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The Journal

Articles

ISPRAMED AND THE NETWORK OF MEDITERRANEAN ARBITRATION CENTRES

What has been done

It is a given that entrepreneurs are particularly cautious when investing abroad, as they enjoy a scarce knowledge of the legal system of the targeted country and consequently they are not confident about its reliability.

Quite to the contrary, the availability of dispute resolution tools which are effective and neutral fosters commercial transactions and relations in a specified socio-economic context, being a sort of precondition for trust of different players to emerge.

This is all the more true for the Mediterranean basin, where there is a tangible interest in ADR techniques in general and in arbitration in particular.

However, such laudable trend does not allow us to consider settled the question of the diversity of approaches and positions on very crucial aspects of arbitration proceedings as well as on different qualitative parameters to be complied with.

It is evident that different procedural patterns may proliferate and spontaneously come in contact in the Mediterranean area (which is, notoriously, the cradle of similar civilizations), so that the cultural contact may manifest some harshness, as it happened at the international level.

It has been said that the solution to the problem may be found in a fair and balanced comparison between different national statutes and the rules of the most representative international arbitral institutions: in so doing, the quintessential principles of a good arbitration practice would emerge and be offered to arbitration users as lowest common denominator of a top-notch service.

When it comes to the harmonization of procedural and deontological principles of international arbitration, arbitration institutions play a

decisive role; working in tight contact with the parties, their counsels and arbitrators, they can have a pedagogical function and actually bridge the gap between different approaches (also on a legal level).

That is exactly the bottom line for ISPRAMED(1), the Institute for the Promotion of Arbitration and Mediation in the Mediterranean.

ISPRAMED is a non-profit organization set up in 2009 in Milan which has been active in many international projects on arbitration (OECD - Organisation for Economic Co-operation and Development, SIOI - Società Italiana per l'Organizzazione Internazionale, UNCITRAL - United Nations Commission on International Trade Law, UPM - Union pour la Méditerranée, etc.).

The main project that ISPRAMED has launched is the Network of Mediterranean Arbitration Centres – it now encompasses seven centres(2), but is open to any other centre willing to join – which gathers Mediterranean arbitration institutions providing ADR services.

The purpose of the Network is to promote arbitration within the Mediterranean area(3), by means of the creation of an alternative dispute resolution system which relies on sharing principles and practices.

Based on the principles of cooperation and co-ownership which inspired the new course of Euro-Mediterranean relations, each Centre of the Network maintains its own rules; at the same time the Centres very often exchange views on different topics, in order to develop common principles and practices, to be intended as a set of case management criteria leading to the application of the same standards in the administration of arbitrations. This would guarantee a reliable service, hence the trust of arbitration users would increase.

(1) www.ispramed.it – Founding associates: Milan Chamber of Commerce, , National Bar Council, e, Ordinary associate: Organisation of Associated Law Firms - ASLA (Associazione Studi Legali Associati)

(2) Centre for Arbitration, Mediation and Conciliation of Algiers, Cairo Regional Centre for International Arbitration, Milan Chamber of Arbitration, Tunis Mediation and Arbitration Centre, Arbitration Centre of the Istanbul Chamber of Commerce, Arbitration Court of Morocco, Lebanese Arbitration and Mediation Centre.

(3) As acknowledged in the final declaration of the Ministerial Conference held in Marseille on 3-4 November 2008 among representatives from the Countries involved in the Union for the Mediterranean, underlining that especially for the benefit of SMEs it is necessary "to improve arbitration procedures in the region"

Such principles and practices are shared by the Centres of the Network on issues which are considered crucial for the good administration of arbitration cases, such as: (i) independence and impartiality of arbitrators; (ii) criteria for selection of arbitrators; (iii) time of arbitration; (iv) arbitration costs; (v) transparency; (vi) confidentiality; (vii) multiparty arbitration; these themes are considered so important that all the Centres have to agree on specific parameters.

The Centres of the Network have set up a working group comprising a representative for each centre coordinated by Prof. Charles Jarrosson, Professor of International Arbitration at Université Panthéon-Assas Paris II.

Principles and practices result from different sources of elaboration: the former are the outcome of the comparison between the articles of the rules of the Centres ruling on a given issue, while the latter concern the practical way in which the Centres settle problematic and delicate questions in their everyday activity.

At the end of such analysis a report is drafted, with all the contributions of the Centres on each issue, purposely defining those prevailing principles and practices among the Centres: such activity would surely benefit foreign investors but also local entrepreneurs, who may enjoy a deeper knowledge of the activity of each Centres and count on a set of predetermined qualitative parameters, together with those shared principles and practices that the Centres shall abide by when managing a case.

So far the working group has drafted two reports, one on independence and impartiality of arbitrators and the other on the criteria for selection of arbitrators. In the first report on independence and impartiality of arbitrators, the Centres have pointed out their common view on the following five topics: 1) independence; 2) impartiality; 3) duty to disclose; 4) challenge of arbitrators; 5) incompatibility.

The report is then completed by an analysis of problematic cases which the Centres may deal with when managing their cases, analysis that leads to a few prevailing trends in the Network.

It is clear that sharing practices is useful for all the Centres, as it increases the value of individual experiences.

Accordingly, in the second report drafted and approved by the Centres, concerning the criteria for selection of arbitrators, the Centres have condensed their shared view on the following topics: 1) way of appointment of arbitrators; 2) the composition of the arbitral tribunal; 3) multiparty arbitration; 4) neutrality of the arbitrators; 5) availability. As already done for the first report, the second one comprises the contributions of the Centres on how some critical cases have been dealt with and settled in practice.

The manifest aim of the harmonisation work is surely not to wipe out the distinctive features of each Centre, which have to be respected as elements of legal culture; rather, the Network works to highlight the shared and common patrimony in terms of qualitative parameters to be offered to arbitration users.

The Network, therefore, creates a shared private justice system in the Mediterranean area, where differences (also of legal culture) are overcome in favour of uniform best practices.

Therefore, the harmonization trend in the area relies on the analysis of empirical facts and becomes a concrete and tangible result.

