

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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INTERNATIONAL COMMERCIAL
ARBITRATION :- INDEPENDENCE AND
IMPARTIALITY OF ARBITRATOR AN
ANALYSIS FOR SPEEDY AND TIME
ABOUT AWARD

Authored By - Arjun P.V

ABSTRACT

In the present era where the courts are flooding with cases, it is always better to resolve the dispute among the parties itself and come to a mutual understanding, that it is always said to be a situation where neither of the parties will lose his case, that is what arbitration provides you with. Thus the international commercial arbitration which paved the way of the domestic arbitration maintains the better relationship of the parties and thus showcases the need for more out of the court settlement.

Another most important aspect of the out of the court settlement mainly revolved around the impartiality of the arbitrator and it is the most important key for an impartial award leading to no appeal and creating a win- win situation. The main aspect in the arbitration is the appointment of the arbitrator as a third person who is said to have impartial behavior. Thus this research paper and the researcher aims at showcasing the importance of the impartiality of the arbitrator appointed and which inturn makes a better effect and cause to the arbitral award thus formed.

When International commercial arbitration is taken into consideration it is the substitute method of resolving the disputes which due arise out of commercial transactions between private individual parties so as to resolve the dispute which can either result as a litigation in the National courts in different countries. The most important aspect in this procedure always turns out to be the impartiality of the arbitrator. The IBA guidelines in the Conflict of interest is one of the most important aspect and which can be welcomed as to the area of practice both the parties including their counsel has to identify the disqualifying factors in the prima facie

stages itself as the Arbitration laws and rules gives the parties the complete autonomy to choose the arbitrator and come to a settlement and avoid the dispute. There are some factors which indicate the partiality and can be taken into consideration to see the disqualification of the party appointed arbitrator, where some of them are as follows: having a financial interest, close family relationship, public position taken in the public, an adversary relationship with the parties are some of them.

It's high time that there is a practical decision taken from the side of the arbitral tribunal so as to arrive at an answer and also to fix their own regulations of liability and hence this in turn increases people's confidence in arbitration and settle the disputes. Further in this article we will see the importance of the impartial arbitrator and the way the impartial arbitrator plays a key role in the settlement.

Keywords: Arbitrator, settlement, UNCITRAL, International commercial arbitration, Arbitration, Arbitral Tribunal

Introduction

The arbitrator is a person who turns out to be the person of paramount importance in the process of arbitration and thus the arbitrator plays a key role in resolving a dispute in such a short time interval where the courts even take more time by going through the rules and nature of law laid down in this country. When the choosing of arbitrator comes 'Arbitration' being a party centered where parties have given predominance choosing of an arbitrator also is of utmost importance. The UNCITRAL model law on International Commercial Arbitration under Chapter III, Composition of Arbitral Tribunal, Article 10 says about number of arbitrators:-

- (1) The parties are given paramount importance to choose freely the arbitrator or the number of arbitrators,
- (2) failing to the above provision then the number of arbitrators shall be three.

Similarly in the UK Arbitration Act which is the Arbitral Tribunal 1996 have given the following:-

- (1) the parties are free to choose the arbitrators and there is an umpire as the third person;

Here we can clearly see that a free and fair method to choose the arbitrator is being given to the parties as such so as to maintain the transparency and accountability.

And if Indian arbitration is taken into consideration again we can see that under chapter III there again the parties have their discretion to choose and make appointments and only thing is the number cannot be one.

For the same the Jordanian legislature has made an answer for the same in the text of Article 14 of the Jordanian law number 31 of 2001 as provided as under:-

A. the number of arbitrators shall be composed of agreement between parties and there is no agreement then the number of arbitrators shall be three

B. If the number of arbitrators is not odd the arbitration shall be void.¹

The principle of party autonomy generally arises from Geneva and New York Conventions thus the importance of appointment of arbitrator plays a crucial role in the juncture before the commencement of the proceedings.

