribunal to know each other and to have had or have close personal, professional or other relationships. During a long arbitration it is also possible for fellow arbitrators to develop close relationships that remain throughout the conduct of the arbitration and afterwards. Many arbitrators are drawn from other professions and instances arise where party-nominated arbitrators would have had close professional relationships with the parties nominating them giving rise to legitimate concerns as to their independence and impartiality. Article 7 (1) of the ICC Rules provides as follows:

> *Every arbitrator must be and remain independent of the parties involved in the arbitration.*

Prior and ongoing relationships with the parties might affect the independence and, as a consequence, the impartiality of arbitrators, and signal the need for careful scrutiny of such relationships during the formation of the arbitral tribunal. The rules of all arbitral institutions provide for this in one way or another even though there is rarely a reference to particular relationships as such between the arbitrators and the parties to the arbitration. In general, persons nominated as arbitrators sign a declaration which includes a statement of their past and present relationships with the parties to the dispute.

That is not surprising as most arbitrators are busy professionals in other fields and it is not unusual for some of them in the practice of their profession to have had contact with the parties before their nomination as arbitrators in a particular dispute involving the same parties. The relevant point is the nature of their relationships and current status and how far the arbitrators can be trusted to be independent and impartial despite previous and ongoing contacts with the parties. Although arbitral institutions make a fuss about the relationships with the parties, in practice none of them actually seriously review their relationships and take appropriate action except on a selective basis. Even if they do, the matter becomes deeply controversial and leads often to allegations against an activist arbitral institution of bias. Much of the scrutiny is left to the parties themselves who may lodge challenges to the appointment of someone as an arbitrator compelling the appointing authority to make a final ruling.

Relationships between arbitrators themselves have rarely been recognized as a meaningful factor in the conduct and outcome of arbitrations probably because there is no obvious link with their capacity to be impartial in any particular dispute although their independence from each other is questionable especially where the arbitrators are all local or belong to the same arbitral entity and are involved in a domestic arbitration. Yet relationships between arbitrators abound and are much more common than relationships with the parties in a dispute. Their relationships *inter se* or, for that matter, absence of relationships *inter se* can affect, if not the independence and impartiality of the arbitrators, the pattern and intensity of interaction between arbitrators in an arbitral panel and impact directly on the quality of the adjudication process and indirectly on the resulting award. However, the Netherlands Arbitration Institute Arbitration Rules (NAI)(2001) may be interpreted to mean that close relationships between arbitrators can indeed affect their impartiality. Article 10 (1) of the NAI Rules reads as follows:

> *The arbitrator shall be impartial and independent. He may not have a close personal or professional relationship with a co-arbitrator or with any of the parties.*

To equate the relationship of an arbitrator with any of the parties with the relationship with a co-arbitrator is unfortunate. If we were to be guided by the NAI Rules, the fact that the relationship must be a close one will depend on the circumstances and nature of each relationship to be evaluated on a case by case basis. As to what is a disqualifying close relationship between the arbitrators can be different from what is a disqualifying close relationship between an arbitrator and a party. Less strict criteria would apply in the scrutiny of a relationship between an arbitrator and a co-arbitrator. Is the relationship so close as to make it obvious to the world at large that the two arbitrators are not fit to serve on the same panel? This would necessarily be the case where family relationships exist or arbitrators belong to a partnership or other business association having a common economic interest

but not always as can be seen below. On the other hand, one can argue justifiably that arbitrators who know each other and belong to the same institutions will result in the arbitral panel operating as a team with a common sense of purpose and lead to a smooth and speedy less costly arbitration.

Quite easily, however, close relationships between arbitrators can lead unconsciously or consciously to shared biases that can distort the conduct of the arbitration and influence the correctness of the eventual award. The NAI Rules have a good point which deserves serious attention from other arbitral institutions and UNCITRAL.

Based on the NAI Rules, one would normally conclude that two barristers belonging to the same chambers may not be appointed as arbitrators in the same arbitration. Unfortunately, the decision by Judge Rix in *Laker Airways v FLS Aerospace Ltd and Burnton et al* to the effect that a party nomination of a barrister as an arbitrator in an arbitration in which the counsel for the party was a fellow barrister in the same chambers was perfectly legitimate suggests otherwise, at least according to English practice.

