Challenges to Arbitrators
-
Independence and Impartiality

Introduction

This article is comprised of a number of different submissions made by litigation and arbitration practitioners from different countries who are members of or have a connection with the worldwide independent lawyer's league (WILL). During one of the regular meetings held in a specialist professional group of dispute resolution, the attendees discussed a Swiss case concerning independence and impartiality of an arbitrator and how far the duties of the parties should extend to determine the existence of such bias. A critical aspect concerned the consequences of failing to adhere to the arbitrator's duty to disclose and the duty of the parties to challenge an arbitrator expeditiously, when a bias is present. Unsurprisingly, different countries impose different duties and consequences and so the team considered it worthwhile to investigate and summarize the duties in the respective countries. Non-members became interested and this article was born. The countries are in alphabetical order without any preference given to any particular country by this choice. We hope that more colleagues from other countries will present the legal situation in their perspective country and contribute to this article. The authors hope you will be edified by the perusal of this article.

Blog Post Israel

*) The part on the Law in Israel was written by the Honorable District Judge (Ret.) Shaul Mannheim, nowadays an arbitrator and mediator, and with the assistance of Adv, Joseph Weinrauch of the Worldwide Independent Lawyers League, as part of the organization's activities to compare the different legal methods regarding the meaning of the existence of a "preconceived opinion" in arbitrations in these legal methods.

1. What are the underlying rules to avoid conflicts of interest, bias, partiality or independence for an umpire (judge or arbitrator)?

001. The basic rules that apply in Israel to judges and arbitrators to prevent prejudice, conflicts of interest or independence are as follows:

002. As for judges, there are rules laid down by law and other rules established by the Supreme Court in a long line of judgments. The means for preventing conflict of interest, dependence or prejudice of

judges is the disqualification of a judge, i.e. the decision to transfer the case to another judge. The basic rule first established by the Supreme Court and then also included in the law, states that a judge will not adjudicate "if he finds, on his own initiative or at the request of a litigant, that there are circumstances that create a real fear of bias in the administration of justice." (Clause 77a of the Courts Law [combined version], 5744-1984). This is a broad definition.

003. The law requires a judge to disqualify himself on his own initiative, even if he has not been asked to do so by any of the parties, in any of several specific situations detailed below:

- Family kinship or "significant" non-family kinship between the judge and: a litigant; between someone representing a litigant; or a "central" witness, i.e., a witness the court needs to determine his credibility.
- A real financial interest, or a significant personal interest, in the proceeding or the results thereof, regarding one of the following: One of the parties; someone representing one of the parties at the trial; or a "central" witness. Here, there will be grounds for disqualification even if this is no concern of the judge but of a first-degree relative of his (except for a matter concerning a "central witness").
- Prior involvement of the judge, preceding the commencement of his term, in the same matter now before him, whether the previous involvement was as an attorney, arbitrator, mediator, witness, counsel, expert or in any other similar manner.

004. This, of course, is not a complete list of grounds for disqualification at all, but it does give an indication of when, by law, a judge cannot decide in a particular matter.

005. In addition to the cases cited above, a judge must disqualify himself if requested to do so by one of the parties when there is a state of affairs that objectively indicates that the judge's opinion is "locked". Locked in this case means that he has already decided before the proceeding is exhausted (i.e. he has a preconceived opinion regarding the outcome, and it does not matter what the source of that preconceived opinion is and how it is expressed), or that the situation shows, objectively speaking, a bias on his part. In any event, it is not sufficient that one of the litigants subjectively feels that the judge's opinion is "locked" or that he is biased in favor of the opposing party. The Supreme Court ruled that "the right to sit in judgment is also the duty to do so" and that disqualifying a judge, even with his consent and even on his own initiative, sitting in judgment in a particular matter when there is no legal ground for disqualification, harms public trust no less than avoiding disqualification when there is a ground for disqualification. Therefore, the "appearance of justice" will usually not be enough for a judge to be disqualified from adjudicating and deciding the matter before him. However, if the judge himself writes that he feels that he is not fully objective in a defined matter, for the most part his opinion will be respected, and the matter will be referred to another

judge. An application to disqualify a judge initiated by a party will usually be filed either because of the discovery of facts for which the objectivity or independence of the judge is harmed, or because of the judge's statements (during a hearing or decision) that he claims are not objective and his opinion is "locked" concerning the result of the trial. The application must be submitted as soon as the alleged cause is known. Delay in submitting it will result in its rejection. Once the application has been filed, the judge must decide it quickly and before any other decision.

06. In addition to all these, the judges are subject to further rules designed to prevent a violation of their objectivity as much as possible and even of the "appearance of justice". An appearance of justice requires that judges will also be seen and perceived as objective. Among other things, a judge elected to the office is required to perform actions even before the beginning of his term of office, the purpose of which is to "clear the table", as far as possible, of any potential conflicts of interest. Furthermore, the judge is also subject to the Ombudsman on Judges acting under a special law, and is also subject to Rules of Judicial Ethics (which were reformulated in 2007 and replaced rules established years before). These rules include, among others, detailed provisions of "do" and especially "do not" for judges, designed to prevent in advance, as far as possible, potential conflict of interest, bias or prejudice (inter alia, it is stipulated that a judge shall not participate in political or factional activities and will not express a public opinion on a matter that is essentially non-juridical and publicly controversial); detailed rules of preclusion from sitting in judgment (which are more detailed and broader than those provided by law); and other restrictions on judges aiming at the same purpose. In addition, an Ethics Committee for judges has been established, to which a judge can address a question on an ongoing basis in the field of judicial ethics. Judges also submit lists of litigants and attorneys or matters in which they consider themselves regularly barred from adjudication due to kinship, bias or conflict of interest, and recently the Supreme Court Chief Justice ordered that these lists be published on the judiciary's website.

07. With respect to arbitrators, it has been determined by the Supreme Court as a principle that the grounds for disqualifying an arbitrator are identical to the grounds for disqualifying a judge. In this context, the Arbitration Law makes do with a provision according to which one of the reasons for the removal of an arbitrator from office by the court is that "it was discovered that the arbitrator is not worthy of the parties' trust", and as stated above, the courts have ruled that the cases in which they will see the arbitrator as unworthy of the parties' trust are the same cases in which they would see a judge as having to disqualify himself from hearing the case. Here, too, the ruling stated that a litigant is not allowed to keep to himself the information revealed to him and that he claims results in the arbitrator not being trustworthy, and he must act to remove the arbitrator from office immediately.

