Justifiable Doubts as to the Arbitrator's Impartiality or Independence

Keywords: arbitration; arbitrator; impartiality; independence; justifiable doubt.

1. Introduction

Traditionally, most arbitration acts provided that an arbitrator could be challenged on the same grounds as those on which judges could be challenged. Thus, arbitrators could be challenged on specific grounds, such as a family relationship with one of the parties or animosity towards one of the parties. The more modern approach is to provide for an open norm for the grounds on which challenges can be brought. This approach finds its origin in the UNCITRAL Arbitration Rules adopted in 1976.[1] It provides that: "[a]n arbitrator may be challenged only if circumstances exist that give rise to the justifiable doubts as to his impartiality or independence".[2] This standard was received in many other arbitration acts and rules. The standard nowadays being more or less uniform, its interpretation and application are far from easy.

The issue of justifiable doubts was addressed by a Canadian Appointing Authority acting under the UNCITRAL Rules of 1976 in a lengthy challenge decision of 11 January 1995.[3] The facts of the case, insofar as relevant, are the following (for reasons of confidentiality, all names have been changed in this description).

The Government of Xanadu had concluded a long-term supply contract concerning agricultural products with a food company from Yahora. The contract provided for UNCITRAL Arbitration in Washington but did not name an Appointing Authority.[4] Around the same time that the food

1. UNCITRAL Arbitration Rules, reproduced *in* I.I. Dore, The UNCITRAL Framework for Arbitration in Contemporary Perspective 192 (1993).
2. *Id.*, Art. 10(1).
3. The decision will be published *in* XXII Yearbook Commercial Arbitration (1997).
4. Under the UNCITRAL Arbitration Rules, *supra* note 1, an Appointing Authority will appoint a sole arbitrator if the parties cannot reach agreement on the sole arbitrator, a Chairman of the arbitral tribunal of three arbitrators if the two party-appointed arbitrators cannot agree on the Chairman, and an arbitrator for a party if that party fails to appoint

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company terminated the contract prematurely, Xanadu faced an internal conflict. In that conflict the Government of Yahora supported the political opposition.

During the arbitral proceedings the food company appointed as arbitrator a Mr. Jones, who had served as a legal advisor of the Government of Yahora during its support of the political opposition in Xanadu. When Mr. Jones returned to private practice, he was engaged to defend the interests of a former government official in relation to an investigation of the activities of the Government of Yahora *vis-à-vis* the Government of Xanadu.

Apparently, the Government of Xanadu had considerable doubts regarding Mr. Jones' impartiality or independence, as he was challenged. As the arbitration clause in the contract did not provide for an Appointing Authority, the Secretary-General of the Permanent Court of Arbitration designated a Canadian lawyer as Appointing Authority to decide on the challenge.

Before the Appointing Authority, the parties made their allegations which the Appointing Authority termed as 'competing factors'. The Appointing Authority summarized these as follows.

On the side of the Government of Xanadu (the claimant in the challenge proceedings):

1. Mr. Jones (the arbitrator) was a high ranking official in the Government of Yahora which was demonstrably hostile to the Government of Xanadu and its policies;
2. Mr. Jones was legal advisor to a Government official on matters relevant to, though not directly concerning, Yahora's policy in relation to Xanadu;
3. subsequently, Mr. Jones was the attorney for an official being investigated in connection with the activities of the Government of Yahora in Xanadu, and was said to have given written evidence of his own antipathy to the Government of Xanadu in his defence of his client's position;

an arbitrator (Arts. 6 and 7). Furthermore, the Appointing Authority will decide on the challenge of an arbitrator (Art. 12). If the parties have not agreed on an Appointing Authority, the Secretary-General of the Permanent Court of Arbitration in The Hague will designate an Appointing Authority (Art. 6(2)).

