Droit Privé

Independence and Impartiality in International Commercial Arbitration

Asst. Dr. Sanem Aksoy Dursun[1]

I. Introduction

In the last century, arbitration has become an important method to resolve the disputes arising from international commercial disputes. Therefore many rules have been developed by different institutions or from different countries to enable to resolve the disputes in the most competent manner. To achieve this goal, the role of the arbitrators is undeniable.

When it is looked at the different rules of the arbitral bodies such as International Chamber of Commerce Arbitration Rules, it can be clearly observed that while the court or institution is either choosing or confirming arbitrators, there are some qualifications they are looking for. The main problem is the question of who may be disqualified from acting as an arbitrator. There can be three headings (1) disqualification due to illegality or lack of capacity; (2) disqualification due to interest and disposition and (3) conventional disqualification[2]. In this essay we will discuss the second point. While discussing the independence and impartiality of the arbitrators, it will also be considered the impartiality of the party-appointed arbitrators.

Finally, it will be discussed the consequences if the arbitrators are not impartial or independent, that is, to challenge the arbitrators.

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1 İstanbul Üniversitesi Medeni Hukuk Anabilim Dalı Araştırma Görevlisi.

2 Fraser P.Davidson, **Arbitration**, Edinburgh W. Green, 2000, p. 73.

II. Appointment Of The Arbitrators

According to the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) Article 11, parties are free to agree on a procedure for appointing an arbitrator or arbitrators. The UNCITRAL Model Law looks initially for parties to agree upon an appointment procedure. If this procedure breaks down then two different rules are given in Article 11(4) and 11(5). By virtue of Article 11(2), parties are free to determine the procedure for appointment, which includes freedom to entrust that determination to a third party. Failing to reach this agreement they may then refer to arbitration rules[3].

UNCITRAL Model Law Article 11(3) failing to reach such agreement[4]:

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court specified in Article 6;

(b) in an arbitration with a single arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court specified in Article 6.

Article 11(3) gives a procedure for appointment of an arbitrator when the parties have failed to agree upon a procedure for appointment -- in the case of a three arbitrator tribunal under Article 11(3)(a), and in the case of a single arbitrator under Article 11(3)(b).

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3 **Fraser P. Davidson**, International Commercial Arbitration: Scotland and the Uncitral Model Law, Edinburgh, W. Green/ Sweet & Maxwell, 1991, p. 62.

4 There is a similar provision in Turkish International Arbitration Code Article 7/ B/ 2 and 7/B/ 3. 7/B/2 corresponds to 11(3)b of UNCITRAL Model Law and 7/B/3 corresponds to 11(3)a of UNCITRAL Model Law.

Appointment of arbitrators 11(4)

Where, under an appointment procedure agreed upon by the parties:

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure.

Any party may request the court specified in Article 6 to take necessary measures, unless the agreement on the appointment procedure provides others means for securing the appointment.

Article 11(4) allows for any party to go to court where the appointment procedure agreed upon by the parties breaks down, unless that procedure provides others means for securing the appointment. A similar provision appears in Turkish International Arbitration Code Article 7/B/4.

SECTION 11(5)

"A decision on matter entrusted by paragraph (3) or (4) of this article to the court specified in Article 6 shall be subject to no appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties."

Article 11(5), which is based on Article 6(4) of the UNCITRAL Arbitration Rules, indicates the criteria by which the court should be guided in appointing an arbiter under (3) or (4) of UNCITRAL Model Law. According to UNCITRAL Arbitration Rules, "In making the appointment, the appointing authority shall have regard to such consid-

eration as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisabilityof appointing an arbitrator of a nationality other than the nationality of the parties." Also, Turkish International Arbitration Code Article 7/B/4/3 states that while appointing an arbitrator it should be noticed that the arbitrator is independent and impartial, and in a three arbitrator tribunal two of the arbitrators' or a sole arbitrator's nationality should be different from that of the parties.