Where state parties are involved, an arbitral institution such as the International Centre for Settlement of Investment Disputes (ICSID), under Rule 1 of its Arbitration Rules (2006), requires as follows:

> *The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.*

The ICC is also sensitive to the matter of nationality of an arbitrator but only in the case of a sole arbitrator or president of an arbitral tribunal and that too only in regard to the parties to a dispute. The ICC Article 9 (5) reads as follows:

> *The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties.*

This is in line with Article 7(1) of the ICC Rules which requires an arbitrator to remain independent of the parties to the dispute. It is apparent that the ICC is not overtly concerned about the close relationship between co-arbitrators and their nationalities, but the ICC Rules include a catch-all provision under Article 11 to the effect that a challenge of an arbitrator may be made on grounds of a "lack of independence or otherwise," meaning that there is no restriction on the range of circumstances that can bring upon a challenge in an ICC administered arbitration.

The rationale for the ICSID Rule and the ICC Rule (to a lesser extent) in regard to nationalities of arbitrators is unclear to me in this age of mass migrations, involuntary transfers of peoples, and political and economic refugees because nationality can often be a matter of accident and convenience than choice. The fact remains that the connection of an arbitrator with a party to the dispute or more curiously with another arbitrator based on nationality is a matter of concern to ICSID. Unfortunately, this rule has effectively put arbitrators from the developing countries out of ICSID arbitrations because arbitrators from developing countries are rarely known outside their own countries and state parties in ICSID arbitrations are all developing countries except for the anomaly in *Mobil Corporation and others v New Zealand Government (ICSID Case No ARB/87/2).*

IS INTERACTION BETWEEN ARBITRATORS AFFECTED BY THEIR RELATIONSHIPS?

There is the six million dollar question, especially in international arbitrations, as to whether interaction between arbitrators is affected adversely by relationships between arbitrators and as to whether interaction is a mandatory procedural requirement in arbitrations, and whether evidence of a lack of reasonable interaction between arbitrators or lack of reasonable attempts to interact a ground for invalidation of an arbitral award.

By interaction, I mean consultations in good faith between the arbitrators including the presiding arbitrator in procedural matters and opportunities for reasonable discussion and debate between all the members of the arbitral panel including the presiding arbitrator before decisions on substantive matters and the award are taken and communicated to the parties. In a properly conducted arbitration, there will also be many occasions when party and other nominated arbitrators exchange ideas and views among themselves, but consultations and exchanges between the presiding arbitrator and the arbitrators should be done in a manner that does not invite criticism of bias on the part of the presiding arbitrator towards one or more arbitrators in which case the independence of the presiding arbitrator can be thrown into doubt and render any award tainted.

The purpose in interaction is to discover the truth through the contributions from all the arbitrators in a panel. Truth is most likely to be discovered by exposure to the scrutiny of those with varying views and standpoints and their interaction in good faith in a rational and reasonable manner, and it will be the duty of the presiding arbitrator to ensure that the arbitration proceedings are so conducted as to encourage the full participation of every member of an arbitral tribunal in the whole arbitral process leading to the making of the award. Past and present relationships between the arbitrators can consciously or unconsciously affect the perceptions of the arbitrators of one another and, as a result their conduct towards one another, raising questions as to the legitimacy of the proceedings and quality of the award if they are unwilling to interact effectively.

The most conventional and common arbitral panel consists of three arbitrators and the arbitral process begins usually with the two parties in dispute nominating their individual choice as arbitrators. The two party-nominated arbitrators would then proceed to select and agree on a third and presiding arbitrator. There is little risk of two party-nominated arbitrators having close relationships being nominated as arbitrators by the parties themselves. Their nominations by the parties is unlikely to impact negatively in the arbitral process unless one of the parties is a state party and the parties have a joint corrupt motive, but it is often possible that the presiding arbitrator has a relationship with one of the party-nominated arbitrators with potential for distorting or corrupting the process.