2. Are there any rules of disclosure that the umpires (judges or arbitrators) have to adhere to when a problem or a potential problem arises?

008. The duty of disclosure on the part of a judge applies in any case where, in the opinion of the judge, a cause arose requiring him to disqualify himself on his own initiative, and where, in the judge's opinion, circumstances do not justify a disqualification initiated by the judge, however they may bring the parties, or any of them, to file a motion for disqualification. According to the accepted approach of the Supreme Court and the judges, they must disclose to the parties any data that may be seen by any of the parties as a basis for an application for disqualification. The judge will examine it and decide it (after hearing both parties' arguments) before making any other decision in the same proceeding.

009. Here, too, there is no real difference between an arbitrator and a judge. However, it can be said that, at least according to recent judgments, the trend is to determine that an arbitrator's duty of disclosure regarding circumstances that may impair his independence, or establish an objective potential of bias or prejudice on his part, is broader than that of a judge; and that the arbitrator may not refrain from disclosing any detail that may raise a party's concern about him, even if the arbitrator believes it to be an insignificant detail.

3. Is there a duty of a party to investigate the umpire beforehand, and if yes, how far does that go?

010. The law stipulates that if a lawyer realizes that a matter, in which he represents, has been fixed for a hearing before a judge being a relative of the lawyer, which will lead to the judge's disqualification, he must refrain from representation or obtain a special permit to continue representing. **Regarding arbitration, the courts have ruled that a litigant must take reasonable measures from the outset to ascertain whether the arbitrator is not affected by a possible conflict of interest.** It was further determined that as soon **as the party becomes aware that there are facts that it considers to be impairing objectivity, it must act in the matter immediately**, and if it does not do so – it will not be able to argue the matter afterwards (a similar rule applies to judges). Along with the obligation of a litigant to take reasonable measures to find out even before the commencement of arbitration that no conflict of interest or bias of the arbitrator is expected, **there is also a duty on a litigant who knows a fact that may affect the other party's considerations regarding the identity of the arbitrator, to disclose that fact to the other**

party, even if he himself believes in good faith that it concerns a trivial fact that should not affect the other party's considerations regarding the identity of the arbitrator.

4. **What are the consequences if these rules are not followed? A) by the umpire B) by the party?**

011. In the case of judges, a breach of the duty to disclose facts that may establish a ground for disqualification will result in the disqualification of the judge from hearing the relevant case, and it may even lead to proceedings by the Ombudsman for Judges or by the Disciplinary Tribunal for Judges. As for arbitrators, if matters become clear before the end of the arbitration, a party to the arbitration may apply to the court and request the removal of the arbitrator from office. If the court complies with the request, the question will arise whether another arbitrator should be appointed in his place, or the parties will have to resolve the dispute in court. This question will be decided in each case according to its circumstances (interpretation of the arbitration agreement, the stage reached by the arbitration, and additional relevant circumstances). When one of the parties violates an obligation to check facts concerning a possible conflict of interest (or prejudice, etc.) or discovers such facts that were known to it being one of the parties, or when a party violates its duty to reveal such facts once they became known to it and reveals them only after an arbitration award has been given, the result can even be the annulment of the arbitration award at the request of the other party.

5. **Is there a marked difference between the rules and consequences concerning judges and arbitrators?**

012. In my opinion, the fact that the duty of disclosure incumbent on arbitrators and even on the parties to arbitration regarding facts that may create a conflict of interest, bias etc., is broader than that which applies when a lawsuit is filed between the parties in court. This is due to several relevant differences between a judge and an arbitrator. The first difference is that a judge must hear any matter brought before him, if there is no known reason for disqualifying him from hearing it, while an arbitrator may always refuse to start hearing the matter which he has been asked to hear as an arbitrator - therefore, if he agrees to discuss, he must make sure that any fact that he himself is aware of and that may be perceived as a violation of his objectivity and neutrality, will be immediately brought to the attention of the parties. The second difference is that while the parties (or those they have authorized to do so) can choose the arbitrator, they cannot choose the judge for themselves. Therefore, it is important to make sure that the choice of the arbitrator remains the same after the parties have been informed of any fact that may affect it. The third difference is that while a judge is subject to many rules, some of which are intended to prevent a conflict of interest in advance and

have the effect of ensuring his independence and there are also control mechanisms on the judges and on the ruling, an arbitrator is not subject to such general restrictions or general disciplinary control mechanisms and, usually, his rulings are unappealable. Judging is an office, in which not everyone desiring to officiate, is able to do so, and it lasts for many years during which the judge is not allowed to conduct business and engage in other occupations (except for lecturing in universities etc., with certain restrictions). Arbitration is not necessarily a career or an office at all: There are no threshold conditions that a person must meet to serve as an arbitrator, other than the very agreement of the parties to it, and a person can serve as an arbitrator at the same time in addition to a variety of other occupations or businesses. In addition to all this, the law stipulates that an arbitrator owes the parties a duty of trust, which is perceived as the source of his duty not only to act without a conflict of interest or prejudice, but also of his duty to disclose to the parties any fact that may create a conflict of interest or bias.

6. History or a new trend that is particularly interesting

013. Everything written above has existed in Israeli law for years. However, in the field of arbitration, there have been developments in recent years since there has been a significant increase in recent years in the use of arbitration as a tool for resolving civil disputes, so more cases are coming to court and more concrete rules are being established.

7. Illustrative examples of cases

014. **Case 1:**

In a court lawsuit between a bank and a customer that was, it became clear after the ruling that, while the lawsuit was being conducted, the bank had filed a lawsuit in another court against the judge's father. The ruling was not overturned, after it was determined that the judge was not aware of the fact that the same bank had filed a lawsuit against her father and since it was found that the ruling itself was not wrong. However, it was held there that the fact that the judgment was not reversed was appropriate to the circumstances of that case, and that any similar case would be examined on its own merits (Civil Appeal Permission 5539/15 **Landa vs. Werkstal**, published in Nevo, the legal database, 19. November, 2015).