According to International Chamber of Commerce Rules of Arbitration (ICC), the secretary General may confirm as co-arbitrators, sole-arbitrator and chairman of Arbitral Tribunal persons nominated by the parties or according to the particular agreement between the parties if they have filed a statement of independence without qualification or a qualified statement of independence has not given rise to objections. However, if the Secretary General considers that a co-arbitrator, sole-arbitrator or chairman of an Arbitral Tribunal should not be confirmed the matter should be submitted to the court (ICC Article 9/2). According to Article 9/1 of ICC, in confirming or appointing arbitrators, the court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's ability to conduct the arbitration in accordance with the rules of ICC. Also, when the secretary General confirms the arbitrators, they will also consider the same criteria. (9/1 of ICC)

III. Impartiality

The concept of partiality is concerned with the bias of an arbitrator either in favor of one of the parties or in relation to the issues in dispute. Because impartiality is an abstract term which involves primarily a state of mind, it presents special difficulties of measurement. Confusion may arise between neutrality, independence and impartiality. It has been argued that the terms were used synonymously but neutrality in its first, and better, known aspect refers to national neutrality. Accordingly, par-

ties from different countries will require that the third or sole arbitrator should not have the same nationality as one of the parties[5].

1. Impartiality Distinguished from Neutrality

Although it is difficult to draw a distinction between the concepts of impartiality and neutrality, it can be argued that a party may nominate an arbitrator who is generally predisposed towards him personally, who however could, at the same time, be capable of judicially and impartially applying his mind to the case. This concept can be only seen in party-nominated arbitrators because the presiding arbitrator who is not usually chosen by the parties must be both independent and impartial[6].

In practice it is sometimes difficult to distinguish between neutral and non-neutral arbitrators. The neutral arbitrator may be more favorable to the party that appointed him, but most of the time he will not allow his sympathy to the party to overcome his professional judgment when the other party presents a better case. Similarly most so-called non-neutral arbitrators, despite any sympathy they may have for the party that appointed them, will not let this interfere with their professional judgment. In international commercial arbitration a party–nominated arbitrator makes little or no secret of his sympathy with the party who appointed him and loses no opportunity to advance his client's case upon the other members of the tribunal both at the hearings and in the private deliberations of the arbitral tribunal. In breaches of this practice, there are two remedies: the first one is to challenge the arbitrator, the second one is to trust the decision of the presiding arbitrators or other members of the tribunal[7]. Some guidelines for non-neutral arbitrators can be found in

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[5] **Alan Redfern/ Martin Hunter**, Law and Practice of International Commercial Arbitration, Third Edition, London, Sweet & Maxwell, 1999, p. 212-213; **Feyiz Erdoğan**, Uluslararası Hukuk ve Tahkim, Ankara, Seçkin, 2004, p. 83-84. The principles that are about the independence and impartiality of the arbitrators in international commercial arbitration are also concerned in international public arbitration. See **Erdoğan**, p. 83 and p. 196.

[6] **Redfern/ Hunter**, p. 213.

[7] **Redfern / Hunter**, p. 213.

the American Arbitration Association and the American Bar Association (AAA-ABA) Code of Ethics which have assumed a great importance in this field[8].

2. Bias and Predisposition

In McDougall v. Laird & Sons[9], it was decided that it is an essential condition of an arbiter that he must keep himself neutral. Therefore any indication that an arbiter sees himself as acting in the interests of one of the parties will be sufficient to disqualify him. If somebody chooses to be a witness for one of the parties, he may be disqualified if he is seen to have lost his impartiality. Also, if the arbitrator takes an active part in the conduct of a litigation on behalf of one of the parties, he cannot qualify as impartial. On the other hand, the mere fact that litigation is pending between the arbitrator and a party does not disqualify, where that litigation is unconnected with the arbitration[10].

There are two tests that can be applied in English Law. The first one was set in R. v. Gough[11] case, where Lord Goff stated not only actual bias, but also the mere appearance of bias is enough to disqualify: "The court should ask itself whether there was a real danger of bias on the part of the relevant member of the tribunal in question in the sense that he might unfairly regard with favour or disfavour, the case of a party to the issue."

General guidelines are also provided in the case of Locabail Ltd. v. Bayfield Properties Ltd.[12]**.** In this case the court decided that although it was difficult to find sound bases to determine the partiality of the judges (also we can apply the same standards to the arbitrators) on questions of religion, ethnicity, sexuality, other connections or educational background. The judge ruled:

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8 **Redfern / Hunter**, p. 214.