REPORT ON THE CRITERIA FOR SELECTION OF ARBITRATORS

ABBREVIATIONS

Centres

CACI - Centre for Arbitration and Conciliation of the Algerian Chamber of Commerce and Industry

CAM – Milan Chamber of Arbitration

CCAT – Arbitration and Mediation Centre of Tunis

CMA – Arbitration Court of Morocco

CRCICA – Cairo Regional Centre for International Commercial Arbitration

ITOTAM – Arbitration Centre of the Istanbul Chamber of Commerce

LAC – Lebanese Arbitration Center

International conventions and laws as mentioned in the Rules Comparison Chart and in the Report

NY Convention - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958

UNCITRAL ML – United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006

UNCITRAL Rules - United Nations Commission on International Trade Law Arbitration Rules, 1976, as revised in 2010.

ISPRAMED language

MOU – Memorandum of Understanding signed by the Centres as members of the Network with the intent to promote arbitration and mediation in the Euro-Mediterranean area and to define shared and common principles

Methodology – Operational pattern agreed upon by the Centres in order to define the common practice in the administration of arbitrations in the Mediterranean area

PRINCIPLES

1. Way of appointment of the arbitrators

The Centres all acknowledge the importance of a transparent and clear-cut procedure for the appointment of the members of the arbitral tribunal, based on the assumption that this allows the smooth set in motion of the proceedings. The selection of the arbitrator by the parties is a quintessential feature of arbitration and this is strictly linked to the broad freedom they generally enjoy to construct a dispute resolution system of their choice in the arbitration agreement. Therefore, the Centres agree that the parties should never be deprived of the power to appoint the members of the arbitral tribunal in favour of the institution, unless it is considered appropriate to intervene to break a procedural deadlock in the arbitration. Besides, when appointing the arbitrators the Centres may either draw from an internal list of arbitrators (ensuring that they all enjoy the highest standards of competence) or freely appoint professionals they trust.

2. The composition of the Arbitral Tribunal

All the Centres share the belief that the parties have the last say on the composition of the arbitral tribunal (tripartite arbitration panel or sole arbitrator) as well as on the relevant appointment process. However, some of the Centres may accommodate for a three-member panel or for a sole arbitrator as a default solution, in case the parties are silent or do not reach an agreement, depending also on the peculiarities of the case at hand (value, type of dispute, complexity and so on). In any event, the members of the arbitral panel cannot result in an even number.

3. Multiparty arbitration

Critical procedural issues arise when there are more than two opposing parties taking part in the arbitrators' selection process. The Centres agree that the leading principle in such a case is the equal treatment of the parties, which must enjoy the same degree of involvement in the mentioned step. Therefore, the parties may either split in two opposing groups, appointing each an arbitrator, or jointly appoint the entire panel (or the sole arbitrator). In case of failure of the said mechanism, the

Centres agree to take it upon themselves to appoint the panel or the sole arbitrator.

4. Neutrality of the arbitrators

The Centres agree that the arbitrator's cultural commonality with one of the parties does not automatically result into partisanship of the same arbitrator. However, the members of the Network may set forth a specific provision on the so called "third nationality rule", establishing that, where the parties have different nationalities, the Centre may appoint as sole arbitrator or chairman of the Arbitral Tribunal a person of a different nationality, unless otherwise agreed by the parties.

5. Availability

The Centres acknowledge the importance of a greater transparency with respect to arbitrators' availability and workload. Therefore, they undertake to require their arbitrators to confirm their ability to devote the necessary amount of time to the arbitration and to conduct the process diligently and efficiently, as well as according to the time limits set in the rules.

COMMON PRACTICES

The Centres have shared a non-exhaustive list of practical examples which are likely to occur in the administration of arbitration procedures. These are some of the most frequent circumstances raising doubts and a variety of procedural problems as to the appointment process. Knowing the position of the Centres towards these situations will be helpful in defining common principles and explanatory cases for arbitration users. The Centres undertake to follow the most recurring relevant decisions on the selection of arbitrators when confronted with such circumstances in the real practice.

1. The composition of the Arbitral Tribunal

a. The arbitration agreement lacks any provision or is ambiguous on the number of arbitrators and the parties do not reach any agreement on the matter.

The case is not that uncommon in the arbitration practice and the Centres' rules allow for different evaluations of it, providing the parties

with distinct alternatives. CRCICA opts for a tripartite panel as a default solution whereas others (CAM; LCA) provide for the appointment of a sole arbitrator. However, the latter group and the remaining Centres (CCAT; CMA) all grant a flexible approach (one or three arbitrators), where arbitration can be referred to a panel of three members given the circumstances of the case (also CRCICA, providing for the reverse case, from a tripartite panel to a sole arbitrator). Where the rules do not offer a default solution, the Centre prompt the parties to clarify, within a short time limit, their position as to the composition of the arbitral tribunal; if the parties fail to give any feedback on the issue, the Centre will decide for them (CACI, ITOTAM).

The above referred flexible approach clearly serves the purpose of offering the parties the most appropriate arbitral tribunal for the case at hand, in terms of combined expertise of the panel and internal exchange of views on controversial issues. The institution has always to strike the balance between possible conflicting position of the parties on the issue and the interests at stake in the case (a high-value dispute is not necessarily a complex one).

Therefore, when facing the parties' disagreement on the number of the members of the Arbitral Tribunal, the Centres endeavour to opt for a customized solution, after careful consideration of the peculiarities of the dispute as well as of the positions of the parties on the composition of the tribunal.

b. The arbitration agreement provides for a two-step process, where the parties appoint two arbitrators who are required to attempt a settlement between the parties and if they fail to do so a third arbitrator will be appointed to constitute a three-member panel.

Such case possibly leads to tie decisions, as it undermines the majority rule, threatening deadlocks in the procedure. Arbitration agreements providing for the aforesaid composition of the arbitral tribunal are usually held invalid under many national laws or amended by way of the appointment of an additional arbitrator. The Centres' Rules always provide for an arbitral tribunal comprising an odd number of arbitrators. As for their actual experience, the occurrence is really

sporadic in the international practice: only one centre - CAM - faced the case. The institution invited the co-arbitrators, whose independence and impartiality had been controlled, to inform the parties and the centre of any settlement within a reasonable time, failing which, the Arbitral Council would appoint the chair (with a meeting scheduled in two/three weeks). When the date of the Council meeting was approaching and no settlement was announced, the Secretariat informed the parties and the co-arbitrators that the Council would appoint the chair, unless the parties agree on the extension of the time limit for a settlement. However, the co-arbitrators did not settle the dispute, hence the chair was appointed by the institution.

c. The arbitration agreement provides for a sole arbitrator, but the dispute is a big case where a three-person tribunal should be appointed (or the reverse: the dispute is a small claim - less than $5.000-$10.000 - and a three-member tribunal is indicated in the clause).

