Insights on the arbitrator's requirement of independence

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Abstract
Arbitrators act as private judges, thereby assuming a judicial role. They have the obligation to be independent and impartial since the time of acceptance of this function to the last act of settling the dispute between the parties. This obligation has become a universally principle accepted in international arbitration.
Keywords: *arbitrator; independence; impartiality; neutrality; the obligation to inform*.

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1. Legal provisions regarding the arbitrator's obligation of independence

The international conventions in the matter of arbitration, the national laws, the UNCITRAL Model-Law of international arbitration [1], as well as the regulations of the permanent arbitration institutions promote as fundamental principles, the independence, the impartiality and the neutrality of the arbitrators.

The Washington Convention for the regulation of Investment Disputes between States and Nationals of other States, signed in 1965, stipulates in art. 14 para. 1) that people who are designated for inclusion on the arbitrators' list, in addition to a high moral, recognized competence in the legal, commercial, industrial and financial field, must offer "guarantee of independence in the exercise of their functions".

Within the art. 12 para. 2) of the Model Law - UNCITRAL are provided as grounds for recusal of arbitrators the lack of qualifications agreed by the parties, the lack of impartiality and independence: "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."

Also in the par. 1) of the art. 12 is regulated the obligation to inform the parties about the circumstances that might substantiate the lack of impartiality or independence: " When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him."

The Romanian Code of Civil Procedure (hereinafter, C.proc.civ.) regulates the obligations of arbitrators through the art. 562, which refers to their incompatibility, but also through the art. 565, which provides for cases in which judges can be held accountable [2].

The independence of of the arbitrators is a fact that can be endangered by circumstances such as those mentioned in the art. 562 para. 1) of the C.proc.civ .: "In addition to the cases of incompatibility provided for judges, the arbitrator may be challenged for the following reasons, which puts in doubt his independence and impartiality: a) the failure to meet the conditions for qualification or other requirements regarding arbitrators, provided in the arbitration agreement; b) when a legal person whose associate is or whose governing bodies is the arbitrator has an interest in question; c) if the arbitrator has employment or service relationships, where appropriate, or direct trade links with one party, with a company controlled by one party or under common control with it; d) if the arbitrator has provided consulting either party, witnessed or was a party or testified in one of previous phases of litigation".

So arbitrators have the obligation to be independent, impartial and neutral throughout the mission that they accepted it, pending the completion of arbitration and the arbitration award.

In the literature it is stated that this obligation has become an "universal accepted principle and, from this point of view, is than completely isolated, any distinction between domestic and international arbitration on the requirement of independence, impartiality and neutrality of the arbitrators" [3].

Also, we must not forget that even the incompatibility provided for judges in the art. 41 and the art. 42 of the C.proc.civ., according the art. 562 paragraph 1) of the C.proc.civ. applies to the arbitrators. Is therefore not allowed to take part in the judgment the arbitrator who was witness, expert, lawyer or mediator in that case.

And according to the art. 562 para. 1) in conjunction with the art. 42 of the C.proc.civ., the following situations are grounds for incompatibility for arbitrators: when the arbitrator previously expressed its opinion on the solution of the case that was assigned to judge; when there are circumstances that make justified the fear that he, her/his husband/spouse, ascendants or descendants or the in-laws, have an interest in the dispute; when she/he is the spouse or the husband, relative or in-law up to the fourth degree with the lawyer or the representative of a party or if she/he is married with the brother or with the sister's husband/spouse of one of these people; when a husband/spouse or ex-husband/ex-spouse is a relative or in-law up to the fourth degree with any of the parties; if he, his spouse/her husband or their relatives up to the fourth degree or related persons, as appropriate, are parties in a process that judges at the institution where one party is arbitrator; if between him, his spouse/her husband or their relatives up to the fourth degree or in-laws, as appropriate, and one party there was a criminal trial with more than 5 years before being appointed to settle the dispute.

In the case of criminal complaints submitted by the parties during the arbitration, the arbitrator is incompatible only if put into criminal action against him. Also, the arbitrator is incompatible if he is the guardian or custodian of a party; if he, his husband/spouse, ascendants or descendants have received gifts or promises of gifts or other benefits from one of the parties; if he, his spouse/her husband or one of their relatives to the fourth degree or in-laws, as appropriate, is enmity relations with one party, the husband or his relatives to the fourth degree; if it is a spouse or relative up to the fourth degree or in-laws, where appropriate, with another member of the arbitral tribunal; if the husband/spouse, a relative or a in-laws family member up to the fourth degree represented or assisted the party in the same cause before other arbitration institutions; when there are other elements that justified in arise doubts about his impartiality.