9 (1894) 22 R. 71.

10 Belcher v. Roedean School Site and Building Ltd. (1901) 85 L.T. 468.

11 [1993] A.C. 646 at 670E-F.

12 [2000] 1 All E.R. 65.

"A real danger of bias might be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if in a case where the credibility of any individual were an issue to be decided by the judge, where he had in previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion ; or if any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearings, in such extreme and unbalanced terms as throw doubt on his ability to try the issue with an objective and judicial mind. The mere fact that a judge earlier in the same case had commented adversely on a party or witness or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection."

There is also some Scottish authorities for the impartiality of arbitrators. If an arbitrator gives any indication that he is prejudiced against one of the parties or a particular category of witness, disqualification must occur[13]. In ERDC Construction Ltd v. H.M. Love & Co.[14] it was decided that it is an implied condition of an arbiter's appointment that he should be in a position to approach with an open mind the question which has been submitted to him for his decision.

In another case the question was whether the arbitrator, who was previously an engineer of one of the parties and had expressed an opinion before receiving the evidence, could act in the case and it was decided that this situation does not prevent him from afterwards applying his mind judicially to the question[15]. So if an engineer has had cause, in his capacity as engineer, to be critical of a party's performance so that a dis-

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[13] **Davidson**, Arbitration, p. 84. Also

[14] 1997 S.L.T. 494.

[15] Halliday v. Duke of Hamilton's Trustees, (1993) 5 F.800.

pute arises, this in itself does not act as disqualification for the engineer to become an arbiter[16].

Also if the arbitrator decided a previous case which is similar to the present one which may be used as a precedent or acted as an expert in a similar case, or if he has a judgment on the issue in another context will not disqualify him[17].

IV. Independence

The terms independent and impartial are not the same thing. One party who is independent does not have to be impartial and *vice-versa*. There are both objective and subjective aspects to the concept of independence. Objectively, a person should be precluded from acting as an arbitrator if he has a direct professional relationship with one of the parties or furthermore if he has a financial interest in the outcome of the arbitration. Subjectively, the appearance of independence is important, for example, the rule in international commercial arbitration that a person of the same nationality as that of the either parties should not be appointed as a sole or presiding arbitrator[18].

1. Nationality

Actually, an arbitrator's nationality should not be important as long as he can act professionally. According to UNCITRAL Model Law Article 11(1), "No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties." However in practice when the sole or presiding arbitrator is appointed, his nationality should be different from the parties to the dispute**.** However in some situations the law applicable to the merits of the dispute may be that of one of the parties to the dispute; in these situations the sole arbitrator, if

[16] **Davidson**, Arbitration, p. 85.

[17] **Davidson**, Arbitration, p. 85.

[18] **Redfern/ Hunter**, p. 214. Also for an example in Turkish Law see Y. 13 HD.26.9.1974 t. 2385/2161 Kazancı İçtihat Bankası.

he is familiar with that law, especially if the seat of the arbitration is also the same place as that of the substantial law, it would be better[19].

Nevertheless UNCITRAL Model Law Rules Article 11(5) states that in making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

ICC Arbitration Rules Article 9(5) provide that:

" The sole arbitrator or the chairman of an arbitral tribunal shall be of a nationality other than those of the parties."

Although there is an exception to this rule "in suitable circumstances and provided that neither of the parties objects", but the general rule is the same as the rule of neutral nationality.

The London Court of International Arbitration (LCIA) Rules take a similar approach:

"Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise"[20].

Although the American Arbitration Association's (AAA) International Arbitration Rules Article 6(4) takes a slightly different approach, however, embraces the same principle.

"In making such appointments, the administrator, after inviting consultation with the parties, shall endeavor to select suitable arbitrators. At the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties."

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[19] **Redfern/ Hunter**, p. 215.

[20] London Court of International Arbitration Rules, Article 6.1.

Even if the arbitrator is of a neutral nationality that does not guarantee his independence or impartiality. However, the appearance is better and that is why it is a practice that is generally followed[21].

According to the Turkish International Arbitration Code Article 7(4)/3 the sole arbitrator's nationality should be different than those of the parties. However if there are three arbitrators to be chosen two of the arbitrators' nationality should be other than those of the parties.