The overriding principle in arbitration is party autonomy, which has a broad meaning and comprises also the right to determine the composition of the Arbitral Tribunal. As a general rule, the agreement of the parties in this respect is a primacy resource so that the institution administering the case has to abide by it: hence, if the parties decide for a panel or for a sole arbitrator in the arbitration agreement, the Centres have to observe such provision. However, it is also true that the same contract may give rise to a wide array of disputes, each with distinct peculiarities (complexity, value, etc.): when drafting the arbitration agreement, at the time of the execution of the contract, parties are usually not aware of the future developments of their dealings and do not know what kind of conflict they will experience (if any). That is the reason why the original provision on the composition of the arbitral tribunal, as embedded in the arbitration clause, may not be in step with the features of the actual dispute, once it arises. Therefore, in such a case, although the principle of party autonomy cannot be overturned, the Centres, in the parties' interest (time and cost-effective procedures), may suggest them to evaluate a change of the above mentioned provision or to use a different ADR method (e.g. mediation).

2. Multi-party cases

a. The arbitration agreement provides for two arbitrators appointed by each party and the chairman appointed by the two party-appointed arbitrators. The arbitration involves more than two litigating parties; such parties do not delegate the appointment of the panel to an appointing authority.

This situation sets a clear limit to party autonomy: the will of the parties, as expressed in the clause, would make the arbitration impractical in case of multiple parties. For those members of the Network which have experienced the case (CAM; CMA), the procedural hurdle has been overcome by way of the joint appointment mechanism (claimants and/or defendants appoint the co-arbitrators). If the parties do not split in two groups, then the institution appoints the panel.

Other Centres (CRCICA) experienced the case of an arbitration agreement in a multi-party contract providing for the appointment of a three-member tribunal by one of the parties only (CRCICA), and had no option but to abide by the parties' agreement after discussing the risk it would entail. In another critical case, where the arbitration clause provided for the joint appointment of the co-arbitrators by the parties, the case was filed by one claimant against two respondents. However, the respondents did not file any brief and remained absent. The Centre (CRCICA) had to decide whether to appoint the arbitrator on behalf of the respondents or to appoint the entire panel, regardless of the selection of the arbitrator made by the claimant. According to CRCICA Practice Notes published in June 2014, in certain multiparty cases, where the parties have agreed to appoint three arbitrators and the multiple respondents fail to appoint the second arbitrator, a question has arisen as to when exactly Article 10(3) of the Rules is triggered and whether an arbitrator could be appointed by the Centre on behalf of the defaulting respondents, in accordance with Article 9(2) of the CRCICA Arbitration Rules. The practice of the CRCICA in this case is to appoint, upon the request of the claimant(s), an arbitrator on behalf of the defaulting respondents pursuant to Article 9(2) of the Rules, as long as the respondents have not made any appointment. Accordingly, in practice, Article 10(3) of the CRCICA Arbitration Rules is triggered

only in the cases where the multiple respondents have appointed more than one arbitrator instead of jointly appointing one, thus causing a failure in the constitution of a tripartite arbitral tribunal as per the parties' agreement.

b. There are arbitration agreements in several connected contracts on the same matter which give rise to several arbitrations with more than two parties. Some of the parties appoint different arbitrators.

This case occurs very seldom in the Centres' practice. Usually the institution deals with each multi-party arbitration as an individual case and apply the relevant provision of its rules.

3. The appointment process

a. The arbitration agreement refers to an appointing authority other than the institution administering the arbitration.

The Rules of the Centres generally allow for the appointment process to be managed by other institutions (except for LAC, which considers the arbitration an ad hoc one and do not administer the case); when this happens the parties have to inform the Centre of the selection of the arbitrator/s made by a third institution

It has to be clear, however, that although admitting such possibility, the Centres ought not step down from the impartiality and independence control of the arbitrators appointed by another authority.

A critical issue arise when the arbitration agreement refers to a non-existent appointing authority or the said authority fails to select the arbitrators. In practice, CRCICA made the appointments in such cases in light of Article 8.1 of its Rules, according to which the appointment shall be made by the Centre if the arbitral tribunal has not been appointed (according to the agreed upon different procedure for appointment) within the time agreed upon by the parties, if any, or within 30 days after receipt by the Centre of a party's request for appointment. In such case the Centre should be in charge of the appointment process, to avoid any standstill in the proceedings.

b. The parties have not specified in the arbitration agreement who will appoint the arbitrators in case of failure of the parties.

Usually the Centres' Rules provide for the default appointment of arbitrators by the institution administering the case, when the interested party/ies do not proceed in that respect.

c. The parties have identified a professional as arbitrator in the arbitration agreement, specifying his name, but the chosen professional is unavailable when the arbitration starts (e.g. he is dead or incompetent).

That is an outstanding issue and a characteristic example of pathological clause, as a poorly drafted arbitration agreement which runs counter to the setting in motion of a proceeding. Although the validity of the defective arbitration agreement has to be finally checked by the arbitral tribunal only (*kompetenz-kompetenz*), the point is how to proceed with the arbitration, as the arbitrator's selection may be made on intuitu personae basis. The Centres' Rules do not explicitly refer to the case at hand but they may take into account the arbitrator's inability to perform his/her duties (art. 19.2 ITOTAM). When the pre-selected arbitrator has died or become unable to perform the task, the Centre may invite the parties to jointly amend the arbitration agreement, so that an alternative path is set for the constitution of the arbitral tribunal. Failing an agreement of the parties, the Centres may be in charge of the appointment.

d. The parties fail to respect the time limits for the appointment of the arbitrators as set forth in the arbitration agreement.

This is not a recurring case in the Centres' practice and may be a matter of negotiation between the parties: the parties may agree on the extension of the said period, before it elapses. In any event, in case one of the parties do not respect the time limit to appoint the arbitrator, as set forth in the arbitration agreement, the counterparty may either raise an objection to any late appointment or agree on the extension of the time limit.

In the former case, given the circumstances of the case, the party will be considered to have waived his/her right to appoint the arbitrator

and the Centre will deal with such appointment: then the parties at the hearing for the constitution of the arbitral tribunal may endorse/ratify the way in which the arbitral tribunal has been constituted.

e. According to the arbitration clause the chairman of the arbitral tribunal is to be appointed by the co-arbitrators but they do not reach an agreement on the third arbitrator. The Centre, being in charge of the appointment of the chairman, requires the co-arbitrators to disclose the selection of professionals discussed by them in order to avoid undue repetition and understand the selection criteria appreciated by the parties.