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4. the international political events, and the consistent hostility towards the Government of Xanadu, took place more or less contemporaneously with the events involved in the dispute presently going to arbitration;
5. some of the actors in both disputes are identical, notably members of the Government of Xanadu; it is argued, *inter alia*, that Mr. Jones's assessment of their credibility could be affected by his past exposure;
6. the political overtones inject a different dimension into the matter such that the structure for the arbitral decision must be insulated, and seen to be insulated, from any taint of bias or a potential challenge; and
7. this composite of the background factors and Mr. Jones's legal writings would persuade a reasonable observer to conclude that the claimant's doubts as to the arbitrator's impartiality are justifiable.

On the side of the food company (respondent in the challenge proceedings):

1. Mr. Jones never acted for the respondent and has had no personal connection with the matters at issue in the arbitration;
2. Mr. Jones acted only as legal advisor and cannot be said to have been doing more than giving a legal opinion to his client at the time when the dispute arose and setting forth his client's position - not his own - in his defence of his client in the subsequent year;
3. even if the two instances relied on could be construed as evidence of potential bias, it was against a particular Government administration - not against the present one or against Xanadu itself;
4. neither could Mr. Jones's views, even if they were as alleged, bear on the matters at issue in the arbitration;
5. it was also denied that, both as an ethical and as a practical matter, Mr. Jones's views could have any governing effect on matters of credibility going to the legal issues in the arbitration; and
6. it was advanced that there is, on the record, no solid evidence of hostility to Xanadu or to the leaders of Xanadu on Mr. Jones's part such as to raise a reasonable doubt as to his impartiality.

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Having read these contentions, I would not be surprised if the reader's first reaction would be: why did Mr. Jones accept his appointment or why did he not resign upon the bringing of the challenge? In one sense, it may be fortunate that he did not do so as it resulted in an interesting examination by a distinguished Appointing Authority as to what may constitute 'justifiable doubts'.

Before reviewing his examination of the question of 'justifiable doubts', the decision of the Appointing Authority may be mentioned. He appeared to have considerable doubts himself: "[t]his is not a clear cut matter. [...] [T]he challenge is a substantive one. It is by no means without merit". Nevertheless, the Appointing Authority determined that the Government of Xanadu had not presented sufficient evidence to sustain 'justifiable doubts'.

The Appointing Authority determined that "the challenge was not founded on an allegation of actual bias". This does not come as a surprise, since most challenge proceedings concern an appearance of bias (also called 'imputed bias'). It rarely occurs that an arbitrator is caught red-handed 'with his fingers in a party's sugar bowl'.

2. The Legal Framework

The Appointing Authority then addressed the legal framework. This examination will be reviewed following the headings used in the challenge decision.

2.1. Background of the UNCITRAL Arbitration Rules

Having considered the history of Article 10(1) of the UNCITRAL Rules as well as its companion text in the UNCITRAL Model Law on International Commercial Arbitration of 1985 (Article 12(2))[5], the Appointing Authority concluded that "no assistance is to be gleaned from the legislative history of either the UNCITRAL Arbitration Rules or the UNCITRAL Model Law in relation to the problem at hand save that it is a matter for decision by the Appointing Authority". Indeed, the legislative history for

5. UNCITRAL Model Law on International Commercial Arbitration (1985), reproduced *in* I.I. Dore, *supra* note 1, at 108.

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both the UNCITRAL Arbitration Rules and Model Law provides little guidance regarding the interpretation and application of this standard.[6]

2.2. Standards for party-appointed arbitrators

In this case, the Appointing Authority concluded that "[t]here is no lesser standard for party nominated arbitrators than for a neutral arbitrator". This is in accordance with the *travaux préparatoires* of the UNCITRAL Arbitration Rules.[7]

However, this does not mean that the role of a party-appointed arbitrator in international arbitration is the same as that of the presiding arbitrator. As is pointed out by Professor Loewenfeld, a party-appointed arbitrator may give confidence to the party which appointed him or her. Furthermore, he or she may act as a "translator of legal culture".[8] In this connection, one can only approve the suggestion made by Loewenfeld that it would be helpful if the various rule-making authorities would provide expressly that firstly, contacts concerning selection of a chairman are permissible, and secondly that contacts after the tribunal has finally been constituted are not permissible except as directed by the presiding arbitrator.[9]