015. **Case 2:**

A former judge had been appointed as an arbitrator in a business dispute between a financial corporation and a man and woman who had been in business relations with the corporation. What the arbitrator did not know was that the woman (who was not present at the arbitration at all) was the daughter of a known attorney who was a neighbor of the arbitrator in the past. Also, after the end of the arbitration, further distant and indirect connections were discovered between the arbitrator and his family members and family members of the woman, of which the arbitrator was not even aware. All these facts were revealed to the business corporation only after an arbitration award was given and the business corporation could not have found them by any reasonable examination before the arbitration commenced. Although no defect was found in the arbitration award itself or in the arbitrator's conduct, it was held that a party to an arbitration agreement had an increased active duty of good faith and had to disclose to the other party the full factual situation even if it thought it was irrelevant. And it was further determined that if the corporation had known all the facts, it would not have agreed to the appointment of that arbitrator. Therefore, the ruling was revoked (Civil Appeal Permission 4839/15 **Daniel vs. Menorah Mivtachim Insurance Co. Ltd.**, published in Nevo, the legal database, 1. December, 2015).

Case 3:

In another known case, a retired judge was appointed as arbitrator between an investment corporation and a person who held, indirectly (i.e., through a chain of companies) control of a large energy corporation in Israel. After the arbitrator made a material decision in the arbitration (but before making a final decision) it was clarified to the parties that two years before the arbitration began, the arbitrator himself, and some members of his family, negotiated with the energy company (which was not a party to the arbitration) to sell to the energy company a plot of land owned by the arbitrator and some of his family members. The negotiations were unsuccessful and thus ended the matter. The arbitrator did not disclose the matter to the parties. It was ruled that, under these circumstances, there should be no real potential of bias and the arbitrator should not be seen as violating his fiduciary duty to the parties when he did not disclose to them the negotiations conducted two years earlier with a non-arbitrating company, and the company was not expected to be affected by the results thereof. However, it was determined that there might be situations in which the court would reach a contrary conclusion. The arbitrator informed the parties even before the court's decision that he was not interested in continuing to serve as an arbitrator in their case, and the court ordered the continuation of the arbitration before another arbitrator from the point reached in arbitration (Civil Appeal Permission 296/08 **ART-B Limited Liability Company (in liquidation) vs. Estate of the Deceased Jack Lieberman, of blessed memory**, published in Nevo, the legal database, 5. December, 2010).

Case 4:

A retired judge was appointed as an arbitrator in a huge business dispute (a lawsuit of more than $ 1.6 billion, a counterclaim of more than a quarter of a billion dollars). The hearing lasted about nine years; the minutes stood at 10,000 pages. After submitting the summaries and just when the arbitrator was about to begin the work of writing the arbitration award, one of the parties informed him that it had learned that the other party had approached a private investigator in order to gather evidence of an alleged connection between the arbitrator and one of the lawyers of the same party who informed the arbitrator, and that in this context, an action involving the arbitrator's spouse was also planned; but the investigator passed the information on this to the other party, and as stated - he was the one who informed the arbitrator. No basis was found for the claim that there was an improper connection or a connection that requires disclosure at all between the arbitrator and the same attorney. It was held that improper moves by a party intended to allow him to "hold the trump card" against the arbitrator if the ruling is not in favor of the person who initiated these moves, will not automatically establish the arbitrator's disqualification, because, otherwise, each party will be able to cause the arbitrator to be disqualified and replaced by way of deviant behavior towards him. Eventually, the arbitrator was replaced by another arbitrator, but this was only because the arbitrator announced that his advanced age and state of health deprived him of a practical possibility to finish the job (Originating Arbitration Summons (Tel Aviv District Court) 69760-11-20 **Moshe Gertner et al. vs. Dan Gertler et al.**, Nevo, 31. January, 2021).

8. Conclusion

The overall picture is that the law in Israel sees major importance not only for the incorruptibility and the purity of opinion (lack of conflict of interest, bias, or prejudice) of the person sitting in judgment, but also for the appearance of justice. For judges, the emphasis is mainly on incorruptibility and purity of opinion. Regarding arbitrators, the appearance of justice also receives a broad (though not absolute) emphasis, in order to increase the public's trust in the arbitration procedure, being a voluntary procedure. In both cases, the parties also have obligations in the context of preventing a conflict of interest or prejudice. Here, too, in arbitration this obligation is broader: it includes an active duty on a litigant to disclose to the other party any known fact, which might influence, even with a low probability, the willingness to conduct arbitration before the particular arbitrator; furthermore, there is an additional active obligation for the litigants to check by reasonable means, before the commencement of the arbitration, whether doubts may arise as to the independence of the arbitrator or his being without prejudice. In any case, both in arbitration and in court, it is obligatory to immediately raise any argument directed against the judge or arbitrator. In any case, the rule is that "if there is doubt - there is no doubt" and it is obligatory (on the judge or arbitrator, as well as on a lawyer) to immediately disclose any fact that may, even in low probability,

lead to a motion for the disqualification of a judge, or a refusal to deal (or continue to deal) with the case before the particular arbitrator, although this breach of duty by the judge or arbitrator will not necessarily result in automatic disqualification.

The foregoing is not a substitute for legal advice.

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Blog Post Italy

**) The part on the Law in Italy was written by Adv, Francesca Sperti of the Worldwide Independent Lawyers League, as part of the organization's activities to compare the different legal methods regarding the meaning of the existence of a "preconceived opinion" in arbitrations in these legal methods.

1. **What are the underlying rules to avoid conflicts of interest, bias, partiality or independence for an umpire (judge or arbitrator)?**

In the context of the Italian legal system, the requirements of the impartiality and impartiality of the judge, as essential elements of the "fair trial" are expressly mentioned in Art. 111 of the Constitution, however, we do not have an express and general prescription of conduct in Italian law and the ECHR, in a case involving Italy (case of **Beg SpA v. Italy** - Application n. 5312/11) reminded us that the guarantees of a fair trial referred to in Art. 6 of the ECHR - and in particular the principle of impartiality of the judge - must also be observed in arbitration proceedings as long as the parties have not voluntarily renounced it "unequivocally" and the state jurisdictions must scrupulously verify compliance when checking the validity of the award referred.

However, the Italian legislation, net of the constitutional reference, has not translated the requirements of independence, impartiality and neutrality into a general and express prescription in this sense.

021. We can deduce the hypotheses in which the legislator configures the absence of these characteristics by deducing them, in relation to the judge, from the cases of abstention contemplated by Art. 51 and the code of civil procedure and, for the arbitrator, from the cases of recusal governed by the Art. 815 of the Code of Civil Procedure (c.p.c.). In accordance with Art. 51 c.p.c., the third and impartial judge must not:

- have an interest in the cause;
- be a relative up to the fourth degree, cohabitant or habitual diner of one of the parties or the defenders;
- have a pending lawsuit or serious enmity or credit or debit relationship with one of the parties or the defenders;
- be the guardian, curator, attorney, agent or employer of one of the parties;
- having given advice or given legal aid in the case or having deposed someone as a witness or having known him as a magistrate in another degree of the trial.