In the above described case, the Centres are involved in the appointment process as a substitute player for the selection of the third arbitrator. By way of introduction, all the Centres of the Network appoint the arbitrator(s) through their technical body (court, council, committee, etc.): it is important to highlight that such body is composed of many professionals so that the Centres always stand for a collective decision-making process. Accordingly, the Centres would never allow the appointment of arbitrators to result from the decision of one person within the institution.

When appointing the third arbitrator each Centre, as an independent body, will freely choose a qualified professional who possesses the skills and expertise required by the given case. However, although the need is felt to preserve the Centre's full integrity and independence in the selection process - without undue influence exercised by the parties/co-arbitrators – the institution may avail itself of the thoughtful considerations made by the same parties/co-arbitrators when trying to appoint the chairman. In that regard, it is true that the co-arbitrators may liaise with the parties in the selection of the third arbitrator, in order to better know their needs and requirements: therefore, it may be appropriate for the Centres to be informed about the selection criteria as dealt with by the co-arbitrators.

4. Selection criteria

a. The arbitration agreement is silent on the qualification of the arbitrators and the parties do not agree on the profiles of the prospective arbitrators. The selection of the arbitrators is made according to the following criteria: … (*e.g.: nature and circumstances of the dispute, applicable law, seat, language, procedural issues to be managed by the arbitrators, identity and nationality of the parties, their counsels and the co-arbitrators, value of the claims, age of the co-arbitrators, academic and/or professional titles, "personal" features, previous appointments – turn over need- previous experiences as co-arbitrator, chairman, sole arbitrator, counsel, secretary, etc.****).***

Some of the Centres, having an internal list of arbitrators, appoint the arbitrators among the professionals included in the said list; the arbitrators are selected and included in the list for their expertise and experience in the field of arbitration (CMA).

Those Centres which do not have a list may freely choose the arbitrators from the international community of renowned arbitration experts. In so doing, the Centres take into account a lot of selection criteria, in order to appoint the best professional for the given case. They may consider: the subject matter of the dispute (by spotting the experts of that very field), the nature of the dispute, as well as any procedural issues to be covered by the arbitrators, the rules of law applicable to the case at hand, the seat of the arbitration, the linguistic skills required by the case (the language of the arbitration and the contract), nationalities of the parties, the amount in dispute (a small claim would barely attract a well-known and busy professional, while a junior expert could perform the task at his/her best), the age and any academic title of the co-arbitrators, and of the parties' counsels (to prevent any undue unbalance inside the panel or when conducting the procedure), the availability of the arbitrator (in terms of time to be devoted to the case), previous experience as arbitrator, failure of the arbitrators in previous cases managed by the Centre to comply with the Rules, etc..

b. The arbitration agreement provides for a panel composed of professionals with non-legal background, whereas the dispute shows that legal qualifications are fundamental.

There is no question that arbitrators may have the most diverse education and professional background, being lawyers, accountants or members of all industries, with different professional experience and from all parts of the world. There are indeed cases in the international practice where the panel comprises professionals lacking any legal qualifications (provided that they have a significant experience in arbitration), but it is also true that most of the times the appointed arbitrators are jurists (lawyers, law professors, judges, etc.) or have combined expertise. The rationale for preferring legal experience rests on one main assumption: most disputes involve legal matters, therefore legal experience is necessary to bring these matters to a satisfactory conclusion and guarantee justice. Choosing an arbitrator with a background and extensive training in legal principles and procedures can help in the conduct of the procedure and in drafting the award. Nevertheless, some of the members of the network (CMA) holds that the institution has always to abide by the will of the parties as expressed in the agreement, or try to make aware the parties of the possible consequences of such choice (CACI).

Some of the Centres believe that one of the arbitrators of the panel must have legal qualifications in order to be able and qualified to render the award (LAC; ITOTAM) or where none of the arbitrators has legal background they make sure that the parties are fully aware of the situation (CAM, ITOTAM) and that the appointed professionals do have experience in arbitration (CCAT, ITOTAM). Another Centre (CRCICA) experienced the reverse case, where the arbitration agreement was silent on the qualifications of the arbitrators and the parties appointed sitting judges as co-arbitrators, which was forbidden by the law of the seat (similar case where the arbitration agreement required the appointment of sitting judges and the law of the seat prohibited such appointment). In such case, CRCICA threatened to reject the appointment of the co-arbitrators based on Article 8.5 of its Rules, according to which the Centre may, upon the approval of its Advisory Committee, reject the

appointment of any arbitrator due to the lack of any legal requirement. This reaction led to the appointment of new co-arbitrators.

c. In the arbitration agreement the parties select a person of a particular religious belief or seek to impose certain restrictions on individuals who may be appointed as arbitrators (e.g.: very specific qualifications required by the parties which make extremely difficult to find an arbitrator who meets those conditions).

This is an uncommon situation and none of the Centres has ever experienced it (although it has recently occurred in the international practice and hotly debated after the decision on the Jivraj case(1)). One Centre (CAM) has faced cases where the religious belief of one of the parties had to be taken into consideration when selecting the arbitrators while another Centre would take a rigorous approach, by considering the provision null and void as contrary to the national Constitution and international treaties as well (ITOTAM).

(1) Jivraj v Hashwani [2011] UKSC 40 is a English Court of Appeal's decision where it was considered the validity of an arbitration agreement which required the parties to select a person of a particular religion (an Ismaili) to be an arbitrator.

REPORT ON INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

Valentina Renna[1]

ABBREVIATIONS

Centres

CACI - Centre for Arbitration and Conciliation of the Algerian Chamber of Commerce and Industry CAM –Chamber of Arbitration of Milan

CCAT – Arbitration and Mediation Centre of Tunis

CMA – Arbitration Court of Morocco

CRCICA – Cairo Regional Centre for International Commercial Arbitration

ITOTAM– Arbitration Centre of the Istanbul Chamber of Commerce

LAC – Lebanese Arbitration Centre

International conventions and laws as mentioned in the Rules Comparison Chart and in the present Report

IBA Guidelines – IBA Guidelines on conflicts of interest in international arbitration, approved on 22 May 2004 by the Council of the International Bar Association

NY Convention - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958

UNCITRAL ML – United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006

UNCITRAL Rules - United Nations Commission on International Trade Law Arbitration Rules, 1976, as revised in 2010

(1) The present Report has been written by: Valentina Renna, ISPRAMED Advisor, with the supervision of Prof. Charles Jarrosson, Coordinator of the Network of the Mediterranean Arbitration Centres.