The Regulation of International Commercial Arbitration Court of the Chamber of Commerce and Industry of Romania provides in the art. 12 that arbitrators are independent and impartial in carrying out their judicial role, emphasizing that the arbitrators are not representatives of the parties [4].

2. Doctrinal perspectives regarding the arbitrator's obligation of independence

In international arbitration, the arbitrators must meet in addition to the requirements of impartiality and independence, the neutrality requirement. In this context, the neutrality condition requires to the arbitrator to take a certain distance from its legal culture, politics, religion, and not be limited to their own traditions, showing openness to other ways of thinking [5].

The doctrine appreciated over time that independence and neutrality can be ensured when the arbitrator nationality is different from the nationality of the parties. Some international institutions have used arbitration doctrinal views and brought into regulations this rule regarding the different nationality between the arbitrators and the arbitration's parties [6].

There is also one part of the literature that states that the application of such rules on neutral nationality of the arbitrator can have serious consequences in practice, in the sense that, in an arbitration in which the applicable law is the law of one party and the sole arbitrator or the presiding arbitrator (the President of the Arbitral Tribunal) does not know this law. Moreover, it states that the nationality the arbitrator does not guarantee the independence and the impartiality, but only creates this appearance [7].
The criterion of the neutrality of the arbitrators qualifies them as neutral arbitrators, and in this category are included the arbitrators appointed by the administrator of the institutional arbitration or the presiding arbitrator appointed by arbitrators, selected by the parties, and non-neutral arbitrators, those appointed by the parties [8].

In the matter of US national arbitration there was the regulation according to which the arbitrators appointed by the parties are non-neutral, so the neutrality requirement does not exist in their task [9]. With regard to international arbitration, the approach was different, the International Bar Association Rules of Ethics for International Arbitration disposing since 1987, that in the international arbitration the

arbitrators must be impartial and independent, and also must be and remain impartial [10].

The position of the American Arbitration Association has changed, and in 1993 the Regulation on domestic arbitration has been substantially amended, stipulating that unless the parties have agreed otherwise, the arbitrators must be impartial and independent. A new change took place in 1997, suppressing the parties' possibility to choose whether or not the condition of independence and impartiality of the arbitrators applies, and so, the American Arbitration Association has aligned its rules provisions in most practice worldwide [11].

The status of the arbitrators appointed by the parties remains the subject of controversy, but most of the doctrine and practitioners however considered dangerous any interim solution regarding the judicial role of the arbitrator.

The Regulations of the permanent institutions of arbitration gives some examples of the application of neutral arbitrators' condition, in the sense of a different citizenship to the parties, but in a subdued manner: the Regulation of the International Court of Arbitration in Paris provides within the art. 13 para. 4) that usually, the sole arbitrator or the chairman of the arbitral tribunal shall have other nationality than the litigants. But, given that we are in the matter of arbitration, in certain circumstances and provided that neither party not raise objections within the period fixed by the Court, the arbitrators may be chosen from a country whose citizen is also a party. The International Arbitration Court in London within the art. 5 and the art. 6 of the Arbitration Rules regulates the formation of the arbitral tribunal and stipulates the implementation of the principle of neutrality, though it can be mitigated by the parties. Thus, in accordance with the art. 6, regardless of the nationality of the parties, both the arbitrators and the President of the Arbitral Tribunal must be a different nationality, unless the parties of different nationalities have agreed otherwise in writing.

It also clarifies the situation of people who have multiple citizenship or who are European Union citizens, such as: one who has more citizens will be considered a citizen of each state and for the European Union citizens, will be considered the nationality of the European Union state member whose citizens are, and does not considered to have the same nationality.

The regulations in the international arbitration field are those that provide the possibility for each party to appoint its own arbitrator. The Model Law - UNCITRAL dispose under the art. 11 that the parties are free to choose a procedure for appointing the arbitrators or to designate them, and in the case of the arbitral tribunal composed of three arbitrators, each party shall appoint one arbitrator, and the two shall designate the third; the art. 1.113 of the C.proc.civ. provides that the appointment, the revocation and the replacement of the arbitrators shall be done according to the arbitration agreement or those established by the parties after this, and by default, the interested party may request to the arbitral tribunal on seat of arbitration to do so; in accordance with the art. 7 para. 1) of the Rules of International Arbitration Court in London, if the parties agreed that an arbitrator be appointed by them or by a third party, this convention has the meaning of a proposal for an arbitrator, and the arbitrator candidate may be appointed arbitrator only by the Court; in the same direction is also the regulation provided by the art. 12 of the International Court of Arbitration in Paris' Regulation, and, if the parties decided to submit the dispute to an arbitral tribunal of three arbitrators, each party shall appoint, for confirmation, an arbitrator by the request for arbitration, respectively respond plea.