022. If one of the aforementioned hypotheses, strictly provided for, occurs, the judge, at the request of each of the parties, can be refused and is obliged to abstain, while he has the right to abstain if there are "serious reasons of convenience" (Code of Civil Procedure, Art. 51).

023. The hypotheses of compulsory abstention concern both, the direct interest of the judge, which exists when the same judge is the holder of a dependent juridical interest, connected or incompatible with that which is the subject of the trial, and the indirect interest, which relates to interests that belong to persons who have a close relationship or dispute the judge has against subjects involved in the various capacities in the case.

024. The judge's impartiality and independence are also protected by the rules on his incompatibility, by the limitation of cases of his civil liability, by the legislative predetermination of the rules of jurisdiction for the purpose of identifying the "natural judge", by the immovability of the judge and from his autonomy and independence from the other powers of the state and from his colleagues, from the subjection of the judge only to the law, from the principle of the request and the correspondence between asked and pronounced.

025. With reference to the arbitrator, the Italian legislator provided an exhaustive list of cases which define circumstances which render the arbitrator non-neutral and thus not able to serve. (Art. 815 c.p.c.) Parties may increase these circumstances (Art. 832 c.p.c., paragraph 4).

026. The arbitrator, pursuant to Art. 815 c.p.c., can be refused:

- if he does not have the qualifications expressly agreed by the parties;
- if he, or an entity, association or company of which he is a director, has an interest in the case;
- if he, himself or his spouse is a relative up to the fourth degree or is a cohabitant or habitual diner of one of the parties, or of any of the defendants;
- if he or his spouse has pending lawsuit or serious enmity with one of the parties, with his legal representative, or with any of his counsel;
- if he is linked to one of the parties, to a company controlled by him, or to a company subject to joint control, by a subordinate employment relationship or by an ongoing relationship of consultancy or remunerated work, or by other relationships of a financial nature or associative that compromise its independence, moreover, if he is the guardian or curator of one of the parties;
- if he has given advice, assistance or defense to one of the parties in an earlier phase of the affair or testified there as a witness.

027. The rules of conduct of arbitrators, aimed at guaranteeing their impartiality and independence, can also be identified in sources of a heterogeneous nature, such as the regulations adopted by various arbitration bodies or contained in the codes of conduct.

028. The Milan Arbitration Chamber, for example, excludes from the appointment as arbitrator: a. the members of the Board of Directors and the Arbitral Council, as well as the auditors of the Arbitration Chamber; b. employees of the Arbitration Chamber; c. professional associates, employees and those who have stable professional collaboration relationships with the persons indicated under a), without prejudice to the different and agreed will of the parties and, Art. 9 of its Code of Ethics prescribes "The arbitrator must avoid, at any stage of the procedure, any unilateral communication with any party or its defenders, without immediately informing the Arbitration Chamber for communication to the other parties and other arbitrators"; and "must avoid any obstructive or non-cooperative attitude, guaranteeing prompt participation in the decision-making phase of the award" (Art. 11 Code of Ethics).

2. Are there any rules of disclosure that the umpires (judges or arbitrators) have to adhere to when a problem or a potential problem arises?

029. Particularly significant is the Italian forensic code of ethics which in Art. 61 establishes "The lawyer who is appointed arbitrator must behave during the proceedings in such a way as to preserve the trust placed in him by the parties and must remain immune from external influences and behavior of any kind." In addition, "The lawyer in the capacity of arbitrator: a) must maintain confidentiality on the facts of which he becomes aware of the arbitration procedure; b) must not provide information on matters relating to the procedure; c) must not make the decision known before it is formally communicated to all the parties ".

030. The tools to ensure independence and impartiality are distinguished between preventive tools and subsequent tools with respect to the acceptance of the appointment by the arbitrator and the decree of appointment by the judge.

031. **Preventive remedies:**

032. <u>For the arbitrator:</u>

033. <u>*Equidistance from the arbitrators with respect to the parties*</u>. First of all, each party must have the same opportunities as the other to influence the appointment of arbitrators, in compliance with the principle of equality mentioned above.

034. <u>*The declaration of independence.*</u> The arbitrator makes the disclosure, or a declaration, before accepting the appointment, in which all the reasons that may question his independence and impartiality must be indicated. This charge concerns not only the reasons that could give rise to doubts from an objective point of view, but also subjectively, that is, in the eyes of the parties. This declaration, although foreseen in the vast majority of international sources, has not found acceptance in Italian law. However, it is usually imposed in the arbitration regulations, while the arbitrator who carries out the profession of lawyer is required by virtue of the forensic code of ethics.

035. Disclosure must also be made during the procedure, if the fact arises after acceptance.

036. It is rightly believed that the arbitrator must declare any potentially relevant circumstance, regardless of whether or not it falls within the list contained in Art. 815 c.p.c.

037. *The confirmation of the institution*. Many regulations subject the appointment of arbitrators (not just the one designated by the party) to a confirmation procedure. In any case, the entity could also take into account, for the purposes of confirmation, circumstances that do not strictly integrate the reasons set out in Art. 815 c.p.c.: for example, the repeated appointment of the arbitrator, or even more so the repeated appointment of the same defender and the same arbitrator in different disputes concerning the same party, or even commonalities with the party and with the defender not clearly attributable to the aforementioned rule.

038. *Non-acceptance of the assignment*. If there are well-founded doubts about his independence, it is the arbitrator himself who does not have to, first of all, accept the appointment.

039. For the judge pursuant to Art. 78 Implementation provisions of the Code of Civil Procedure:

040. a) as soon as the appointment decree has been received, the judge, if he recognizes the existence of a reason for abstention pursuant to Art. 51 c.p.c., must make an express declaration or written request to the President of the Court; b) if the reason for abstention arises after the investigation of the case has begun, the investigating judge immediately informs the head of the competent judicial office and declares or asks to abstain.

041. **Subsequent instruments for the protection of impartiality**

Once the assignment has been accepted, the parties have the following remedies available.