They could have worked together before, enjoy connections with the same arbitral institutions in one form or another (for example, official or corresponding members of the ICC or AAA), be members of professional arbitral bodies such as the London Chartered Institute of Arbitrators, or be members of other professional bodies such as the Institution of Civil Engineers and be listed by these institutions in their own approved band of arbitrators.

All these institutions encourage fellowship among their members and many members pride themselves on the closeness of their commitment to these institutions. These institutions compete with each other for business and some are overtly entrepreneurial in character. They mix politics and business and engage in prejudicial conduct where their interests are affected by blocking targeted groups and individuals from joining the profession. On top of this eager-beaver mix of competing arbitral institutions and semi and quasi arbitral bodies, an arbitral panel can be drawn from a mix of nationalities, cultures, religions and legal systems with the result that at some point parties may be faced with a panel formed of arbitrators with an uneasy relationship *inter se.* It is unrealistic to think that an arbitral tribunal is a collegial team "marked by power or authority vested equally in each of a number of colleagues" unless members of the tribunal are drawn from the same institutions or have established successful personal or other relationships – in which case their independence suffers but arbitration rules are wrongly predicated upon the belief that an arbitral tribunal is a collegial team. For that reason, arbitration rules ignore the impact of close relationships among arbitrators as a factor in their appointment. In fact, the language of most arbitration rules reflects the assumption underlying the conduct of an arbitration that the panel members are all fellow members of the same fraternity.

So much so, institutional arbitration rules refer generally to the powers of the arbitral tribunal and the tasks that have to be carried out by the tribunal and reference to members of the tribunal, if at all, is made only in regard to the making of the award. For example, Article 25 (1) of the ICC Rules reads as follows:

When the Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there is no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone.

Article 31 (1) of the UNCITRAL Arbitration Rules reads as follows:

When there are three arbitrators, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators.

In both the ICC and UNCITRAL Rules there is obviously an assumption that the president of the tribunal must have included both co-arbitrators in a three-member panel in the tribunal's deliberations and that both co-arbitrators would have been given an opportunity to interact with the president in the deliberations and reaching a conclusion on the award and preparing the draft. In practice, the president or one of the co-arbitrators would draft the award with the approval of the president and invite the others to join in signing the award. What the parties see is the award when it is finally printed and presented to them. As to whether a party-nominated arbitrator has been excluded effectively from all deliberations and from reviewing the award, the parties will not know except for a mandatory requirement under Article 32 (4) of the UNCITRAL Rules for a note in the award as to the reasons for the absence of the signature of any one of the arbitrators. There is no guarantee that an arbitral tribunal would have availed itself of the knowledge, experience and expertise of all the members of the panel. The ICC is concerned neither with the minority view nor the absence of any signature.

By contrast to the ICC and UNCITRAL Arbitration Rules, the ICSID Arbitration Rules, Rule 47 (3) recognizes the presence of the third or minority arbitrators by providing as follows:

Any member of the Tribunal shall attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

And this too without the agreement of the majority or approval of the presiding arbitrator who are bound by the ICSID Convention and Arbitration Rules to admit the contribution of the minority or third arbitrator. It also means that a minority or third member of an ICSID Tribunal cannot be refused the right to review an award made by the majority of the tribunal before it is communicated to the parties to the dispute. The ICSID Arbitration Rules, Rule 16(2) goes further and makes it mandatory in any decision by correspondence among members of the tribunal to be made only after consultation with all members of the tribunal without exception:

Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided all of them are consulted.

Although the presence of a majority of the members of a tribunal is sufficient for a valid sitting of an ICSID Tribunal, the fact remains that all the members should have been notified and consulted, of the date of a hearing or deliberations on any matter and the making of an award.

I return to the six million dollar question as to whether interaction or attempts to interact between all the arbitrators and the opportunity for review of the award by all the arbitrators is a mandatory procedural requirement for all arbitrations under both the UNCITRAL and ICC Rules and indeed under other arbitral institution rules; and as to whether the exclusion by the tribunal of an arbitrator who is able and willing from the review of the award results in invalidation of the award.