International commercial arbitration is a method of deciding and resolving disagreements arising from such contracts. Arbitrators must be impartial and independent since they have an adjudicative function. Even though they seem to be similar, they are different, the term Impartiality means the absence of any partiality or bias in the mind of the arbitrator towards a party in the matter of dispute. The Independence means that there should be no actual or past dependent relationship between the parties and the arbitrators, which could influence arbitrator decision in the case. The arbitrator need to disclose certain relationship it is considered important because it decides the rights and obligation of parties in the proceedings. The relationship of arbitrator and parties mainly dealt under two school i.e., first school believes that this relationship is established by contract and the second one is statute. In contractual relationship the obligation of the arbitrator may be divided into three categories:

duties imposed by the parties, duties imposed by law, and ethical duties. The main duties are :-

¹ The Arbitration and Conciliation Act 1966

- a) To resolve the dispute among the parties and to provide a valid award which is not open challenge
- b) To be independent and impartial with the parties and to act in an independent and unbiased and impartial way, indulging with the parties equally during the entire proceedings, and giving each party a realistic opportunity of putting their case.
- c) To carry out his task within the fixed time limit created by law or by contract.
- d) To carry out his function in good faith, with carefulness and avoiding undue delays (because it is said that justice delayed is justice denied), abstentions and withdrawals.
- e) To carry out his task to the point of delivering the award and not to resign without good cause before the award is made. Consequently, arbitrator's functions cannot cease unless there are very solid reasons for this. Moreover, this rule is still present in a great number of legal systems, and most particularly it is detailed in French, Italian and Dutch, Belgian law. Similarly, the majority of the regulations arbitration forbids the arbitrator from withdrawing without grounds.
- f) To respect and preserve the privacy and confidentiality of the arbitration.

The part of party autonomy is considered in a comparison almost all the international conventions and treaties keep the most important aspect as the party autonomy in selecting the arbitrator. The first one turns out to be the 'Geneva Convention and Geneva Protocol; the Geneva Protocol Article II says the arbitral tribunal shall be as per the will parties make where the arbitration takes place further the Geneva Convention Article 1(2)(d) says it shall be as the parties agree upon and the law that govern the arbitration. The New York Convention Article V (1)(d) an award may be refused if the arbitral authority is not constituted as per the law governing the arbitration, European Convention in Article IV(1) (b) states that parties are free to submit the arbitration procedures even to an ad hoc Arbitral procedure where they inter alia differ in appointment of arbitrator. Nevertheless "Impartiality" is the watch word which is of all the tribunals which even includes arbitrators, the conditions for independence and impartiality has to be taken into consideration from the strating of the arbitration itslef from appointment to challenge even invoking to challenge the award the guidelines are now set forth as per the IBA guidelines and the UNCITRAL Model law.

Impartiality and Independence concept:

The two terms may seem exactly similar at the first instance but they are not, the term Independence is related to personal relation between the parties and the arbitrators and their representatives. Impartiality simply refers to any partiality or bias which towards any of the parties or the matter in dispute. Impartiality should clearly mean that no favoritism towards any of the parties and moreover the arbitrator could be removed if the grounds of bias has been found as the Arbitration Act and also the UNCITRAL Law even emphasises the same in Article 13 of the UNCITRAL model law. This can be clearly taken to show that the most essential part of the Arbitration is taken as the impartiality of the arbitrator.²

Disclosure requirements from the arbitrator as a part of the arbitration are; The prima facie aspect before an arbitrator accept a case of arbitration he need to disclose the fact that he has any kind of gain from the same referring to Article 12 of the Arbitration and Conciliation Act of 1996 which is especially referring to Independence and Impartiality for the same aspect the Arbitration Rules from the 1976 UNCITRAL Rules provide that: A person who is going to be appointed as an arbitrator shall disclose to those parties who approaches him in connection with his possible appointment in any circumstances which is likely to give doubts as to the impartiality and independence. When an arbitrator is appointed or chosen, shall disclose the circumstances to the parties unless he has already disclosed it earlier.

The IBA guidelines

The international Bar Association's guidelines on conflict of interest was as a result of long consultation, more meetings that were held and discussions that were held in and out. The draft was made on 07th and 15th October 2002 was duly presented in the conference of IBA in Durban in South Africa³, Second time the same was taken for discussion in San Francisco and later the guidelines was finalized on January 2004 named as the IBA Guidelines on Conflict of Interest in International Arbitration.