ISPRAMED language

ISPRAMED – Institute for the Promotion of Arbitration and Mediation in the Mediterranean

Methodology – Operational pattern agreed upon by the Centres in order to define the common practice in the administration of arbitrations in the Mediterranean area

MOU – Memorandum of Understanding signed by the Centres as members of the Network with the intent to promote arbitration and mediation in the Euro-Mediterranean area and to define shared and common principles

PRINCIPLES

1. Independence

The Centres recognize the importance of the principle of arbitrators' independence as defined by the most renowned authors and scholars worldwide. The Centres agree that such duty concerns each member of the Arbitral Tribunal, whether party-appointed or not and requires the arbitrator to avoid any relationship with the parties and/or their counsels - which may be ambiguous or potentially detrimental to his/her independence - in the personal, social and financial spheres. The arbitrator's obligation to be independent should be met in the course of the entire arbitration proceedings. Finally, the Centres also agree that the lack of independence endangers the fairness and integrity of the arbitral process and may not be a matter of negotiation between the parties - for situations which manifestly jeopardise the overriding principle that no person can be his or her own judge.

2. Impartiality

The Centres acknowledge the importance of freedom of judgment of arbitrators in the arbitral process, to be regarded as a subjective standard concerning the mental state of the arbitrators towards the case, the parties and their counsels. Although some of the Centres do not explicitly require the arbitrators to be impartial, all the members of the Network do not tolerate lack of impartiality and fight to prevent arbitrators' partisanship. The arbitrator's obligation to be impartial

should be met in the course of the entire arbitration proceedings. The Centres would be prone to uphold a challenge to an arbitrator whose impartiality is legitimately doubted.

3. Duty to disclose

The Centres believe that the duty of prospective arbitrators to disclose every circumstances likely to give rise to justifiable doubts as to their independence and impartiality is a quintessential requisite to the arbitral process and to the perception of its fairness. Also, the Centres agree that the arbitrators should update their disclosure in the course of the proceedings, subject to supervening circumstances. The scope of the arbitrators' disclosure is broadly construed by the Centres and any doubt by the arbitrators is to be resolved in favour of disclosure.

4. Challenge of arbitrators

The Centres acknowledge the right of the parties to challenge the arbitrators, even the party-appointed arbitrator, based both on the circumstances disclosed by the arbitrators and on circumstances the parties somehow learn in the course of the proceedings. The arbitrators may be challenged by the parties if they do not meet the obligations to be independent and impartial and/or, in some Centres, they lack the qualifications required by the parties. In order to ensure certainty to the process, the Centres set time limits to the parties to submit their challenge: should such time limits expire, the challenge is deemed to have been waived. The parties and the arbitrators are entitled to comment on the proposed challenge.

5. Incompatibility

The Centres agree that their members (officers, employees, member of the Board/Council/Court, etc.) cannot be directly appointed by the Centres as arbitrators in the proceedings they manage, as this may seriously call into question the arbitrator's impartiality and independence. Furthermore, the Centres agree that these officers, employees, members of the Board/Council/Court cannot derive any financial benefit from the appointment of an arbitrator.

COMMON PRACTICES

The Centres have shared a non-exhaustive list of practical examples which are likely to occur in the administration of arbitration procedures. The Centres undertake to follow the most recurring relevant decisions on either confirmation or refusal of arbitrators when confronted with such circumstances in the real practice.

1. Arbitrator's relationship with the Institution

Being an official member of the arbitral institution or having professional relationships with official members of the Centre (such as professional partners or employees of the Centre's official members).

The Centres' rules allow for different evaluations of the above reported case. Some of them find that the situation gives rise to a case of incompatibility (CMA; CAM, where the incompatibility is also extended to professional partners/employees of the arbitral council's members or CAM's employees, unless the parties agree otherwise) while others openly admit such possibility (CACI, although predicting a change when the rules will be revised). According to CRCICA's practice, its Director, officers and employees are prohibited from acting as arbitrators or counsel in arbitrations conducted under its auspices. Pursuant to Article 7 of the By-Laws of CRCICA's Advisory Committee (AC), the Centre may not appoint the AC members as arbitrators except by way of the list procedure. According to ITOTAM practice, persons who have been appointed to any ICOC bodies by election, cannot serve as arbitrators in disputes that concern them or any establishments, institutions or enterprises at which they are employed or with which they have any type of relationship. Employees of ICOC cannot serve as arbitrators, except for hired consultants (art. 9 of the Internal Regulation of ITOTAM (Appendix 1).

As a matter of principle, in such circumstances an objective conflict of interest may exist from a third person's standpoint, although the values of independence and impartiality are not affected by themselves. Incompatibility serves the purpose of preserving the institution's integrity and autonomy towards the administration of the case. The Centres, regardless of their provisions on incompatibility, endeavour

to protect their integrity and to keep their activity separate from that of the arbitrators.

2. Arbitrator's relationship with the parties

a. Present or past parental relationship between an arbitrator and a party

The party appointed arbitrator is the son of the legal representative of the company which appointed him.

The scenario as exemplified in the above case is likely to affect the arbitrator's freedom of judgment, thus causing justifiable doubts as to the arbitrator's impartiality and independence. As regards the 2004 IBA Guidelines, the arbitrator's close family relationship with one of the parties comes under the "waivable red list", which encompasses situations that pose a serious threat to the independence and impartiality of arbitrators, being possibly waived only with the express agreement of all the parties.

Although not all the members of the Network have experienced such a case (only CMA, CAM and ITOTAM contributed with their positions), it can be argued that the Centres would be prone to refuse or not to confirm the said arbitrator, in view of preserving the fundamental value of independence and impartiality.

b. Present professional relationship of an arbitrator with one of the parties

CASE 1: the party-appointed arbitrator declares that he is currently serving as counsel or as witness expert to the same or the other party in another arbitration or judicial proceedings.