Where a government or one of its agencies or corporations is involved in an arbitration the state party will usually appoint somebody who has some connections with the state. The arbitrator may feel pressure towards the governmental agency that appointed him. Especially, if the country that appointed the arbitrator is a totalitarian state, the judgment of the arbitrator may be paralyzed by the fear of retaliation. This situation is accepted by most of the arbitral institutions including the ICC. The reason that the ICC accepts this kind of arbitrators is to bring the largest number of countries to favor the use of arbitration for the settlement of commercial disputes including of course the large number of countries having totalitarian regimes. It was recommended that this kind of arbitrators should not be permitted by an institution as respectable as ICC[22].

2. Family Relationships

A judge is disqualified under Turkish Civil Procedural Code, Article 28 / 2 from adjudicating on a case where a man's wife (even if the marriage is annulled), or his /her ascendants and descendants by blood, or his affinities by marriage; his relatives with blood relation up to the third degree, his affinities by marriage up to the second degree or by collateral consanguinity and in case he has an adoptive relationship are a party. According to this provision, the judge must not adjudicate a case concerning his / her above mentioned relations. Under Turkish Civil Procedural Code, Article 29/4, parties can challenge the judge where his / her blood

[21] **Redfern/ Hunter**, p. 216.

[22] **Jacques Werner**, "The Independence of Arbitrators in Totalitarian States: Tackling the Tough Issues", **14 Journal of International Arbitration 1**, March 1997, p. 141-144.

or affinities by marriage up to the fourth degree, by collateral consanguinity are concerned in the case. Consequently, it can be claimed that as the arbitrator's position is similar to that of a judge, the same disqualifying factors should be applied to an arbitrator. However, this statute does not prescribe provisions about the arbitrators, it is exclusively about the judges. Concerning the fact that there is also no provision about this issue in Turkish Arbitration Act it can be argued that if it was intended to embrace arbitrators, it would have been done so. A safer approach might be to suggest that a close family relationship would be the sort of circumstances which has a plain practical tendency to bias the arbiter in favor of one of the parties. And bring the matter under this general principle[23].

3. Other Relationships

A close relation other than family relations between the arbitrator and a party will similarly disqualify. Under Turkish Civil Procedural Code Article 28/1 a man cannot be a judge in a case directly or indirectly concerning him. This general principle should also be applicable for arbitrators. This general rule is also emphasized in case law. For example in Magistrates of Edinburgh v. Lownie[24], it was ruled that a man cannot be judge in his own cause, or in the cause of a body which he is a member. Similarly, a partner cannot dissociate himself from the action of the firm and claim to act as arbiter. He would be deciding in a question between his own firm and pursuer[25]. Recently the House of Lords in R. v. Bow Street Metropolitan Stipendiary Magistrate[26], has confirmed that a judge being automatically disqualified from hearing a matter in his own cause was not restricted to cases where he had a pecuniary interest in the outcome, but applied to cases where his decision would lead to the promotion of a cause in which he was involved together with one of the parties.

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[23] Also see **Davidson**, Arbitration, p. 79.

[24] (1903) 5 F. 711. For a similar case in Turkish Law see Y. 13 HD.26.9.1974 t. 2385/2161 Kazancı İçtihat Bankası.

[25] McDougall v Laird & Sons (1894) 22 R. 71.

[26] [1999] 1 All E.R. 577.

There is a question whether an agent or employee of a party or someone from whom a party has engaged in their professional capacity, is subject to disqualification[27]. The general principle is that the other party should be told the relation, if he does not object, it is acceptable. And secondly, the arbiter would be disqualified where he had accepted appointment as the engineer of one of the parties subsequent to his appointment as arbiter[28].

However in certain cases agents and professional persons, such as solicitors and advocates, can be distinguished from employees and trusted to act fairly as arbiter. The basic principle would suggest that in these cases where the other party is unaware of the relationship, or it arises subsequent to the appointment being made, such relationships should only disqualify if they involve such a degree of involvement with the subject matter of the arbitration that it would be incompatible with the discharge of the arbitral function[29].