In the literature it is appreciated to be "illusory combating the hope of the party that unilaterally choosing or designating a member of the arbitral tribunal it shall not seek and will not see him, unless a lawyer in charge exclusively with the support of its view, at least an arbitrator with a predisposition in his favor [12]."

The principle of impartiality and independence of arbitrators apply whether questioning a domestic or an international arbitration, and international conventions emphasizes its importance. But, it seems that between theory and practice there is a large gap: a part of the doctrine considers that the arbitrator cannot be independent when he was appointed by a state or the very support that the arbitrator must be independent is "hypocritical". The other part of the doctrine is not as trenchant and invokes the contractual freedom under which the parties can designate arbitrators [13].
Along with other authors [14], we argue that the absolute independence of any arbitrator is required or it may jeopardize the exercise of this function, and the institution of arbitration would be seriously injured.

Matthieu de Boisseson raises the following problems: "the independence of the arbitrator, as arbitrator of all parties, it is an unattainable ideal or a legal fiction that was developed on the foundation of the arbitrator's definition in international trade? This fiction, it is, in the etymological sense hypocritical: it is the arbitrator's mask?"[15]
It is sure that in this case, the ideal must be identical with the reality, because otherwise, it would raise enough problems, both ethical, and legal.

The arbitrators must be independent and impartial since assuming the function and until a decision on the last act of arbitral dispute is pronounced [16]. In this respect, the fundamental principles like the independence of arbitrators, their impartiality and neutrality need a legal guarantee regarding the compliance.

The doctrine appreciates that "the obligation to inform falls among the most important guarantees for the respect and impose conditions set forth both in national and international arbitration" [17], representing also a preventive measure to implement the requirements of impartiality and independence [18].

3. The duty to inform, the guarantee of the arbitrator's independence

The information obligation was laid down in national legal systems in matters of national arbitration and then was extended to the field of international arbitration. It is considered that the UNCITRAL Model Law had a considerable influence on the settlement of this obligation under national laws to international arbitration matters. The art. 12 of this law regulates the obligation of the nominated arbitrators to inform the parties and the arbitral tribunal, throughout the course of the arbitration proceedings concerning all circumstances likely to cause reasonable doubt on their independence and impartiality.

This obligation of the person designated as arbitrator has acquired the status of a universal principle in international arbitration law [19], and the purpose of this obligation is to ensure the possibility of the parties to recues arbitrators which, according to their belief, not (any longer) meet the requirements of independence and impartiality [20].

In national law, this information obligation is governed by paragraph. 3), 4) and 5) of the art. 562 of the C.proc.civ., by which a person who knows that there is an issue regarding his recusal, is required to notify the parties and the other arbitrators before he accepted the mission of arbitrators, and if such cases occur after acceptance, once

knew them. This person cannot participate in the arbitral proceedings unless the parties notified the cause for recusal, communicated in writing that they do not intend to challenge the arbitrator. Even in this case, the arbitrators has the right to abstain from hearing the case, without such abstention signifying the recognition of the challenge in this respect, the abstention takes effect on its formulation without any further formality.

It can be seen that in the domestic arbitration, this obligation to inform the arbitrator's about the causes of the challenge is brought in mandatory terms, and is not exempt from legal repercussions: first, the breach of that duty may lead to the annulment of the arbitral award based on the art. 608 para. 1) lit. h, according to which the arbitration award may be canceled only if the action for annulment was adopted in breach of the provisions of the law; secondly, in accordance with the art. 565 lit. d of the C.proc.civ., the arbitrators answer for the damage caused by breach in bad faith or gross negligence of their other duties and the obligation to inform the parties and the other arbitrators; thirdly, the arbitrators may be removed following a recusal request submitted by the parties, resolved through a resolution by the arbitral tribunal.