The situation hereby described allows for an economic relationship between the arbitrator and one of the parties: this might greatly affect the freedom of judgment of the arbitrator. Some of the Centres have clearly stated that in such circumstances they have refused or non-confirmed the arbitrator, as this would give rise to justifiable doubts as to the arbitrator's impartiality or independence, with regard to the understanding of a reasonable third person (CAM; CMA; ITOTAM). The Centres acknowledge that an objective conflict of interest exists

from the standpoint of a reasonable third person having knowledge of the relevant facts; therefore the professional appointed might not serve as arbitrator in the above described case.

CASE 2: the party appointed arbitrator (or the arbitrator appointed by the institution) declares that he is serving as arbitrator in another arbitration appointed by the same party.

Repeated arbitrator appointments may appear frequent in international arbitration practice and the need is felt to strike the balance between possible bias and the freedom of the parties to appoint the specialist they trust. Some of the Centres would deem such situation truly problematic and consequently would refuse the arbitrator appointed by the same party in two different pending procedures (CMA). Other institutions are willing to invest in closer examinations of the arbitrators' relationships with the parties: it has been pointed out (CAM) that the non confirmation of the arbitrator in such a case may depend on the fact that the subject matter of the disputes is the same, as this can cause a prejudice and a misbalance in the panel (since a party-appointed arbitrator has a wider knowledge of the case). Also, serial appointments may represent a problem when they are made in different times, so as to create a continuative economic relationship between the arbitrator and the appointing party (CAM). The Centres agree that an existing professional relationship between the arbitrator and one of the parties may give rise to justifiable doubts as to the independence and impartiality of arbitrators, although the relevance of such circumstance should be reasonably considered in each individual case.

c. Past professional relationship of an arbitrator with one of the parties

The party-appointed arbitrator declares that he has served as counsel, as witness expert or as arbitrator for the same or the other party in another arbitration or judicial proceedings 3 years ago.

In assessing whether a past professional relationship between an arbitrator and one of the parties is critical to the arbitrators' independence and impartiality, some of the Centres are inclined to refuse the arbitrator (CMA; CRCICA, experiencing the case of an arbitrator appointed by

the same party for three consecutive proceedings) while others have a flexible approach, focusing on the time-span occurring between the services rendered for the party by the arbitrator, making reference to the time limits set by the IBA guidelines (CAM). ITOTAM faced a similar case, where an arbitrator was challenged due to the fact that he had served as a lawyer in a judicial proceeding six years prior to the arbitration for the party who had appointed him. The challenging party raised his challenge shortly after the arbitral tribunal rendered the award, although the award had not been notified to the parties yet. Therefore, the arbitral tribunal did not decide on the challenge issue. Accordingly, the party set aside the award.

In some cases the institution has experienced the reverse situation, where the appointed arbitrator has declined to serve in the arbitration because of past professional relationships with the appointing party, like a judge appointed by a party who declined the appointment because of past involvement of that party in judicial proceedings under his jurisdiction (CCAT). The Centres agree that a past professional relationship between the arbitrator and one of the parties may give rise to justifiable doubts as to the independence and impartiality of arbitrators, although the relevance of such circumstance should be reasonably considered in each individual case.

d. Common nationality of the arbitrator and one of the parties

The chairman holds the nationality of one of the parties who are of different nationalities.

Such case calls into question the concept of neutrality of arbitrators, which is defined as the absence of cultural commonality with one of the parties: this shared feature does not automatically result into partisanship of the arbitrator. The members of the Network do not consider such case problematic as no apparent and/or actual conflict of interest exists from the relevant objective point of view. Also the Centres' Rules may encompass a specific provision on the so called "third nationality rule": where the parties have different nationalities, the Centre may appoint as sole arbitrator or chairman of the Arbitral Tribunal a person of a different nationality, unless otherwise agreed by the parties (CAM).

3. Arbitrator's relationship with the parties' counsels

a. Present or past parental relationship between arbitrator and counsels or arbitrator's relatives and counsels (and vice-versa)

The arbitrator declares that his son is working within the same law firm of the counsel assisting the party who appointed him.

Some of the Centres state that such situation gives rise to justifiable doubts as to the arbitrator's impartiality or independence and therefore would not confirm the arbitrator based on that disclosure (CMA; CAM; ITOTAM). Given the overriding importance of arbitrators' independence and impartiality and also of the appearance of independence and impartiality, it can be inferred that all the members of the Network would share the same position and would be inclined to refuse the arbitrator, in the interest of the arbitration's fairness.

b. Present or past professional relationship of arbitrator with one of the parties' counsel

CASE 1: the arbitrator and the counsel serve together as co-counsel in other proceedings.

This may be a very recurring case in the international arbitration practice. While a few institutions believe that a professional enjoying such a connection with a party's counsel in principle may not serve as arbitrator in the arbitration (CMA; CACI), others consider that the appointed arbitrator should be granted the opportunity to act as such in the proceedings, provided that no direct economic relationship exists between the arbitrator and counsel (CAM, which would treat in a different way – i.e. with a non confirmation - the case of an existing professional collaboration, like in the event of a counsel domiciled at the arbitrator's firm for a judicial proceedings. Along the same lines, ITOTAM approach would be not to confirm the arbitrator).

The Centres agree that a professional relationship between the arbitrator and one of the parties' counsels may put at serious risk the independence and impartiality of arbitrators, leading to bias: therefore they undertake to closely peruse such circumstances in view of safeguarding those values.

CASE 2: the arbitrator and one of the parties' counsel are associates in the same law firm.

An existing and also stable professional partnership between the arbitrator and one of the parties' counsel is likely to affect the freedom of judgment of the arbitrator, thus most of the Centres, when experiencing such case, are disposed to refuse/not to confirm the said arbitrator (CAM; CMA; CACI; ITOTAM; LAC, which experienced the case of previous professional collaboration in the same firm between the co-arbitrator appointed by one of the party and the counsel of that party). In other circumstances, the members of the Network have faced the case of an arbitrator being appointed by the same counsel (or firm) for three consecutive appointments (CRCICA, which confirmed the arbitrator); or the case of a previous bad professional relationship between the arbitrator appointed by the court and the counsel of a party (LAC, which confirmed the arbitrator, although later on the arbitrator resigned). The Centres agree that the case of a professional partnership can give rise to justifiable doubts as to the arbitrator's impartiality or independence and should lead to refuse the arbitrator.

c. Sharing the same premises not being associates

The Centres enjoy different attitudes towards the case of an arbitrator sharing the same professional premises with a parties' counsel, without any partnership. Some of the members of the Network have a rigorous approach (CACI; CAM; CCAT has experienced the reverse case, where an arbitrator refused to serve as arbitrator because he shared the premises with the counsel of the appointing party), whilst others believe that such a case would not give rise to justifiable doubts as to the arbitrator's impartiality or independence (CMA; ITOTAM). The Centres agree that such relationship may unduly "put in contact" the arbitrator and one of the party, therefore they commit to a thorough analysis of the individual case, in order to protect the fundamental principles of arbitrators' independence and impartiality.

d. Academic relationships

Having experienced such a case, the Centres believe that an academic relationship between the arbitrator and a party's counsel does not pose a

threat to the arbitrators' independence and impartiality from a reasonable third person's point of view (CMA; CAM; ITOTAM; CACI). Although sharing the belief that the said circumstance per se cannot be considered as a ground for challenging/non confirming the arbitrator, nonetheless they agree on the importance of analysing the nature of the existing relationship.

