

Arbitrators' Duties

"Selected Issues"

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8. November 2013

Overriding Definition

"It is the duty of the arbitrators in international arbitration to be **independent of the parties** and in an unbiased way and **in accordance with due process** [...] to make themselves acquainted with the facts of the case and the claims, allegations and defences of the parties and, **within a reasonably short period of time**, to make a **reasoned award**, based on **applicable law**, which fulfils the requirements for the award to be **enforceable**."

(Allan Philip, 'The Duties of an Arbitrator', in: *The Leading Arbitrators' Guide to International Arbitration*, ed. Lawrence W Newman & Richard D. Hill)

Independence and Impartiality, Duty to Disclose (1|2)

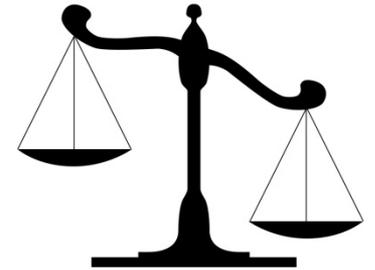
- Duty to disclose any facts and circumstances that may give rise to justifiable doubts as to independence or impartiality (see Art. 363 CPC, IBA Guidelines, Part I(3), etc.)
- Status of the IBA Guidelines:

"In order to verify the independence of the arbitrators, the Parties may also refer to the IBA Guidelines [...]. Such guidelines admittedly have no statutory value; yet they are a precious instrument [...] to dispose of conflicts of interests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals." (DFT 4A.506|2007)

Independence and Impartiality, Duty to Disclose (2|2)

- Does failure to make disclosure create an appearance of bias (see Art. 4.1 of the IBA Rules of Ethics)?
- Arbitrators' duty to investigate conflicts? ("Can an arbitrator be independent if the conflict is unknown?")
- **Note:** Parties might have an affirmative duty to investigate potential conflicts (see DFT 4A_528|2007: "reasonable efforts")

Due Process Duties (1|3)



In General:

- Art. 182(3) PILA: "Regardless of the procedures chosen, the arbitral tribunal shall **guarantee equal treatment** of the parties and their **right to be heard** in contradictory proceedings."
- Reasonable opportunity to express views on the essential facts for the judgment, to present legal arguments, to propose evidence to pertinent facts (**Note:** Article V(1)(b) NYC)
- Entitlement to hear the case as put by one's opponent and entitlement to respond

Due Process Duties (2|3)

Adjudication of issues not addressed by the parties?

- Factual issues: No.
- *lura novit arbiter* vs. right to be heard
 - **Swiss view:** Parties do not have a specifically protected right to be heard on the court's legal assessment of the facts presented by them unless if the decision is intended to be based on a rule of law which was not pleaded by the parties and the relevance of which could not have reasonably been anticipated (DFT 4P.260|2000)
 - What about Article V(1)(b) NYC?
 - ILA Recommendations on Ascertainning the Applicable Law, sec. 7, 8, 10

Due Process Duties (3|3)

— Does an arbitral award have to be reasoned?

"Admittedly, the **right to be heard** in contradictory proceedings within the meaning of Art. 190(2)(d) PILA does **not require an international arbitral award to be reasoned** (ATF 134 III 186 at 6.1 and references). However, it imposes upon the arbitrators a minimum **duty to review and handle the pertinent issues** (ATF 133 III 235 at 5.2, p.248, and the cases quoted). This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into account some facts stated, arguments made, evidence and offers of evidence submitted by one of the parties and important for the decision to be issued. **If the award is totally silent as to some items apparently important to the resolution of the dispute, it behooves the arbitrators or the Respondent to justify this omission in their observations as to the appeal.** They must demonstrate that, contrary to the Appellant's arguments, the items omitted were not pertinent to resolve the case at hand or, if they were, that they were implicitly refuted by the arbitral tribunal." (DFT 4A_730|2012)

Duty of Efficiency and Expediency

- General principle: Arbitrators have to organize proceedings in a time and cost efficient manner (see Art. 14 Model Law, Art. 25, 27 ICC Rules, etc.)
- Proactivity vs. Right to be heard
- Duty not to accept the mandate
- Duty to make an award in reasonable time

Duty to Apply the Law (1|4)

Swiss view:

"[P]arbitral tribunals are **obliged** to determine the legal consequences of the duly established factual circumstances **ex officio** without being bound by the parties' legal understanding [...]. There is an exception if the parties have limited the arbitral tribunal's scope of review to specific legal aspects which is, however, not to be assumed lightly. [...]

[T]here is no violation of the principle of "*ne eat judex ultra petita partium*" if a court applies to claims partly or totally other legal rules than pleaded by the parties [...]." (DFT 4P.260|2000)

Duty to Apply the Law (2|4)

Foreign mandatory rules

- Should a party be "forced" to illegal performance?
- Should an award be made which might not be enforceable due to a violation of mandatory rules?
- Should the arbitral tribunal allow "crime"?

Duty to Apply the Law (3|4)

Possible scenarios

1. Joint-venture between an Italian and a Belgian party providing for the application of Swiss Law and which might violate EU antitrust regulations (see DFT 118 II 193)
2. Longterm sales agreement between an Argentinian and a French party under Swiss law and in violation of Argentinian export provisions.

Duty to Apply the Law (4|4)

Possible approaches

- Swiss style (Art. 19 PILA): "[a] compulsory provision of another law may be taken into account **if interests of a party** which are considered legitimate and clearly prevalent under Swiss legal concepts require it and the case has a close connection to that law."
- Notion of "true international public policy"

Duty to Render an Enforceable Award

- **Art. 41 ICC Rules:** "In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law."
- More than a negative duty which merely reinforces other obligations a tribunal may have in any event?

For example:

- Duty to complete the mandate (or: duty not to resign without justification)?
- Duty to consider or even investigate enforceability requirements?
- Duty to aid in enforcement?
- Duty to make consent awards (see Art. 32 ICC Rules)?

Thank you for your attention.

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