In Morgan v. Morgan[30] case being indebted to one of the parties was not found itself sufficient to disqualify an arbiter. Also, it is permissible to have business transactions with one of the parties which are unconnected with the arbitration[31]. There is unlikely to be any general rule about this regard, with much regarding on the circumstances of the case[32].

4. Financial Interest

A financial interest, however minimal, in the outcome of the dispute will disqualify. Therefore, the fact that the arbitrator holds a small number of shares in a company which is one of the parties is sufficient to disqualify him from acting. A business partner will also disqualify as he

[27] **Davidson**, Arbitration, p. 79-80.

[28] Caledonian Railway Co. v. Glasgow Corporation (1897) 5 S.L.T. 200.

[29] **Davidson**, Arbitration, p. 80.

[30] (1832) 1 Dowling 611.

[31] Morrison v. Thomson's Trustees (1880) 18 S.L.R 97.

[32] **Davidson**, Arbitration, p. 81.

has material interest. Naturally, if the arbitrator stands to gain or lose if the dispute is decided in a given way, then he must be disqualified[33].

V. Party-Appointed Arbitrators

It is a fundamental principle in international commercial arbitration that an arbitrator must be and remain impartial and independent. Although it is unusual for the arbitrator to act as a negotiating advocate outside the specialist groups of trade tribunals, it is not unknown. In those situations the parties have nominated the arbitrators and they are expected to represent the parties who nominated them. The only truly neutral arbitrator is the presiding arbitrator, who will generally not have been chosen by the parties[34]. In American Law there is a dual standard between the domestic and international arbitration. Under American Law, party-appointed arbitrators may act to some degree as partisans unless either both parties expressly confirm that all three arbitrators are to be neutral or the contract, the applicable arbitration rules or any rules of the governing law, requires all three arbitrators to be neutral[35].

1. American Law and Party-Appointed Arbitrators

Historically, in the USA there has been a debate about the impartiality of the arbitrators. The American cases American Eagle Fire Insurance Co. v. New Jersey Insurance Co.[36] in 1925 and Lipschutz v. Gutwirth[37] in 1952 rejected the argument that "an arbitrator chosen by a party is merely that party's agent and will act in a partial manner". An award made by a panel including a partial or interested arbitrator was subject to *vacatur,* in the same way as one obtained through fraud or corruption.[38] American

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[33] **Davidson**, Arbitration, p. 82.

[34] **Redfern/ Hunter**, p. 210.

[35] **Redfern/ Hunter**, p. 210-211.

[36] 240 N.Y. 398, 404 (1925).

[37] 304 N.Y. 58 (1952).

[38] **James H. Carter**, " Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice", **3 The American Review of International Arbi-**

Eagle and Lipschutz were decided when New York Arbitration Law provided that an award must be vacated when any arbitrator was evidently partial or corrupt. By the late 1950s, different standards had come to be expected for party-appointed members of tripartite tribunals, and moves were made to revise the Arbitration Law to reflect this. However this approach changed by the new laws. There was a differentiation between the party-appointed and presiding arbitrator. [The Uniform Arbitration Act was promulgated by the National Conference of Commissioners on Uniform Laws and the American Bar Association in 1956.] This approach was given statutory expression in the New York Civil Practice Law and Rules ("CPLR") which was enacted in 1962 and came into force in 1963. According to this law an award can be vacated on grounds of bias only if a party's rights were prejudiced by the partiality of an arbitrator appointed as neutral. The participation of a non-neutral arbitrator may only be attacked on grounds of corruption, fraud or misconduct[39].

However the US Federal Arbitration Act of 1925, refers to a single standard for all arbitrators. Like the former New York Arbitration Law, there are two grounds for vacation of an award: either that it was "procured by corruption, fraud or other undue means" or that there was "evident partiality or corruption in the arbitrators, or either of them [partiality or corruption]."

The phrase "evident partiality" caused some debate in court decisions. In the Commonwealth Coatings Corporation v. Continental Casualty Co.[40], even the appearance of bias should be enough to vacate an award. But this test was not accepted in most federal cases[41]. Later decisions such as Health Servs. Management Corp. v. Hughes[42] and Florasynth, Inc v. Pickholz[43] took a different view; they hold that the

tration, 1992,The Parker School of Foreign and Comparative Law, Columbia University, New York, 1992, p. 146.

39 **Carter**, p. 157.