These situations seldom arise as the arbitral institutions and the professional bodies through their propaganda and subtle pressures tend to deter the parties from nominating truly independent arbitrators other than those known and approved by these institutions and professional bodies and have close relationships with them and each other. Professional relationships are common among lawyers and arbitrators with large practices but by and large they learn to respect the independence of each other. Close relationships also develop and it would be unusual if normal human beings do not relate to each other outside their professions. Besides, as pointed above, national arbitral bodies encourage the appointment of their membership as arbitrators and professional associations and arbitral institutions maintain panels of arbitrators available for selection as arbitrators. Many of the successful arbitrators know each other, have close professional and personal relationships and actively promote the interests of the arbitral entities to which they belong.

The arbitration rules as they presently stand have made it possible for a three-member panel arbitration to be conducted and the award made with minimum participation of a member of the panel if the presiding arbitrator and a co-arbitrator so decide. Although it is very rare, it is also possible for a presiding arbitrator to be ignored in the deliberations leading to an award if the co-arbitrators so decide and are agreed on the contents of the award. The majority generally has absolute power to control the conduct of an arbitration and deliberations afterwards if the majority so decides. Under the present rules, there is no express mandatory requirement for interaction of the all the arbitrators in the making of an award although all arbitrators must be notified and consulted on dates of tribunal deliberations. However, there is nothing stopping a presiding arbitrator meeting with one of the arbitrators with whom he has a close relationship in informal exchanges including writing the award. Arbitration rules do not regulate the procedures to be adopted in the making and review of an award by an arbitral tribunal to ensure that every member of the tribunal puts in his bit to produce a quality product.

If there is a compelling reason to require an arbitrator not to have a close relationship with a co-arbitrator, it lies in the potential of such a relationship to discourage the effective participation of the third arbitrator as, for example, where the two arbitrators find it convenient to ignore him and where they develop a hostility towards the third arbitrator for good reasons or bad. It is only where two arbitrators have a corrupt motive that their close relationship can have a negative impact on the arbitration and the validity and value of the award, but it can affect the quality of the award. The NAI Rule does not distinguish between professional and personal relationships and it would be misleading to consider the NAI Rule as anything other than a matter of policy to encourage new entrants to the arbitration field. There is wide criticism that international commercial arbitration is dominated by a small group of practitioners promoted by the institutions to which they belong.

It would be counter-productive if there were to be a general rule excluding those with previous professional relationships from appearing together in an arbitration, but considering the failings of human beings every allegation of relationship professional or otherwise between arbitrators should be examined on a case by case basis, and appropriate action taken by the competent authority.

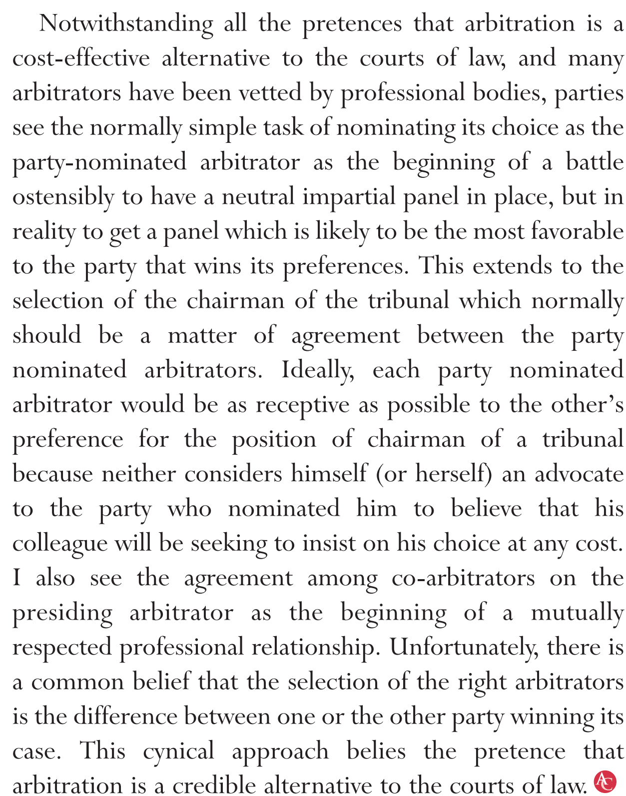
Even though the rules of international arbitral institutions mandate that arbitrators should be independent of the parties to a dispute and give powers to the institutions to refuse a nomination, the institutions themselves seldom interfere in the choice of party-nominated arbitrators in the interests of respect for party autonomy and to avoid criticism of bias and prejudice on the part of the institutions. A close relationship between two arbitrators is all but ignored by the arbitral institutions. This can be a serious matter in arbitrations under arbitral rules such as the UNCITRAL Rules which give the parties absolute freedom in the choice of arbitrators and where there is no compulsory supervision by a reputable arbitral institution. By contrast, the ICC supervising counsel ensures that the award is reviewed by all the arbitrators even though not so expressly required by its arbitration rules and ICSID rules go further and invite arbitrators to express their individual opinion on awards made by the majority in a panel thus compelling the majority to share with the minority in the making and review of the award.