042. For the arbitrator:

043. The objection: The arbitrator may be objected, pursuant to Art. 815 c.p.c., for the reasons already illustrated.

044. The recusal procedure, whose application must be proposed to the President of the Court of the seat of the arbitration, within ten days from the notification of the appointment or from the discovery of the cause, does not automatically involve the suspension of the arbitration judgment, as the arbitrators may evaluate the opportunity less. If the objection is upheld, the arbitrator is replaced.

045. Where rejected, for manifest inadmissibility or groundlessness, it will lead to the condemnation of the refusing party to pay in favor of the other party an equitably determined sum, not exceeding

triple the maximum compensation due to the arbitrator. In administered arbitrations, the regulations often provide for a special discipline of recusal before the administrative body.

046. Renunciation of the assignment. The arbitrator has the possibility to renounce the appointment, in the event of supervening circumstances that integrate the 'just cause' required by the waiver.

047. Appeal of the arbitration award. The lack of impartiality or independence does not fall within the grounds of appeal of the award, therefore it is excluded by the jurisprudence as a remedy also for the existence of the instrument of recusal. However, it could be considered the possibility of configuring it where the lack of impartiality and independence has resulted in a violation of the rules on the constitution of the arbitration body, and therefore can be invoked as a ground for invalidity provided for by no. 2 of Art. 829 Civil Procedure Code, or in a defect of the adversarial principle provided for by n. 9 Civil Procedure Code (c.p.c.).

048. Also with reference to the judge, Art. 52 c.p.c., the remedy of the objection by the parties, with an appeal, to be filed two days before the hearing, if the judge is already known, or before the start of the discussion or discussion of this, in the opposite case. The recusal suspends the process.

049. However, there is a recent jurisprudential orientation according to which the suspension is necessarily ordered only in the event that the request for recusal is admissible and, therefore, respectful of the conditions and terms prescribed by law.

050. In the Italian experience, with regard to arbitration, the obligation of disclosure can be found in the forensic code of ethics and in the regulations of the most important arbitration bodies, but it is not provided at the regulatory level. This gap could be filled by referring to the rules in good faith in the execution of the contract, or to the duty of diligence in the execution of the mandate.

051. With regard to the judge, we can look to the arbitration disclosure, the declaration of which the judge is charged by Art. 78 of the provisions implementing the Code of Civil Procedure in the event of abstention pursuant to Art. 51 c.p.c.

3. Is there a duty of a party to investigate the umpire beforehand, and if yes, how fare does that go?

052. No burden of preventive investigation by the parties, in relation to possible profiles of lack of impartiality or independence of the judge or the arbitrator is to be found in the Italian law, but rather a prompt reaction burden when one becomes aware of these critical issues for the judges, through the use of the instrument of recusal.

4. What are the consequences if these rules are not followed? A) by the umpire B) by the party?

053. The lack of a duty established by law means that failure to fulfill the corresponding obligation of impartiality or independence could only expose the arbitrator to compensation for damages suffered by the parties, without affecting the validity of the award.

054. Furthermore, the exercise, in the existence of the conditions, of the refusal of the judge who should have abstained becomes decisive given that the jurisprudence considers null the sentence pronounced in violation of the obligation to abstention, only where a personal or direct interest of the judge was configurable in that cause, in the other cases the defect remains irrelevant if the relative request has not been promptly proposed.

5. Is there a marked difference between the rules and consequences concerning judges and arbitrators?

055. From the above discussion, it can be concluded that, with reference to the essential requirements of impartiality and independence of the arbitrator and the judge, in the Italian discipline there are more similarities rather than differences.

6. History or a new trend that is particularly interesting

056. As noted by some arbitration chambers, in recent years in the field of arbitration, there has been an increase in objections and, more generally, in observations on the positions of arbitrators. This trend is probably also to be attributed to an enlargement of the professional audience of arbitration with an increase in conflicts of interest and relationships involving arbitrators, parties and defenders. The strengthening of the guarantees of independence and impartiality of the arbitrators is a requirement also accepted by the current Draghi Government which in the delegated bill no. 1662, Art. 11

provides for: a) the strengthening of the guarantees of impartiality and independence of the arbitrator with the provision of the faculty of recusal "for serious reasons of convenience" an expression intended to contemplate those personal circumstances of the arbitrators that could create a hypothesis of conflict of interest of the same. Furthermore, the obligation of disclosure is envisaged, with the further provision of achieving the forfeiture of the arbitrator (currently envisaged for the omitted or delayed performance of acts of his function, Art. 813 bis of the Italian Civil Code) who is in the conditions listed in Art. 815 c.p.c. and omitted its spontaneous disclosure.

7. Illustrative examples of cases

057.

Here are some cases in which the requirements of impartiality of the arbitrators in their relations with the parties and / or with the defenders in the context of arbitrations administered by the Arbitration Chamber of Milan have come to light.

058.

Case 1:

The arbitrator appointed by the defendant declares that he has assisted in the two years preceding the appointment one of the companies controlled by the defendant and that the firm of which he is a partner assisted and assists the defendant and various of its subsidiaries in practices unrelated to the matter at the time of the appointment of the dispute in which he declares not to be involved.

059.

Request for clarification of the plaintiff, confirms that the firm has received and could receive further mandates from the defendant and its subsidiaries on issues unrelated to the matter of the dispute and to participate, as a partner of the firm, in the profits deriving from the activities carried out by the firm itself. The Arbitration Council does not confirm the arbitrator, considering as impediments to confirmation that the termination of the consultancy relationship between the defendant and the arbitrator dates back to two years earlier and that, at the time of the appointment, there is an assistance relationship between the firm of which the arbitrator and shareholder and a subsidiary of the defendant and the arbitrator's participation in the profits of the firm itself.

060.

Case 2:

The President of the Arbitral Tribunal appointed by mutual agreement of the co - arbitrators (here indicated with A and B) declares to be: 1) defender of a party in which the counterpart is assisted by A; 2) defender of a party in an arbitration in which the counterparty has appointed B arbitrator; 3) defender of a party in a case whose counterpart is assisted by lawyers from the same firm that assists the defendant but other than those involved in the arbitration in question. The parties declare that they have no comments. The Arbitral Council confirms the arbitrator by positively evaluating the independence and impartiality of the arbitrator on the basis of the following considerations: the

relationships declared had no relationship with the parties involved in the arbitration in question, nor with the matters in dispute, the completeness and timeliness of the President's statement, the absence of observations by the parties, the appointment of the President made by mutual consent by the two co-arbitrators appointed by the parties.