40 393 U.S. 145 (1968).

41 **Jack J. Coe, Jr**., International Commercial Arbitration: American Principles and Practice in a Global Context, USA, Transnational Publishers, 1997, p. 312.

42 975 F.2d 1253, 1258 n.3 (7th Cir. 1993).

43 750 F.2d 171 (2d Cir. 1984).

mere appearance of bias or impropriety, standing alone, is insufficient. The courts indicated that the same standards that are applied to the impartiality of judges and arbitrators can not be applied. In other words the standards applicable to the judiciary are not applicable to arbitrators. In Hunt v. Mobil Oil Corp.,[44] the Court of Appeals stated that "the mere appearance of bias that might disqualify a judge will not disqualify an arbitrator". The court also continued to set aside an award for partiality: "the interest or bias must be direct, definite and capable of demonstration rather than remote, uncertain or speculative." While trying to find evident partiality, the inquiry will depend on the facts.

The Ninth Circuit has recently developed an approach that employs two discrete tests: which of the approaches will depend on whether the arbitrator, in questions of partiality, had disclosed certain facts. In non-disclosure cases, *vacatur* is appropriate where the arbitrator's failure to disclose information gives the impression of bias in favor of one party. Elsewhere the *vacatur* standard in non-disclosure cases has been defined as "a reasonable impression of partiality". The required impression depends on the gravity of the relationship or interest that the arbitrator failed to disclose. Actual bias must be proven and *vacatur* will be allowed only if there are established specific facts that demonstrate that the award was that result of the interest or relationship[45].

Petitions about evident partiality may relate to both independence and impartiality. The Fourth Circuit has categorized the main factors bearing on evident partiality as[46]:

1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding;

2) the directness of the relationship between the arbitrator and the party he is alleged to favor;

3) the connection of the relationship to the arbitration; and

[44] 654 F. Supp. 1487, 1498 (S.D.N.Y. 1987).

[45] **Coe**, p. 313.

[46] **Coe**, p. 313.

4) the proximity in time between the relationship and the arbitration proceeding.

It can be seen that in American Law there is not only a dual approach between domestic and international arbitration but also between Federal Law and state laws such as New York Law. Besides, case law in the subject is inconsistent. Therefore, arbitration practitioners have sought to clarify the situation through the promulgation of codes of ethics lacking the force of law but designed to influence the courts[47].

2. Ethical Codes

As a result of a five-year process from 1972 to 1977, a Joint Committee of the American Arbitration Association and the American Bar Association prepared a Code of Ethics for Arbitrators in Commercial Disputes. According to this code, party-appointed arbitrators do not have to be neutral and they can be predisposed toward the party appointing them. Nonetheless they are obliged to act in good faith and with integrity and fairness in all arbitral proceedings[48]. The partisan arbitrator could not, for example, delay the proceedings, or relinquish to the appointing party independence in the assessment of evidence and applicable law[49]. However, in the code it is essential that the party-appointed arbitrator should notify the opposing party whether the part-appointed arbitrator intends to act neutrally or non-neutrally so that the other party can take the necessary measures. According to AAA-ABA Code, the non-neutral arbitrator may communicate with the party who appointed them about any aspect of the case[50].

The International Bar Association (IBA)'s Ethics for International Arbitrators established a set of principles intended to embody a detailed definition of this potentially predisposed, but nonetheless impartial

[47] **Carter**, p. 162.

[48] **Carter**, p. 313.

[49] **Coe**, p. 310-311.

[50] **Carter**, p. 162-165.

and independent, international arbitrator[51]. According to this, an independent and impartial arbitrator must not engage in any *ex parte* communications with the parties regarding the merits of the case during the course of the proceedings. A more difficult question may arise in relation to communications before and during the hearings. In practice, it is accepted that there will be communications with a party-nominee before his appointment and also in respect of the choice of a third arbitrator. The IBA's Ethics for International Arbitrators allow communications prior to an appointment in order to determine the suitability and availability of the potential third arbitrator. Notice should be given to the other party of any unilateral communications that take place[52].

