

M U N I
L A W

Arbitrators

International Commercial Arbitration

Syllabus

- Who can be an arbitrator?
- Number of arbitrators
- Methods of appointment
- Independence and impartiality
- Obligations of arbitrators

Who can be an arbitrator?

- No regulation in international conventions
- Requirements of national arbitration laws (*lex arbitri*)
 - UNCITRAL Model Law – no specific requirements
- Arbitration institutions
 - 2017 ICC Rules – no specific requirements (x appointment or confirmation by the ICC Court – nationality, residence, availability, ability)
- Agreement of the parties
 - Risk of being too specific

Number of arbitrators

- Sole arbitrator x more arbitrators (arbitral tribunal) – uneven number is a standard
- Agreement of the parties
- Institutional rules
 - 2017 ICC Rules – one or three, default rule: sole arbitrator (x nature of a dispute requires three arbitrators)
- National laws
 - UNCITRAL Model Law – default rule: three arbitrators

Methods of selection

- Institutional arbitration x ad hoc arbitration
- 2017 ICC Rules as an example (Arts. 12, 13)
- Ad hoc arbitration
 - Parties' agreement (including e.g. choice of UNCITRAL Arbitration Rules)
 - National arbitration laws (*lex arbitri*)
 - UNCITRAL Model Law as an example

Independence and impartiality

- Key element
- National laws, institutional rules
- Independence – relationship between arbitrator and a party (financial or other) – objective
- Impartiality – bias either in favour of one of the parties or in relation to the issues in dispute – subjective
- National laws, institutional rules – disclosure obligation, challenge procedure

2017 ICC Rules as an example

- Art. 11(1): „*Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.*“
- Art. 11(2) – statement of impartiality and independence
 - Disclosure obligation
 - Facts and circumstances – call into question arbitrator’s independence in the eyes of parties, reasonable doubts as to impartiality
 - Comments by parties
- Art. 11(3) – disclosure obligation during arbitration

2017 ICC Rules – challenge procedure

- Written statement to the Secretariat – relevant facts and circumstances
- 30 days
- Comments – arbitrator, other parties, other members of the tribunal
- ICC Court decides

UNCITRAL Model Law as an example of national law – Art. 12

- Disclosure obligation
 - Any circumstances likely to give rise to justifiable doubts as to impartiality or independence
 - Before appointment, throughout arbitration proceedings
- Challenge procedure (x procedure agreed by parties)
 - Written statement to the tribunal
 - Challenged arbitrator withdraws, other party agrees x arbitral tribunal decides
- Procedure is not successful -> request to a court

IBA Guidelines on Conflict of Interests 2014

- Application:
 - 1) Reference in arbitration agreement => binding for parties, arbitrators, institution
 - 2) Guidelines:
 - For arbitrators (scope of disclosure obligation)
 - For tribunals, institutions, courts (confirmation, appointment, challenge)
 - For parties (challenge)

IBA Guidelines – General Standards

- General standard 1

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

IBA Guidelines – General Standards

- General standard 2 – conflict of interest
 - Subjective test
 - Objective test – „test for challenge“
 - Justifiable doubts
- General standard 3 - disclosure obligation
- General standard 5 – scope

IBA Guidelines – Practical Application

- Red List
 - Non-Waivable
 - Waivable
- Orange List
 - Situation that may give rise to justifiable doubts
 - Disclosure obligation
 - Objections of parties
- Green List

Failure or impossibility to act

- Arbitrator is unable *de jure* or *de facto* to perform his/her function or for other reasons fails to act with undue delay
- UNCITRAL Model Law
 - Resignation x parties' agreement on termination x court
- 2017 ICC Rules
 - Resignation x challenge x parties' request for replacement x ICC Court decision on replacement

Replacement of arbitrators

- Challenge, resignation, parties agreement on termination, death of arbitrators, other reasons
- UNCITRAL Model Law
 - Same procedure as for appointment of replaced arbitrator
- ICC Rules
 - It is up to ICC Court if the original process is used
 - Arbitral tribunal with new arbitrator – if and to what extent prior proceedings shall be repeated
 - After closing of the proceedings – ICC Court – instead of replacing – remaining arbitrators continue

Obligations of arbitrators

- No lists of obligations can be found in national laws or arbitration rules
- Imposed by parties, arbitration rules, *lex arbitri*
- Stay impartial and independent
- Render an enforceable award
- Act with due care (question of responsibility)
- Act promptly
- Act judicially – respect due process
- Confidentiality

Practical situations – common core

- *All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. Seat of arbitration will be Vienna. The arbitration proceedings shall be conducted in English. The parties agree on application of 2014 IBA Guidelines on Conflict of Interests.*

Practical situations - questions

- Does an arbitrator have a duty to disclose the information?
- Is there a conflict of interest?

Situation no. 1

- Claimant (a company) nominates as its arbitrator Mr. Fasttrack who is the president of Claimant's supervisory board.

Situation no. 2

- Respondent (a company) nominates as its arbitrator Mrs. Ming. She is a professor at the University of Vienna. Before the commencement of arbitration she provided an expert opinion on one of the legal issues which are at stake in this arbitration.

Situation no. 3

- Claimant nominates as its arbitrator Mr. Langweiler. His wife holds 60% shares of Claimant.

Situation no. 4

- Respondent nominates as its arbitrator Mr. Prasad. He and Respondent's counsel are partners of the same law firm.

Situation no. 5

- Claimant nominates as its arbitrator Mr. Slowfood. Two years ago Mr. Slowfood represented Claimant in court proceedings in a dispute with the company X.

Situation no. 6

- Claimant nominates as its arbitrator Mrs. Reitbauer. From 2015 to the present arbitration, Mrs. Reitbauer was appointed as an arbitrator by the Claimant twice.

Situation no. 7

- Respondent nominates as its arbitrator Mr. Weinbauer. Mr. Weinbauer knows Respondent's counsel more than 20 years. They play golf together every week, they have also spend several holidays together.

Situation no. 8

- Claimant nominates as its arbitrator Mr. Barolo. Mr. Barolo published an article in law review in which he analysed in general manner the problems related to the application of Article 35 CISG. Article 35 is the key provision in the present arbitration.

Situation no. 9

- Respondent nominates as its arbitrator prof. Moses. She teaches at the same law school as Respondent's counsel.

Sources for presentation

- Moses, M.L. *The Principles and Practice of International Commercial Arbitration*. 3rd ed. Cambridge: Cambridge University Press, 2017. Chapter 6.
- Lew, J.D.M., Mistelis, L. A., Kröll, S.M. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003, Chapters 10 – 13.
- Blackaby, N., Partasides, C., Redfern, A., Hunter, M. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, Chapters 4, 5.
- The names in practical situations were taken from previous cases of Willem C. Vis International Commercial Arbitration Moot.