8. Conclusion

061. The illustration shown above testifies to the persistence of the essential character of the requirements of impartiality, independence, impartiality and neutrality of the arbitrator as well as of the judge for the purpose of the correct conduct of the procedure and the validity of the final provision and, moreover, as the assessment of the existence or the lack of such requirements, must be conducted on a case by case basis, with a specific and careful assessment of all the circumstances of the case.

The foregoing is not a substitute for legal advice.

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Blog Post Switzerland

***) The part on the Law in Switzerland was written by Adv, Lara Pair of the Worldwide Independent Lawyers League, as part of the organization's activities to compare the different legal methods regarding the meaning of the existence of a "preconceived opinion" in arbitrations in these legal methods.

1. What are the underlying rules to avoid conflicts of interest, bias, partiality or independence for an umpire (judge or arbitrator)?

062. The relevant article regarding the rejection of an arbitrator is Art. 367 of the Civil Procedure Code, (CPC). Relaying to Art. 367 (1)(c) and Art. 180 (1)(c) a member of the arbitral tribunal may be challenged if there are circumstances which give rise to justifiable doubts to his or her independence or impartiality. According to the judgments of Swiss Federal Tribunal, justifiable doubts in terms of

Art. 180 (1)(c) require specific facts "which are objectively and reasonably qualified for provoking suspicions as to the independence of the arbitrator". Hence, the existence of objective circumstances that give rise to serious doubts are required (BERGER/KELLERHALS, margin 860 with further information). The subjective sensations or impressions of the challenge raising party are in principle irrelevant. They may only be taken into consideration "if they are based on specific facts, and if these facts are, in themselves, of a kind that would objectively and reasonably justify such a sentiment on a person reacting normally" (Swiss Federal Supreme Court Decision 111 Ia 259 para 3a), (BERGER/KELLERHALS, margin 860.)

063. Examples for justifiable doubts as to independence are if the arbitrator is the sole member of the board of directors and significant shareholder in a company having agreed to indemnify one of the parties in case it should lose the arbitration, if the wife of an arbitrator works in the law firm of the counsel representing the party who appointed him or her or if the arbitrator is participating in proceedings in which the same legal questions are at issue as in another, still pending case, in which he or she acts as counsel (BERGER/KELLERHALS, margin 861 with further information).

An arbitrator who has publicly assailed an earlier award in an comparable case as being grossly wrong is a justifiable doubt as to impartiality (Swiss Federal Supreme Court decision 133 I 89, para 3.4), (BERGER/KELLERHALS, margin 862.).

064. No justifiable doubts may be invoked if an arbitrator had withdrawn from his mandate without valid reasons and the remaining two arbitrators continued with the proceedings and rendered an award (Swiss Federal Supreme Court decision 115 Ia 400 para 3c). Nor is there any presence of bias or partiality if the president refuses to transfer the advances on costs to a separate trust account, when the arbitral tribunal had determined in its order of constitution that the advances were to be paid into the client-account of the president (BERGER/KELLERHALS, margin 863 with further information).

065. The Swiss Federal Supreme Court considers the IBA guidelines on Conflict of Interest (they have no statutory value). The guidelines are a helpful tool for unifying and harmonizing international arbitration standards (Swiss Federal Supreme Court Decision 4A_506/2007 of 20. March 2008 para 3.3.2.2).

2. Are there any rules of disclosure that the umpires (judges or arbitrators) have to adhere to when a problem or a potential problem arises?

066. There is a duty for arbitrators to make reasonable enquiries to investigate any facts or other circumstances that may affect their independence (IBA Guidelines, Part I (7) (c)), (NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 15 to Art. R33 CAS Code).

067. In part I of the IBA Guidelines are general standards concerning impartiality, independence and disclosure set. Part II contains a greater specificity by means of four lists and various examples. The four lists are a Non-Waivable Red List, a Waivable Red List, an Orange List and a Green List. The lists do not cover every conceivable possible conflict but they are a helpful tool for the unification and harmonization of the standards applicable to conflicts of interest in international arbitration (BERGER/KELLERHALS, margin 786).

068. **Non-Waivable Red List**: This list describes circumstances which necessarily raise justifiable doubts as to the arbitrator's independence or impartiality. The conflict of interest arising in such a situation cannot be waived by the parties (IBA Guidance, General Standard 2 (d) page 6). Some examples for the Non-Waivable Red List are (IBA Guidance, Part 2 Nr. 1 page 20).

- "There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration."

- "The Arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration."

- "The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case."

069. **Waivable Red List**: The Waivable Red List describes a serious conflict of interest. The parties may have the wish to engage such a person as an arbitrator. Here must be mad a balance between party autonomy and the desire to have only independent and impartial arbitrators. Persons with a serious conflict of interest may only serve as arbitrators if the parties make explicit and fully informed waivers (IBA Guidance, General Standard 4 (c) page 11). Some examples for the Waivable Red List are (IBA Guidance, Part 2 Nr. 2 page 20).

- *Relationship of the arbitrator to the dispute*: "The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties."

- *Arbitrator's direct or indirect interest in the dispute*: "The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this part or an affiliate being privately held."

- *Arbitrator's relationship with the parties or counsel*: "The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties."

070. **The Orange List**: The Orange List represents a non-exhaustive list of specific situations that could give rise to doubts as to the arbitrator's impartiality or independence in the eye of the parties. The Orange List remarks situations which would fall under General Standard 3 (a), what leads to the consequence that that the arbitrator has a duty to disclose such situations (IBA Guidance, Part 2 Nr. 3 page 18). The relevant source of this duty in Switzerland is Art. 363 of the Swiss Civil Procedure Code. Situations which are not listed in the Orange List or falling outside the time limits which are used in some of situations in the Orange List are generally not subject to disclosure. This cases need to be assessed by the arbitrator by a case-by-case basis to clarify if justifiable doubts as to his or her independence and impartiality are given (IBA Guidance, Part 2 Nr. 6 page 18 f.). Some examples for the Orange List are (IBA Guidance, Part 2 Nr. 3 page 22 f.):

- *Previous services for one of the parties or other involvement in the case*: " The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter."

- *Current services for one of the parties*: "The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator."

- *Relationship between an arbitrator and another arbitrator or counsel*: "The arbitrator and another arbitrator are lawyers in the same law firm."