In Scots Law there is little authority: in Hope v Crookston Brothers[53], the Lord Justice-Clerk envisages each party looking upon the arbitrator nominated by him as the representative of his side of the case, although he was no doubt to act with reasonable fairness. It can be seen that Lord Justice-Clark regards it normal for an arbitrator to act as advocate for the party who appointed him. However the situation in England is contrary. It is settled that even a party-appointed arbitrator requires to be neutral, at least while acting in the character of arbitrator, and so he is not immune from challenge[54].

V. Waiver

If the parties are aware or should have been aware that a particular individual was subject to a potential disqualifying factor, but nonetheless chose to appoint the arbitrator, neither party can rely on that factor as a ground for seeking the disqualification of the arbitrator. If after a dispute has arisen between the parties a further distinct source of bias arises which was not foreseen at the time when the parties appointed the arbitrator, then the arbitrator will be disqualified. If a party discovers a

[51] **Carter**, p. 165.

[52] **Redfern/ Hunter**, p. 217-218.

[53] (1890) 17 R. 868.

[54] **Davidson**, Arbitration, p. 86-87.

factor which would disqualify the arbiter he should not delay unduly in objecting the arbitrator, otherwise he may be taken impliedly to have agreed to the arbiter continuing to serve[55].

VI. Disclosure

The most important aspect of impartiality and independence is disclosure. If a prospective arbitrator discloses all the facts which are available to him, any challenge during or after the proceedings should be unsuccessful. The right to an independent and impartial arbitrator would be deemed to have been waived in respect of objections founded upon facts contain in the disclosure. The requirement of disclosure is a continuing duty throughout arbitration. If new circumstances arise concerning the impartiality or independence of the arbitration, he should disclose these circumstances immediately to the parties and to his fellow arbitrators. When a person is approached to act as a party-nominated arbitrator, he should normally disclose any relevant factors informally to his prospective appointing party. The prospective arbitrator then should write formally to both parties disclosing the relevant facts even if he (the arbitrator) thinks the disclosed facts would not give rise to doubts about the impartiality and the independence of the arbitrator[56].

In the case of a third arbitrator, who is normally approached jointly by the parties or by the two party-nominated arbitrators, the two-stage process that happens in relation to a party-appointed arbitrator is not necessary. He should disclose any circumstances that he considers the parties should know to both parties simultaneously[57].

Article 12(1) of the UNCITRAL Model Law imposes this duty upon an arbitrator to disclose. Article 12(1) sets an objective test. The arbitrator (actual or potential) must disclose "any circumstances which are likely to give rise to justifiable doubts as to his impartiality and independence". It is not up to him to decide that he is not predisposed if

55 **Davidson**, Arbitration, p. 88-90.

56 **Redfern/ Hunter**, p. 216-217.

57 **Redfern / Hunter**, p. 217.

circumstances exist which would cause any party to fear that he may have a predisposition. At the same time, it places something of a burden on an arbitrator to have to recognize every circumstance which would compel him to disclose[58]. The same duty is also given to the arbitrator under Turkish Arbitration Code Article 7/C.

To enable the court and the parties to prevent the appointment and/or challenge the arbitrators, the ICC Rules require the disclosure of all facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. This disclosure must be in the form of a "statement of independence"[59].

VII. Challenge Of The Arbitrators And The Decision

According to Article 12(2) of the UNCITRAL Model Law an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Firstly the grounds for challenge are exhaustive under UNCITRAL Model Law and cannot be augmented by national legislation. According to the last sentence of Article 12(2), if a party participates in an arbiter's appointment, knowing full well that circumstances exist which make the arbitrator liable to challenge, later he is not allowed to rely on these circumstances to challenge the arbitrator. Participation in the appointment does not only cover joint appointments but also less direct involvement such as list procedure. List procedure involves an appointing authority giving a list of potential arbitrators to the parties, each party having the right to veto any person of whom he disapproves. The appointing authority then selects the arbitrator from the list of approved names. The term "participate" suggests some degree of involvement in the actual ap-

[58] **Davidson**, International Commercial Arbitration, p. 67.

[59] ICC Arbitration Rules, Article 7(2).

pointment. However a third party or other party choosing the arbitrator does not suggest participation[60].