² Independence and Impartiality in the International Centre for Settlement of Investment Disputes convention and Arbitration Rules. From Jstor

³ Leon Trakma, The Impartiality and Independence of Arbitrators Reconsidered, available at: <http://classic.austlii.edu.au/au/journals/UNSWLRS/2007/25.html>

The UNCITRAL Model Law

The major part of the International Commercial Arbitration is clearly and precisely drawn from the UNCITRAL Model Law from Article 12(1)⁴ which showcases that when a person is approached he should disclose any aspect which will give rise for bias. The major principles also make sure and ensure that if there exists or not a conflicting interest, that should not make any difference at all.

The particular state of legislation can be purely said as in need of justice and that can only be provided by the dispute resolver and in terms of law Judges are said to be independent and they are not restricted by any kind of authority other than bound by law⁵.

The IBA guidelines regarding the same are very much important and they have published the same⁶, it is within the arbitrator to see to that while taking on the post of the arbitral tribunal they have to be neutral without any impartiality and with complete independence and complete use of mind for the completion of the dispute through arbitration⁷. If that is not the instance then there will be a chaos and confusion with respect to the arbitrability of the arbitrator and finally leading to removal⁸.

The reference can be taken from the Jordanian Civil procedure code⁹ with respect to the this from the Article 132¹⁰ which clearly emphasizes as follows:- ‘That the Judges will be prohibited to hear the lawsuits’ if no one comes to the judge with various effectful reasons. Similarly the United Arab Emirates namely has the Dubai International Arbitration Centre Rule¹¹ in the Article 9.1¹² clearly showcases that the arbitrator has to be clearly independent and impartial and the penal code of the country even governs the same under the Article 257

⁴ Trans-Lex Law Research, available at : https://www.trans-lex.org/968925/_/arbitrators-duty-to-disclose/

⁵ AlSharq Forum, The Hashemite Kingdom of Jordan constitution 1952

⁵ IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council

⁶ IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council

⁷ Under Part I: General Standards Regarding Impartiality, Independence and Disclosure.

⁸ Part II: Practical Application of the General Standards, IBA Guidelines on Conflicts of Interest in International Arbitration.

⁹ Jordanian Civil Procedures Code No. 24 of 1988

¹⁰ Civil Procedure Law and its Amendments No. 24 for 1988, Published on Page 735 of the Official Gazette No. 3545 on 2.4.1988, available at: https://atwanlaw.com/library/111_111.pdf

¹¹ Pursuant to Decree No. 11 of 2007

¹² United Arab Emirates Haider K Afridi and Chatura Randeniya Afridi & Angell available at:- https://afridi-angell.com/wp-content/uploads/2021/02/disputeresolution_vol2a1.pdf

which has been recently amended¹³ where on submission or having the concurring proof stating the same of impartiality and biases they will be temporarily put behind the bars for a term of minimum of one year or upto 5 years.

On the same hand the International Chamber of Commerce the ICC¹⁴ under the Article 07 also mentioned as independent and impartial arbitrator is one of the foremost necessity of the arbitration procedures and in the International Centre for Settlement of Investment Disputes Convention under Article 14(1) the person appointed should be with high moral character and have high experience. The 1976 UNCITRAL Arbitration rules provide that the arbitrator shall address the need and necessity of the impartiality and independence of his own work that will be carried out for the good of the parties.

Liability of arbitrator

Apart from certain obligation the arbitrator has certain liability they are as follows:-

- Civil Liability
- Disciplinary Liability
- Criminal Liability

Civil liability:-it occurs in different ways such as violation or breach of legal or contractual responsibility, failing to meet institutional rules. This liability is towards all persons involved in the arbitration process.

Disciplinary liability: that breaches on the part of the arbitrators of the instructions of the arbitration institution would generate a disciplinary responsibility which could result in their dismissal or failure to receive payment.

¹³ Federal Law No. 7 of 2016, which was passed at the end of October, 2016.