071. **The Green List**: The Green List represents itself as a non-exhaustive list of specific situations where no actual conflict of interest and no appearance exists from an objective point of view. There is no duty for the arbitrator to disclose situations falling within the Green List (IBA Guidance, Part 2 Nr. 7 page 19). Some examples for the Green List are (IBA Guidance, Par 2 Nr. 4 page 25 f.):

- *Previously expressed legal opinions*: "The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case)."

- *Current services for one of the parties*: "A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter."

- *Contracts with another arbitrator, or with counsel for one of the parties*: "The arbitrator and counsel for one of the parties have previously served together as arbitrators."

072. In practice it is fact that parties, arbitrators, counsels, institutions and sometimes courts frequently take guidance from the IBA Guidelines in their decisions-making process (BERGER/KELLERHALS, margin 787). The Swiss Federal Supreme Court argued as follow: "The Guidelines certainly do not have the same value as statutory law; but they constitute nevertheless a valuable tool, likely to contribute to the harmonization and unification of the standards to be applied to conflicts of interest in international arbitration, i.e. an instrument that is likely to influence the practice of both institutions and state courts." (Swiss Federal Supreme Court Decision 4A_506/2007 of 20. March 2008 para 3.3.2.1).

073. One must be aware of that the threshold for facts to be disclosed is much lower than the threshold to assume an actual lack of impartiality and independence. A justified challenge is not per se given when a fact has been disclosed by the arbitrator. The fact that the arbitrator failed to disclose a fact (that should have been disclosed) is just a component to be taken into account when assessing the arbitrator's impartiality and independence. But it is not per se an indication for a lack of independence and/or impartiality (NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 15 with further information to Art. R33 CAS Code).

074. The independence of an arbitrator must be given during the entire arbitration proceedings. Means until the final award is rendered or the proceedings are otherwise terminated. Any potential issues should be disclosed at the outset of the proceedings. This should prevent long delays at a later stage of the arbitration. When the arbitrators sign the "Arbitrator's acceptance and statement of independence", a standard document of the CAS, the arbitrators should make full disclosure upon their nomination. Should an arbitrator become aware of circumstances which potentially affecting his independence at a later stage, he must disclose them immediately. In addition he has to provide

reasons for not having done so earlier (NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 16 with further information to Art. R33 CAS Code).

3. Is there a duty of a party to investigate the umpire beforehand, and if yes, how fare does that go?

075. On 15. January 2020 the Swiss Federal Supreme Court published on its website a new decision regarding international arbitration. The decision set aside the CAS award against the Chinese swimmer Sun Yang. On him was an eight-year ban imposed for violating doping rules. Because of apparent bias by the Chairman of the arbitral tribunal, the CAS award was set aside (https://www.bger.ch/files/live/sites/bger/files/pdf/de/4a_0318_2020_2021_01_15_T_d_13_55_31.pdf, visited on 17. June 2021).

076. The Swiss Supreme Court decision of 22. December 2020, is a very interesting case because it contains several statements regarding the party's investigation duty (Swiss Federal Supreme Court Decision 4A_318/2020 of 22. December 2020).

077. When a party wants to challenge an arbitrator, it has to state the reasons for the challenge as soon as it becomes aware of it – means immediately (Swiss Federal Supreme Court Decision 4A_318/2020 of 22. December 2020 para 6.1). Further, an arbitrator can be challenged by a party in a request for revision only for reasons that the party had no discovered and could not discovered during the arbitration proceedings by the application of the attention required by the circumstances (Swiss Federal Supreme Court Decision 4A_318/2020 of 22. December 2020 para 6.1).

078. Another statement of the Swiss Supreme Court is that the parties would have a "duty of enquiry" regarding the existence of possible challenge reasons of arbitrators. The party has to make certain investigations to be sure that the arbitrator offers sufficient guarantees of impartiality and independence. Means therefore that the party may not only rely on the declaration of independence of the arbitrator (Swiss Federal Supreme Court Decision 4A_318/2020 of 22. December 2020 para 6.5). However, defining the contours of the duty of enquiry is difficult. It depends on the circumstances of the specific case. Nevertheless, this duty is not unlimited. There is an obligation for the parties to carry out certain internet investigations. The court expects the parties to use the main computer search engines and consult sources which provide a priori elements for a possible risk of partiality. Examples are the website of the parties, of their counsel an of the law firm in which they

practice, of the law firms of the arbitrators, the website of the main arbitration institutions and in the field of sports arbitration, the sports institutions and organizations involved (Swiss Federal Supreme Court Decision 4A_318/2020 of 22. December 2020 para 6.5). But it cannot be expected of the parties that they systematically and thoroughly read all sources regarding a certain arbitrator. Just because information is freely accessible in the internet and the party does not become aware of this information (despite having conducted researches) does not ipso facto mean that there is a violation of the parties duty of enquiry. Always the circumstanced of each specific case will remain decisive (Swiss Federal Supreme Court Decision 4A_318/2020 of 22. December 2020 para 6.5).

4. What are the consequences if these rules are not followed? A) by the umpire B) by the party?

079. Generally speaking, any member of the arbitral tribunal at any time throughout the arbitral proceeding may be challenged by a party, as soon as circumstances have come to the parties attention that may give rise to grounds for challenge (BERGER/KELLERHALS, margin 869).

080. Art. 369 (1) CCP recalls that the parties may freely agree on the terms of the challenge procedure. Is there no such agreement, Art. 369 (2) CCP states that the aggrieved party has a 30 days-time period to file any request for challenge with the arbitral tribunal from the date on which the party learned of the grounds for challenge. If, according to Art. 369 (3) CCP, the challenging party disputes the grounds, the aggrieved party has again 30 days time to seek a decision on the challenge from the body agreed between the parties, or in the absence of it, from the state court at the place of arbitration (BERGER/KELLERHALS, margin 876 with further information).

081. If the aggrieved party fails to communicate its challenge request to the arbitral tribunal within the time deadline of 30 days, or if the party fails to seize the competent authority or state court within the time period of 30 days after the rejection of the challenge, the right to challenge the arbitrator on the basis of the grounds at issue will be treated as have been irrevocably waived (BERGER/KELLERHALS, margin 876 with further information). This consequence was recently confirmed by the decision of the Swiss Federal Court, where the court argued that if the party wants to rise a challenge, it has to do so by stating the reason for the challenge as soon as the party becomes aware of it. If there is not an immediately raise of the challenge, the right to challenge the arbitrator is forfeited (Swiss Federal Supreme Court Decision 4A_318/2020 of 22. December 2020 para 6.1).