2.3. The effect of the timing of the challenge or its disposition

The Appointing Authority quoted from Baker and Davis:

> [a] prudent appointing authority may be tempted to sustain an early challenge simply to be on the safe side and avoid potential for delay and disruption later, even though the same circumstances later on would not justify disqualification the closing days of a case. But such an approach would muddle the standard for arbitrator impartiality - after all, if an arbitrator is biased he

6. *See* J.J. van Hof, Commentary on the UNCITRAL Arbitration Rules - The Application by the Iran-US Claims Tribunal 62-63 (1991).
7. *Id.*
8. A.R. Loewenfeld, *The Party Appointed Arbitrator - International Controversy: Some Reflections,* 30 Texas International Law Journal 65 (1995).
9. *Id.*, at 64. One of the few Rules giving guidance is the Arbitration Rules of the World Intellectual Property Organization (WIPO), reproduced *in* WIPO, Introduction to Intellectual Property Theory and Practice 351-356 (1997). Art. 21 of the WIPO Rules provides: "[n]o party or anyone acting on its behalf shall have any *ex parte* communication with any candidate for appointment as arbitrator except to discuss the candidate's qualifications, availability or independence in relation to the parties".

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should be disqualified no matter how late the challenge, and if he is impartial he should be allowed to serve, no matter how timely the challenge.[10]

The Appointing Authority went along with the suggestion: "the test which I must apply is not a pragmatic or discretionary one, but rather one based on whether there are justifiable doubts as to the arbitrator's impartiality". It is submitted that this view reflects the correct one. However, this is regarded differently by the Dutch Supreme Court which held that the appearance of bias of an arbitrator must be judged according to a standard that is less severe in proceedings for setting aside the award than in challenge proceedings.[11]

2.4. Relevance of US law

While noting that the matter is governed by the UNCITRAL Arbitration Rules and its interpretation must be based on that text, the Appointing Authority also stated that "assistance may be gleaned from jurisprudence in other jurisdictions. United States law, the law of the *lex fori* is particularly relevant". The Appointing Authority referred in particular to the leading United States authority, the Supreme Court decision in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*[12] The *Commonwealth Coatings* case involved the failure of the third arbitrator to disclose a long-standing although not significant continuing business relationship with the winning party. The Supreme Court held that there was evident partiality or undue means which led to the setting aside of the award. The Appointing Authority, however, determined that "[t]he real rationale that emerges from the *Commonwealth Coatings* case is that each [case] is *sui generis*. This latter is very much the situation we are faced with here". Therefore, in the Appointing Authority's opinion, United States case law (or case law of any jurisdiction for that matter) could be of little or no assistance.

10. S.A. Baker & M.D. Davis, The UNCITRAL Arbitration Rules in Practice 51 (1992).
11. Nordström c.s. *v.* Van Nievelt Goudriaan & Co (Nigoco), Dutch Supreme Court, 18 February 1994, Nederlandse Jurisprudentie 1994, no. 765. This decision is approved by P. Sanders (1994 Tijdschrift voor Arbitrage 187-191). On the other hand, it is criticized by H.J. Snijders in his case comment under Nederlandse Jurisprudentie 1994, no. 765.
12. 393 US 145 (1968).

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2.5. Relevance of the American Arbitration Association Code of Ethics

The American Arbitration Association (AAA) Code of Ethics provides:

> [i]n the event that an arbitrator is requested by all parties to withdraw, the arbitrator should do so. In the event that an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator should withdraw unless either of the following circumstances exists:
> 1. If an agreement of the parties, or arbitration rules agreed to by the parties, establishes procedures for determining challenges to arbitrators, then those procedures should be followed; or
> 2. If the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the ends of justice.[13]

The Appointing Authority determined that the above provisions were not applicable because the arbitration was a proceeding under UNCITRAL Arbitration Rules. One can only agree with the Appointing Authority's determination since the above quoted Cannon (exception (1)) actually refers to the *procedure* for challenging arbitrators under other arbitration rules.