Regarding the international arbitration, the arbitrators have no obligation to inform the parties of the circumstances that would give rise to justifiable doubt on their impartiality and independence, and there are no provisions concerning their liability. But, the arbitration award may be canceled by action for annulment if it violates public order, morals and mandatory provisions of the law, according to the art. 1.120 par. 3) of the C.proc.civ. in conjunction with the art. 608 para. 1) lit. h) of the C.proc.civ., and the lack of independence and impartiality of the arbitrator affect the right of the opposing party to a fair trial. Also, the liability of arbitrators regulated by the art. 565 of the C.proc.civ. is applicable in the domestic arbitration, but also in the international arbitration, according to the art. 1.122 of the C.proc.civ.[21].

The international doctrine considers that the lack of independence and impartiality of the arbitrator or arbitrators may be a means of cancellation of the arbitration award invoking in this regard, the irregularity of the formation of the arbitral tribunal and the violation of national or international public order [22].

The international jurisprudence states that the breach of this informing obligation by the arbitrator's cannot support the annulment of the award on which pronouncement

has participated because the independence or impartiality of the arbitration tribunal has been compromised or because the arbitrator's failure to disclose these circumstances that could give rise to justifiable doubts regarding the independence and impartiality since these represents just one of the reasons appreciation [23]. And yet the French national courts annulled awards on the grounds that there was a conflict of interest between the president of the arbitral tribunal and one of the parties or an arbitrator's declaration of independence was made elliptical, but could highlight the existence of an interest in the case because the arbitrator was appointed by the Board appointed party or the situation where an arbitrator is appointed with some frequency by the same party in disputes of the same nature (in French doctrine, "l'arbitre-maison") [24].

The appreciation of an arbitrator's independence shall be made both objectively and subjectively point of view. In the objective assessment is taking account the existence of material or intellectual dependence between the arbitrator and one of the parties, and in the subjective assessment, is weighed the effect of this dependence on the arbitrator and the parties [25].

In accordance with the art. 20 para. 1) of the Rules of Arbitration of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of Romania, the arbitrators are incompatible to settle a dispute in the following cases, which question their independence and impartiality: is in one the incompatibility situations that the Code of Civil Procedure provides for judges, art. 41 and the art. 42; do not meet the qualification requirements or other requirements regarding the arbitrators, provided for in the arbitration agreement between the parties; a legal person whose associate is or whose governing bodies are concerned the arbitrator has an interest; the arbitrator has employment relationships or service, or direct trade links with one of the parties, with a company controlled by one of the parties or under common control with it.

Also, it is regulated the situation of the arbitrator who is a lawyer, in the art. 20 para. 2), 3) and 4), stating that the arbitrator who is also a lawyer cannot enter into the composition of an arbitral tribunal vested with the arbitration of a dispute about who carried out or will perform legal activities, nor may represent or assist any of the parties in that dispute before the courts established under the Arbitration Court. These activities

cannot be exercised either directly or through its substitution by another lawyer of the professional organizational whom he belongs.

Under the art. 16 on the declaration of acceptance of the mission, regulates in the par. 2) that this statement will contain, among other things, the statement that the arbitrator or presiding arbitrator is not in any of the incompatibility provided for in the art. 20 of these rules, which may can question his independence and impartiality. The arbitrator shall declare the relevant facts and circumstances existing if it considers that it can fulfill its mission independent and impartial, despite their existence. This obligation has to be respected throughout the arbitral proceedings, declaring them immediately. Both, the initial declaration and the subsequent, shall be made in writing and submitted to the case file that the parties can get to know their contents [26].

The arbitrator may request to be suspended or this measure shall be decided by the College of the Court of Arbitration, when incompatibility is about the quality of arbitrator, due to circumstances arising after its inclusion on the list of arbitrators, who puts him in the physical or moral impossibility fulfill the mission for a longer period of time [27]. Likewise, the International Court of Arbitration Rules of Paris regulates the arbitrators' obligation of independence from the parties throughout the period of the arbitration proceedings, but also the obligation to inform the parties and the Secretariat of the Court on the circumstances that question his independence and impartiality. This obligation to inform the parties and the Secretariat of the Court take the form of a declaration of independence written, and must be respected throughout the course of the arbitral process [28].

The provisions of the art. 5 paragraph. 3) - 5) of the Rules of Court of International Arbitration in London require that all arbitrators shall be and remain, at all times, impartial and independent from the parties. Also, before his appointment by the Court, each arbitrator must sign a declaration stating that there are no known circumstances which give rise to justifiable doubts regarding his impartiality or independence. This obligation to inform the parties and the arbitral tribunal on the circumstances "compromising" must be followed throughout the course of the arbitration proceedings, pending the completion of arbitration.