4. Arbitrator's relationship with another arbitrator

a. Present or past relationship of an arbitrator and another arbitrator

CASE 1: the arbitrator and another arbitrator are associates in the same law firm.

Although such an instance would be quite rare in the arbitration practice, the Centres believe that this relationship would endanger the arbitrators' independence and impartiality. Therefore they may wish to explore further on it and this may possibly lead to the arbitrators' disqualification (CMA; CACI).

ITOTAM`s approach would be no to confirm the arbitrators. Before the new arbitration rules of ITOTAM entered into force, ICOC faced a few cases where the arbitrators were associates. Surprisingly in these cases, the arbitrators were not challenged. Since there was not an arbitration court, the confirmation mechanism was not applied; this was a result of peculiar appointment mechanism set forth by the old rules. Where there was no agreement of the parties on the appointment procedure, the arbitrator included in the first arbitrator's list and whose turn had come was acting as a president and appointed the other two arbitrators. Almost in all the above-mentioned cases, the president has appointed an arbitrator from his law firm. ITOTAM believes that this jeopardizes the impartiality of the arbitrators.

CASE 2: the arbitrator has served as co-counsel with another arbitrator in other proceedings.

When experiencing that kind of relationship between two of the members of the Arbitral Tribunal, the Centres may have different approaches. Some of them are inclined to refuse the arbitrator (CACI)

whereas others would treat the case in a less rigorous way, confirming the arbitrator (CMA; CAM; CRCICA, which experienced the case of the co-arbitrator and the chairman being former judges who used to sit in the same court chamber). The Centres agree that such case should not automatically result in a disqualification of the arbitrator; they are at liberty to analyse the above described situation, taking into account the best interest of the parties.

5. Arbitrator's relationship with the subject matter of the dispute

a. Personal or economic interest either direct or indirect in the subject matter of the dispute

The arbitrator holds relevant shares of one party.

The Centres believe that justifiable doubts necessarily exist as to the arbitrator's independence and impartiality if he has a significant financial connection with one of the party. Such a case is listed in the waivable red list of the IBA Guidelines, as giving rise to an objective conflict of interest, from the standpoint of a reasonable third person having knowledge of the relevant facts. The situation is serious and undermines the arbitrator's duties to act in an impartial and independent way. Consequently the Centres would refuse/not confirm the arbitrator (CAM; CMA; CACI; ITOTAM).

b. Arbitrator appointed in connected arbitrations

The arbitrator has already decided on the same subject matter between the same parties.

The Centres have experienced the above case and believe that it may give rise to serious doubts as to the arbitrator's impartiality and independence. Therefore, they may take into account the other party's position on the issue and refuse the arbitrator who enjoys a knowledge of the subject matter between the parties for having already served as arbitrator on the disputed issues between the same parties (CMA; CACI; ITOTAM; CAM, which experienced different cases falling under the above category: (i) the arbitrator was required to decide between the same parties a claim which was rejected in the previous arbitration as time barred; (ii) an arbitrator was appointed by the same party in

two different arbitrations which originated from the same contractual relationship while the other party (to both proceedings) had not appointed the same arbitrator; CRCICA also faced different situations: (i) the Arbitral Tribunal rendered a unanimous final award on its jurisdiction declaring the inadmissibility of the case because the claimant lacked standing to sue. The company having standing according to the award filed a new arbitration appointing the same arbitrator rendering the award on jurisdiction; (ii) an arbitrator reappointed by the same party to decide on the same dispute between the same parties after setting aside of the first award and the filing of a new arbitration case).

c. Arbitrator professor of law

The arbitrator is a professor of law and he has written an article/essay on the disputed issue. If the parties believe that he is biased and bring a challenge on such basis only, the Centres agree that the challenge has to be rejected by the institution: also according to international case law, such thing bears no importance and does not put at risk the independence and impartiality of an arbitrator.

Future developments

The Centres wish for and are committed to a steady application of the above listed 5 principles as well as of the above practices. Also, as far as the future course of the Centres' activity is concerned, they engage with levelling, as much as possible, the playing field with regard to the different sets of rules, so that highstandard uniform principles are established and adhered to by the Centres on the most important arbitration issues. ISPRAMED will endeavour to become a reference point for advice for the Centres, both in their daily practice and in crucial circumstances (e.g. the revision of the Rules, the implementation of the agreed common principles, etc.).

EQUAL TREATMENT OF THE PARTIES: WHAT DIFFERENCES IT ALLOWS?

Equal Treatment of the Parties in International Commercial Arbitration

What Differences Does It Allow?

Comparative Study: Egypt, France and Switzerland

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Abstract

This paper discusses the implementation of equal treatment principle and demonstrates its imperative character in international commercial arbitration, as a fundamental procedural principle that should be guaranteed during the proceedings. To this effect, it address two considerable questions (1) to what extent equal treatment principle constitutes a limitation on the party autonomy principle and the tribunal's power, and (2) What are the differences it allows?

In this paper, we would like to present a comparative study of this topic in Egypt, France and Switzerland. The goal of this comparative analysis is to offer a synopsis of the different legal frameworks; while providing an overview of its justification under those jurisdictions; we will focus first on New York Convention, and we will inevitably examine how the principle is being addressed under the corresponding rules of arbitral institutions. Finally, this paper presents rigorous analysis to its interpretation by both Arbitral tribunals and national courts.