2.6. Are arbitrators held to the same standard as judges?

The Appointing Authority emphasized that "[t]his is an ongoing question resolved differently in several jurisdictions". He also noted that in the United States the *Commonwealth Coatings* case suggested that the rule for testing the impartiality of arbitrators is the same as the one applying to judges. However, he added:

> [t]he rationale for a more attenuated view, which is closer to actual practice, appears to be that to apply the same test as that for judges would disqualify the best informed and most capable potential arbitrators (White J.) in a system characterized by dealing in faith and reputation for reliability (Fortas J., dissenting) [...].
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> It may be observed that arbitrators do not have the permanent and pro-

13. American Arbitration Association, Code of Ethics, available at http://www.adr.org/code.html.

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> tected status of judges. They will have prior relationships. They are frequently selected for their expertise, in many cases arising out of those very relationships. Judicial standards, as a practical matter, may not always be applicable. Much may, therefore, be said - as it was in separate judgments in *Commonwealth Coatings* - for the proposition that each case depends on its own particular facts and that, while judicial standards may well apply in certain cases, they do not necessarily apply in all cases. [...]
>
> I might add as well that, as a practical matter, one cannot expect arbitrators, any more than judges, to come to matters before them without any previous exposure or personal views. Indeed, as has been suggested in the Supreme Court of the United States, proof that a judge's mind is a complete *tabula rasa* would be evidence of lack of qualification, not lack of bias. *Laird v. Tatum*, 409 U.S. 824 (1972) Rehnquist J. at 835 [...].
>
> Where lawyers are involved, there may be attenuating considerations. It will depend on the client or clients and the circumstances - where they act as advocates there are special considerations. It must be recognized that they may be advancing a particular proposition or position at one point in time and quite a different one at another. Whilst all lawyers will seek to maintain a sense of objectivity this is especially so of those involved in written or oral advocacy. They will be at pains to maintain an objective approach making the best possible submissions on the basis of the case given them by their client. An advocate may, or may not, be intellectually or emotionally committed to that case. But one must also recognize that there is in many cases a natural tendency to identify oneself with the case one is pleading however limited be that identification.

Considering these observations, it would be exaggerated for a reader who is not a practising lawyer to believe that practising lawyers are an endangered species who need protection. It should be recognized that in most international arbitrations, at least the Chairman is a practising lawyer or a law professor who has, or has had, practical legal experience. The very reason for this phenomenon is that the procedure of international arbitrations can be fairly complex and requires persons who have experience in litigation and case management. Appointing persons as presiding arbitrators who are highly qualified in the substance of the matter but have little or no experience in conducting proceedings, is a recipe for disaster. This is less true for party-appointed arbitrators, although they should, in my opinion, have the ability to understand the process.

The fundamental question addressed above is whether a practising lawyer in his capacity of arbitrator can be considered predisposed if he has acted for a client representing a point of view that may have to be decided differently in the arbitration. The ability of changing heads depends on the personality of the person involved. It is, in my view, however, an overgeneralization to state that "[w]hilst all lawyers will seek to maintain a sense of objectivity this is especially so of those involved in written or oral

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advocacy".

The question of predisposition may also come up if an arbitrator has decided a similar issue in a prior case. For example, if, in a given case, an arbitrator has decided that *force majeure* was present, can he be challenged in the next case where the same question arises in a similar factual pattern? In principle, I do not believe that this should be a ground of challenge, although I am aware that certain arbitral institutions accept a challenge on this ground. If this would be a ground for challenging judges (as arbitrators may be compared with them in this respect), courts would be flooded with challenge requests.

Again, another question of predisposition concerns an arbitrator who has become the 'home arbitrator' for a party. For example, I personally know of an arbitrator who has been appointed at least ten times by the same party in consecutive cases against different parties. I do not doubt the impartiality or independence of the arbitrator involved, but I wonder whether the opposite parties, had they been aware of all these previous appointments, would not have had these doubts. This actually brings us to the standard to be applied regarding 'justifiable doubts'.