The American Arbitration Association provides within the Procedure for resolving international disputes that the arbitrators must be impartial and independent. They have an obligation to inform the parties about the circumstances that could give rise to justifiable doubts on their impartiality. This obligation also has throughout the course of the arbitration, regardless of its stage [29].

The doctrine and the judicial practice consider that the determination of the circumstances that arbitrators should disclose the parties and the arbitral tribunal is problematic. In principle, it must be communicated all circumstances that could affect their independence and impartiality, but the courts consider that its implementation is difficult. The French jurisprudence states that this obligation must be determined by the notoriety of the criticized situation and the reasonably foreseeable impact on the arbitrator's ruling. Publicly known facts, and the facts that do not raise "reasonable doubt" about the impartiality and independence of the arbitrator does not fall within the scope of that duty to inform.

Who appreciates the impact of these circumstances on the impartiality and independence of the arbitrator: the arbitrator himself, the parties, the arbitral tribunal or the national court? Everyone can appreciate the extent to which the circumstances disclosed or not disclosed by the arbitrator affects his impartiality or independence, but in different procedural moments [30].

The arbitrator can appreciate the impact of these circumstances, disclosing their parties and the arbitral tribunal, both before accepting his task, and throughout the course of the arbitration proceedings and might even abstain from judging the dispute.
Parties, if they are properly informed by the arbitrators on the incidence of these circumstances, they can appreciate their influence when they became aware, agreeing to appoint an arbitrator under these conditions (that they appreciate as having no impact on his impartiality and independence), and after the appointment, if it does not agree, can challenge him.

The arbitral tribunal may consider that these circumstances may influence or not the arbitrator's independence in the case of resolution the request for recusal; in institutional arbitration, the arbitration institution may waive the appointment of the arbitrator if it considers that circumstances specified in the declaration of acceptance of

the arbitrator's mission may affect its independence and impartiality in question [31]. The court may decide upon these circumstances when the arbitral award is challenged by either party with action for annulment.

In accordance with the art. 562 para. 1) and 3) of the C.proc.civ., the obligation to inform refers to the non-compliance of the qualifications, the existence of an interest in the case of a legal person whose associate is the arbitrator or whose governing bodies is, the existence of service or employment relationships, direct trade links between the arbitrator and one of the parties or a company controlled by one of the parties or under common control, the arbitrator provided legal advice, assisted or represented one of the parties or has filed testimony in one of the earlier stages of the case. To these grounds of incompatibility are added those provided for judges by the Code of Civil Procedure. Thus, the obligation to inform is limited to those grounds for recusal required by law.

There are national regulations, but also regulations of international arbitration courts, which allow the recusal of the arbitrators for their lack of independence or for any other reason, leaving on the arbitrator's interpretation the circumstances that affect their independence [32].

The International Bar Association (hereinafter IBA) has prepared a Guide [33] relating to conflicts of interest that may arise when a person assumes the responsibility of arbitrator. It reflects the vision of the IBA Arbitration Committee on the current international practice and provides general standards and their application, taking into account the existing laws and jurisprudence, but also the experience of practitioners involved in international arbitration. In this sense, it tries to balance the interests of all participants in international arbitration, parties, representatives, arbitrators, arbitration institutions, all having a duty to ensure the integrity, reputation and efficiency of arbitration [34].

4. Conclusions

Following the debate, we can conclude that there is a certain dose of subjectivity that cannot be removed nor in the situation of judges' judgments, nor in the case of the arbitration awards issued by the arbitrators: "A judgment or an arbitral award bears the imprint of the personality of the author or authors. Between the independence like goal and independence as state of fact, for arbitrator or judge will always exist a distance

and we can only strive to make it as small as possible. The overlap is only possible in the case of the machines, but these even equipped with artificial intelligence, will not be able to be judges [35]."

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[19] Poudret F., S. Besson, Droit comparé de l'arbitrage international, LGDJ Publisher, Paris, 2002, p. 382.
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[21] 578Art. 1122 of the C.proc.civ.: "Any issues concerning the composition of the arbitral tribunal, the arbitral procedure, the arbitral award, the completion, the communication and its effects, not covered by the parties in the arbitration agreement and the resolving of them not entrusted to the arbitral tribunal shall be settled by applying accordingly the provisions of the fourth book."

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