¹⁴ International Chamber of Commerce, Arbitration Rules, available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>

Criminal liability:- The criminal act of the arbitrator need to be clearly proved

Immunity:-Arbitrator immunity is important to protect independence and impartiality. Elimination of liability mainly upon immunity of judges. Various school uphold the view that The immunity helps the arbitrator from the pressure of parties so justice can be done. in *Bremer Schiffban v. South India Shipping Corp. Ltd.*, Donaldson J. asserted that — courts and arbitrators are in business, namely the administration of justice¹⁵. The arbitrator's immunity varies from country to country and it is that of three types they are absolute immunity, a limited or qualified form of immunity and no immunity. Absolute immunity says that Arbitrators have complete or utter immunity for any legal acts they take while performing their duties. They are not subject to legal liability for their actions, including failing to disclose. No one may contest their conduct or rulings in court or before their arbitration institution. The ICC(International Commercial Arbitration), LCIA, and AAA have embraced the common law strategy of excluding arbitrators' liability. The second category does not enjoy any immunity so that they are held liable in any national court. that the arbitrator is a professional, and that he is therefore expected to carry out his function with a professional duty of care¹⁶. In limited liability arbitrators can be held liable but only in limited circumstances. One of the main aims of the English Arbitration Act 1996 is that the courts should not interfere excessively in the conduct of the arbitration process. The Act thus restricts a party's power to obtain judicial control of the process or to challenge an award.¹⁷

Different countries' legal systems apply to arbitrators' liability

- Argentina: Argentina's arbitration law examines and holds that the arbitral contract holds arbitrators liable for any damages resulting from their failure to perform their responsibilities, regardless of whether their carelessness was basic or egregious.
- Australia : Arbitrator not liable for negligence or omission which was done in the official capacity.

The term independence and impartiality may seem very much similar though they are not, as the term independence is very much related to the relationship that exist personally between

¹⁵ J. Donaldson, *Bremer Schiffban v. South India Shipping Corp. Ltd.*, 1981, AC 909-921

¹⁶ Martin Hunter, *Arbitration International*, vol. 9, no.3, 1993, p.330

¹⁷ Neil Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* 260 (Mohr Siebeck, Germany, 2008).

the arbitrators and the parties to the arbitration and at the same time impartiality term refers to avoidance of any kind of bias with the arbitrator to the parties that are to the dispute.¹⁸

Impartiality in the arbitral terms focuses and emphasizes on not to be in favor of any of the sides at any cases and furthermore in the same case if at all there appears to be any kind of bias the parties are free to move to the court's to remove the arbitrator.¹⁹

Conclusion and Suggestions

The development and growth of the arbitral proceedings are not new in origin as they carry from the age old periods and still which continue and which has gained prominent importance and in the present era which has got great significance as the cases have been piling up in the courts. Whether it is domestic arbitration or international commercial arbitration, there is always a need for highly qualified arbitrators because they have the ability to view a problem from many different angles and see it through to completion, which allows them to close the case quickly and within the allotted time frame.

Some factors which clearly affect the procedures arbitration are:-

- a. existence of the financial interest in the particular suit from the arbitrator on the promises of the parties.
- b. the family relationships that can exist
- c. the earning or public position that will be earned by these people.
- d. other settlement to the arbitrator.

The suggestions that the researcher put forth to this research is that

- a. The UNCITRAL law should be clearly and precisely made applicable in all the countries to maintain an uniform law in arbitration.
- b. The difficulties in and out of arbitration should be clearly removed applying all kinds of law that exist.

Thus with this paper the researcher is trying to clearly showcase how the process of arbitration can be lawfully conducted time bound with utmost independence and impartiality thus making more people trust on the existing arbitration procedures and how people can trust the legal procedure thus in the 'Rule of law' in arbitration.

¹⁸ Bruno Manzaneres Bastid, the previous reference, page 4.

¹⁹ Niyati Gandhi, The Double Requirement that the Arbitrator be Independent and Impartial, International Academy for Arbitration Law 2014 Winning Essay Laureate of the Academy Prize.