RELATIONSHIPS BETWEEN ARBITRATORS AND ARBITRATIONS INVOLVING STATE PARTIES

The relationship between arbitrators is of particular interest in arbitrations involving state parties. Many international arbitrations involve developing countries, usually in the capacity of the respondent. Although seldom raised as an issue in international arbitrations, the general malaise and misconduct in government institutions and parastatal agencies in most developing countries must

inevitably creep into the arbitral process too, with the potential to corrupt an otherwise efficient and cost effective alternative to the local courts of law. Damage to the integrity of the arbitral process can occur where the arbitrations of such disputes are governed by UNCITRAL Rules without the supervision of a reputable arbitral body such as the ICC and ICSID. I am convinced that the use of UNCITRAL Rules without the supervision of an international arbitral body should be discouraged in arbitrations involving a state party because there is no guarantee that the arbitral process will not be abused by corrupt state officials and unethical private entrepreneurs.

Given that relationships between arbitrators and between arbitrators and parties to a dispute do matter in an arbitration, the combination key to a successful arbitration in terms of a reliable quality award is (1) respect for party autonomy, (2) the appointment of arbitrators who are prepared to interact with their fellow arbitrators whoever they are and from wherever they may originate, and (3) the selection of a chairman under strict conditions requiring that he or she ensures maximum interaction between the arbitrators and full participation of all members of an arbitral tribunal in its deliberations or else risk the invalidation of the award in a court of law. As pointed out above, a close relationship between two arbitrators can affect the independence of arbitrators and the way in which the arbitrators interact with arbitrators outside that relationship. However, the respect for party autonomy will ensure that co-arbitrators are relatively new to each other without a close relationship and, as a result, without the risk of collusion in pursuit of a corrupt motive. Unfortunately, the focus on the person of an arbitrator and fellowship among arbitrators by arbitral institutions and professional bodies promoting their membership has resulted in encouraging parties to engage in time consuming practices in the nomination process and making the formation of the arbitral tribunal a protracted painful event. Exchange of lists of acceptable arbitrators prepared by the parties and their counsel and the tactics surrounding the preparation and scrutiny of the lists to arrive at nomination of arbitrators acceptable to both parties is an example of such practices.



Notwithstanding all the pretences that arbitration is a cost-effective alternative to the courts of law, and many arbitrators have been vetted by professional bodies, parties see the normally simple task of nominating its choice as the party-nominated arbitrator as the beginning of a battle ostensibly to have a neutral impartial panel in place, but in reality to get a panel which is likely to be the most favorable to the party that wins its preferences. This extends to the selection of the chairman of the tribunal which normally should be a matter of agreement between the party nominated arbitrators. Ideally, each party nominated arbitrator would be as receptive as possible to the other's preference for the position of chairman of a tribunal because neither considers himself (or herself) an advocate to the party who nominated him to believe that his colleague will be seeking to insist on his choice at any cost. I also see the agreement among co-arbitrators on the presiding arbitrator as the beginning of a mutually respected professional relationship. Unfortunately, there is a common belief that the selection of the right arbitrators is the difference between one or the other party winning its case. This cynical approach belies the pretence that arbitration is a credible alternative to the courts of law.

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