3. THE STANDARD TO BE APPLIED

Having reviewed the above legal framework, the Appointing Authority came to the real question of the standard to be applied. Here, it is not easy to discern which standard was actually adopted by the Appointing Authority. He stated: "[i]n sum, the test to be applied, is that the doubts existing on the part of the claimant must be 'justifiable' on some objective basis". At least three definitions were given of this objective basis:

1. "[w]ould a reasonably well informed person believe that the perceived apprehension - the doubt - is justifiable";
2. "[r]easonable, fair minded, objective, normally reacting person"; and
3. "[w]ell informed but disinterested commercial person assessing the matter without specific expertise but aware of the [...] background".

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In my view, all of these tests are too limited. The point is not what the doubts of the disinterested person may be (i.e., the Appointing Authority); rather, the doubts of the party bringing the challenge are at issue. The question is: "is *he or she* justified in doubting the impartiality of the arbitrator?"

This means that the Appointing Authority should not do the soul searching for his own doubts but should attempt to step in the shoes of the challenging party. The test is then "if I were that party, in his position, would I have had the doubts?" This is a subjective test, rather than an objective one. The subjective test is also the test given in the Rules of Arbitration of the International Chamber of Commerce: "in the eyes of the parties" ("*dans l'esprit des parties*", Article 2(7)).[14] It should not be forgotten that arbitration for the parties is a matter of trust in the arbitrator.

Consequently, only after the Appointing Authority has placed himself in the position of the challenging party, and ascertained whether in *that* position there could be doubts, the next question to be addressed is: "are the doubts such as to lead to the removal of the arbitrator?"

4. Conclusion

This article addressed, in the framework of the challenge decision by a Canadian Appointing Authority, the question of the justifiable doubts as to the impartiality or independence of arbitrators.

It follows from this decision that the same standard applies to party-nominated arbitrators as to neutral arbitrators. However, in my opinion, rule-making authorities should consider the possibility of expressly providing that, apart from contacts concerning the selection of a chairman and contacts directed by the presiding arbitrator after the Tribunal has been constituted, any contacts between parties and arbitrators are not permissible.

In spite of the disagreement of the Dutch Supreme Court regarding this issue, it is commonly accepted that the test to be applied by an Appointing Authority is not a pragmatic or discretionary one; instead the

14. Rules of Arbitration of the International Chamber of Commerce, reproduced *in* W.L. Craig, W.W. Park & J. Paulsson (Eds.), International Chambers of Commerce Arbitration (1986), part 1-6.

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decision should be based on whether there are justifiable doubts as to the arbitrator's impartiality.

In determining the criteria for evaluating the existence of justifiable doubts, no guidance is provided by the legislative history of the UNCITRAL Arbitration Rules and Model Law or any case law. Neither can local or national ethical codes be of assistance in this matter.

In relation to the question whether arbitrators are held to the same standards as judges, an open question remains concerning the possible predisposition of a practising lawyer, acting as an arbitrator, who has

1. acted on behalf of a client representing a controversary point of view;
2. decided a similar issue in a previous arbitration; or
3. repeatedly been appointed by the same party in other arbitrations.

Contrary to the decision of the Appointing Authority in this case, I do not agree that the question of justifiable doubts should be evaluated in an objective manner. Instead, as the arbitration proces for the parties involved is highly dependent on trust in the arbitrator(s), the parties' doubts ought to be evaluated in a subjective manner. If one of the parties truly lacks confidence that the arbitrator is impartial or independent, the party should be able to use the appropriate means to challenge the particular arbitrator, in order to avoid the risk of appearance of impropriety.

It has frequently been observed that many challenges could be avoided if full disclosure is made by the prospective arbitrator. This view can be fully endorsed and a disclosure as fully detailed as possible should be the rule.

However, this is not sufficient. In my opinion, when a party expresses doubts upon disclosure or otherwise, the arbitrator should either not accept the appointment or he should resign, unless the doubts are completely devoid of substance. The maxim is once again true: *in dubio, se abstine.*

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