A prospective arbitrator should not accept an appointment if he has reason to believe that either party will genuinely feel that he is not independent, or not capable of approaching the issues impartially. The position may be more difficult if a party objects after a party is appointed. If both parties think he should resign he should do so. He should also resign if he believes the objection is well founded even if the parties do not agree[61].

Similarly, under ICC Arbitration Rules Article 11(1) an arbitrator can be challenged for lack of independence. The 1996 English Act also states the principle comprehensively. Also many national systems deal with the question and allow for parties to challenge the arbitrators if they are not impartial or independent[62]. In Turkish International Arbitration Code Article 7/D is about how to challenge the arbitrators[63]. The party who wants to challenge one of the arbitrators or the tribunal, should notify this request with its reason to the tribunal. In thirty days after the decline of this request the decision must be taken to court (Asliye Hukuk) in order to challenge the arbitrator or the tribunal. The court's decision is absolute.

Furthermore, the principles that ICC set can be found in the Universal Declaration of Human Rights[64] and The International Covenant on Civil and Political Rights[65].

The Universal Declaration of Human Rights states:

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[60] **Davidson**, International Commercial Arbitration, p. 69.

[61] **Redfern/ Hunter**, p. 220.

[62] **Mauro- Sammartano Rubino**, International Arbitration Law, Boston, Kluwer Law and Taxation Publishers, 1990, p. 207.

[63] For more information see **Ziya Akıncı**, Milletlerarası Tahkim, 2. Bası, Ankara, Seçkin Kitabevi, 2007, s. 116.

[64] UN General Assembly, 1948, Office of Public Information, UN, New York, 1978.

[65] UN Treaties, Office of Public Information, UN, New York, 1978 (in force since 1976)

"Everyone is entitled on fully equality to fair….. hearing by an independent and impartial tribunal, in the determination of his rights and obligations…" (Article 10)

Consequently the challenge of the or of the tribunal(s) is no doubt a basic right of any party to an arbitration against a biased, dependent and impartial arbitrator(s) and/or against careless, lack of diligence, loyalty, fairness and responsibility of the arbitrator. Although it has almost never been used, the International Court of Arbitration has the discretionary power to refuse the nomination or confirmation of arbitrators for incompetence if it clearly appears to be the case[66].

The power of the parties to challenge the arbitrator results from Article 11(1) and (2) of the ICC Arbitration Rules. The request should be sent within 30 days after the requesting party is informed of the facts and circumstances disclosed. This request must be in writing. Article 11(3) of the rules provides that all comments made concerning the challenge of the arbitrators will be communicated to all parties and the arbitrators.

However if the challenge is brought without justifiable grounds, the expediency and fairness of the arbitral process may be seriously curtailed. Finally, the challenge procedure shall depend on the Institution Rules chosen by the parties[67].

The second thing that can be done under UNCITRAL Model Law is to challenge the award if the decision is made. Under Article 34(2)(a)(ii), the award can be challenged, if one of the parties did not get a fair hearing. According to Turkish International Arbitration Code Article 15/A/1/g an arbitral award can be challenged if it does not concern the equality principle between the parties[68]. Also under Article 15 of the Turkish International Arbitration Code the tribunal decisions can be

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[66] **Michel A. Calvo**, "The Challenge of the ICC Arbitrators; Theory and Practice", **15 Journal of International Arbitration 4**, 1998, p. 65-66.

[67] **Jose Luis Siqueiros**, "The Challenge of Arbitrators in the Inter-American Commercial Arbitration Commission Proceedings", **12 Journal of International Arbitration 4**, December 1995, p. 92-93.

[68] For more see **Akıncı**, s. 231vd.

nullified in the court (Asliye Hukuk). The tribunal's decision can be challenged within thirty days of the decision being certain.

VIII. Conclusion

The aim of the international arbitration is to resolve an international commercial dispute in the most efficient and time saving way. However, while trying to achieve these goals it is essential that rights of fair hearing be maintained. The parties should be given equal chances to present their case. This can be done only if the arbitrators are independent and impartial. The arbitrators should be entirely unbiased towards the parties: they should not have financial expectations from the award. Even the party-nominated arbitrators should have these qualifications especially in the international arbitration. A successful international arbitration can only be achieved if the arbitrators are impartial and independent. However if the arbitrators are not impartial and independent both the arbitrators and the award can be challenged.

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