5. Is there a marked difference between the rules and consequences concerning judges and arbitrators?

082. As a starting principle, the Swiss Federal Supreme Court has ruled that arbitral tribunals must present the same guarantees of independence as state courts (Swiss Federal Supreme Court decision 125 I 389, para 4a), (NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 5 with further information to Art. R33 CAS Code). Further when assessing the independence of an arbitrator one should also take into account the particularities of international arbitration – so the Swiss Federal Supreme Court (Swiss Federal Supreme Court Decision 4A_506/2007 of 20. March 2008 para 3.1.1), (NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 5 with further information to Art. R33 CAS Code).

083. One of its particularities is that counsels and arbitrators have frequent contacts due to their professional and economic background and the private nature of arbitration. These contacts by themselves should not justify a challenge brought against them (Swiss Federal Supreme Court Decision 129 III 445, para 4.2.2.2).

084. On a general view can be said that the Swiss Federal Supreme Court is fairly liberal in assessing arbitrator independence and admits a challenge only rarely (NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 12 with further information to Art. R33 CAS Code).This is true for sport and commercial arbitration – "the particularities of sports arbitration do not justify as such the application of less demanding standards to sport arbitration than in commercial arbitration." (Swiss Federal Supreme Court Decision 4A_506/2007 of 20. March 2008 para 3.1.1; NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 12 to Art. R33 CAS Code).

085. The Swiss Federal Supreme Court jurisprudence shows a justified and balanced approach in assessing whether allegations of partiality are based on objective indicators of bias or on subjective distrust (NOTH/HAAS, Arbitration in Switzerland, The Practitioner's Guide, margin 12 to Art. R33 CAS Code).

6. History or a new trend that is particularly interesting

086. On 1. June 2021, the revised Swiss Rules of International Arbitration (Swiss Rules) entered into force and apply generally to all arbitrators in which the Notice or Arbitration is filed on or after that date. The revised law defines now the impartiality of the arbitrator as an additional requirement beside his independence. Furthermore does the new law regulate, that each arbitrator must promptly disclose to the Secretariat and the parties any circumstances that could give rise to justifiable doubts

as to the arbitrator's impartiality or independence. The procedure for challenge and removal of an arbitrator are now regulated in more detail.

087. The relevant Articles for the independence, impartiality and disclosures of arbitrators are regulated in Article 12 of the new Swiss Rules. The challenge of an arbitrator in Article 13 (Swiss Rules of International Arbitration (Swiss Rules), June 2021, page 8).

088. The new **Article 12 of the Swiss Rules** regulates the following (Swiss Rules of International Arbitration (Swiss Rules), June 2021, page 8):

- 1. "Any arbitrator conducting an arbitration under these Rules shall be and shall remain impartial and independent throughout the proceedings."

- 2. "Before appointment or confirmation, prospective arbitrators shall disclose to the Secretariat any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. The Secretariat shall provide such information to the parties and set a time limit within which they may comment."

- 3. "After appointment or confirmation, each arbitrator shall have the duty to promptly disclose to the Secretariat and to the parties any such circumstances arising in the course of the proceedings."

089. The new **Article 13 of the Swiss Rules** regulates the following (Swiss Rules of International Arbitration (Swiss Rules), June 2021, page 8):

- 1. "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."

- 2. "A party intending to challenge an arbitrator shall send a notice of challenge to the Secretariat with a copy to the other parties and the arbitral tribunal within 15 days after the circumstances giving rise to the challenge became known to that party."

- 3. "If, within 15 days from the date of the notice of challenge, the parties do not agree to the challenge, or the challenged arbitrator does not withdraw, the Court shall decide on the challenge."

7. Illustrative examples of cases

Case 1:

The Court ruled that the arbitrator and the chairman have the same requirements for independence and impartiality (Swiss Federal Supreme Court Decision 4A_234/2010 of 29. October 2010 para 3.3.1).

Case 2:

The court decided that doubts as to impartiality must be based on objective criteria. It is sufficient if circumstances exist, on a objectively view, that give rise to the appearance of bias and partiality (Swiss Federal Supreme Court Decision 4A_292/2019 of 16. October 2019 para 3.1).

Case 3:

The Court relied on its well-established case law that whoever feels aggrieved during the arbitration, for instance because the arbitrator shows a bias, must raise the point immediately and give the arbitral tribunal a chance to remedy the deficiency. By keeping the argument "in reserve" in case of an unfavorable outcome of the arbitration, the party forfeits the right to raise the matter before the Federal Tribunal (Swiss Federal Supreme Court Decision 4A_173/2016 of 20. June 2016 para 2.1, 2.3.1).

Case 4:

The court clarifies that impartiality is not a question of public policy. It is only a subsidiary guarantee that can just be invoked if non of the reasons provided in Art. 190 para 2 lit. a-d PILA are relevant (Swiss Federal Supreme Court Decision 4A_530/2011 of 3. October 2011 para 3.2).

Case 5:

According to case law, do procedural measures, whether they are correct or incorrect, not give themselves rise to an objective suspicion of bias by the arbitrator who ruled them (Swiss Federal Supreme Court Decision 4A_236/2017 of 24. November 2017 para 3.3).

8. Conclusion

The Swiss Federal Supreme Court decision regarding the award against the Chinese swimmer Sun Yang is a case worth reading, because it contains several statements regarding the party's investigative duties. This decision is a helpful guidance for the parties, which allows them to know how fare their duty of enquiry goes. However, how the case law will be implemented in practice remains to be seen.

096.

Beside the new framework regarding the duty of enquiry, the revised Swiss Rules of International Arbitration further stress the importance of the impartiality of the arbitrator. They also strengthen the procedure for challenge and removal of an arbitrator, which are now regulated in more detail.

097.

Impartiality and independence of arbitrators and judges are an indispensable condition for the performance of their office. The IBA Guidelines, the case law by the Swiss Federal Supreme Court and the revised Swiss Rules give the parties and the arbitrators a more detailed guideline how to act in different cases. The future will show how effective the guidance will be.

Sources:

- MANUEL ARROYO, Arbitration in Switzerland, The Practitioner's Guide, Second Edition, Volume II, Netherlands 2018.

- BERNHARD BERGER/FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND, Third Edition, Berne 2015.

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