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I. Introduction

The concept of equal treatment is present in most international human rights documents, *"All are equal before the law and are entitled without any discrimination to equal protection of the law"*.(2) "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*.(3) There are also many examples of equal protection and non-discrimination clauses contained in national constitutions and national legislations: "*The state ensures equal opportunity for all citizens without discrimination"*.(4)

It is broadly accepted that such provisions are of great importance, not only because they symbolize the social and legal importance of the principle of equal treatment, but also because they offer legal standards against which concrete cases about unequal treatment can be assessed.(5)

The question thus arises how an arbitral tribunal should apply the equal treatment principle to parties in international arbitration. The equal treatment principle should be interpreted in the light of the distinctly international character of arbitral proceedings. In the context of international arbitration, the core guarantees of equal treatment principle comprise that the arbitrator's duty to apply similar procedural rules or apply similar treatment in similar situations, and to ensure that each party has an opportunity to present its case and to answer to that of its opponent. For instance, the arbitral tribunal may not hear a party's submission in the other party's absence, unless the other party has been given an opportunity to attend such hearing. An arbitrator is also restricted from discussing anything concerning the dispute with a party or its legal counsel outside the arbitral proceedings.

The equal treatment principle must be observed at all stages in the proceedings from the constitution of the arbitral tribunal to the formal closing of the proceedings, to the exclusion of the tribunal's deliberations, so it includes the number of submissions, the time for filing them, the

(2) See Article 7 of The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948

(3) See Article 6 of the European Convention on Human Rights, 3 September, 1953.

(4) See Article 9 of the Egypt's constitution, 18 January, 2014.

(5) Janneke H. Gerards, 'Intensity of Judicial review in equal treatment cases, (International studies in human rights)',Netherlands International Law Review, June 2004, Vol 51 (2) P.135-183, 19 February 2015.

right to request the examination of witnesses and experts as well as the modalities of such examinations, the allocation of time at hearings and the access to the record.

It is worth mentioning that equal treatment principle does not preclude differences provided they are justified by the circumstances; a concrete example that often arises when it comes to apportioning the time for a hearing. When one party has seven witnesses and the other two, should the tribunal apportion equal time at the hearing to the parties or allow more time to the party that has more witnesses to cross-examine?

The principle of equal treatment has been branded as the "*Magna Carta*" of arbitral procedure and as the most relevant provision of the UNCITRAL Model Law.(6) The equal treatment principle is a mandatory procedural provision as the breach of this provision, in most national legislations and arbitration rules, serves as a basis for setting an award aside. In addition, the breach of this principle is one of the grounds for non-enforcement of an award listed in the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention").

II. Preliminary Remarks

The following paragraphs examine these questions as follows: which starts by identifying the rules that govern the conduct of arbitral proceedings. How do these rules interact? Is there a hierarchy among them? (A. below), as a result, we discuss party autonomy (B. below); turning then to the tribunal's powers (C. below), and concluding with the immediate objection limitation on equal treatment principle (D. below).

A. The rules governing the arbitral proceedings

The proceedings before the arbitral tribunal are governed by several different bodies of rules: the lex arbitri, the arbitration rules when the parties have referred to rules, specific rules agreed by the parties, and rules adopted by the arbitrators. Arbitral proceedings are governed, in

(6) Stavros Brekoulakis and Laurence Shore, 'UNCITRAL Model Law on International Commercial Arbitration', Concise International Arbitration (Kluwer Law International, 2010) p.623-624.

the first place, by the law of the arbitration (lex arbitri); the law of the arbitration is a framework law in the true meaning of the term, a law that provides the outer frame to the proceedings, nothing more and nothing less. Within that framework, it is for the parties and, failing them, the arbitrators to adopt the rules that will govern the proceedings before the tribunal.

The lex arbitri grants the parties broad autonomy in this respect. Nevertheless, legislation and/or judicial decisions in most developed jurisdictions require that arbitral proceedings seated in the territory of the country satisfy minimal standards of procedural fairness and equality. These standards are variously referred to as requiring *"equality of treatment," "due process," "natural justice," "procedural regularity," or "fair and equitable treatment.*(7)

In most cases, the parties exercise their procedural autonomy by selecting a set of institutional arbitration rules. Most institutional rules, however, fill only part of the picture and leave the rest open for determination. The tribunal must then complete the picture, taking into account the specificities of the dispute, the expectations and procedural background of the participants in the proceedings – parties, counsel and arbitrators – and any relevant practical requirements. In doing so, arbitral tribunals strive to reconcile two sometimes conflicting objectives: efficiency and respect for due process.(8)

B. Party autonomy

The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice. What then are the limits to party autonomy, if any? Can the parties agree on any matters they please, or are there restrictions?

The primacy of the parties' agreement is limited by the requirements of proper administration of justice and by the necessity to comply with fundamental principles of due process. These principles include in particular the parties' right to a fair trial and their right to equal treatment.

(7) G. Born, 'International Commercial Arbitration', 2nd edn (Kluwer Law International, 2014), p.224- 225

(8) Gabrielle Kaufmann-Kohler and Antonio Rigozzi 'International Arbitration – Law and practice in Switzerland', (Oxford University Press, 2015).

For instance, Article 18 of the Model Law requires that the parties be treated with equality and that each party be given a fair opportunity of presenting his case.

While party autonomy should be proclaimed as an essential principle of international arbitration, it should not be invoked dogmatically or applied too broadly. The requirement that parties must be treated equally thus operates as a limitation on party autonomy. For instance, a provision in a submission agreement that the arbitral tribunal might hear only one party could be treated as invalid, even if both parties had agreed to it. The UNCITRAL Secretariat recognized the dilemma in its report leading to the Model Law:

> "It will be one of the more delicate and complex problems of the preparation of a Model Law to strike a balance between the interests of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto".(9)

C. Tribunal's power

The arbitral tribunal is conferred jurisdiction to decide a particular dispute by the agreement between the parties. Absent the parties' agreement, an arbitral tribunal does not have "inherent jurisdiction". It is a creature of contract. The scope of the tribunal's jurisdiction will be determined by the scope of the arbitration agreement, subject to any mandatory legislative requirements at the place of arbitration.

If the parties have not determined the procedure, the tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules. The tribunal can only exercise its powers if the parties have not regulated the procedure. Irrespective of the procedure chosen by the parties or the arbitrators, the arbitral tribunal shall ensure fundamental procedural rights such as ensuring equal treatment of the parties during the proceedings.

For example, we can shed some light on the extent of the equal treatment principle can be seen in the case *ALUR v. Capital NN (Russian*

(9) See 'Redfern and Hunter on International Arbitration', 5th edn, (Kluwer Law International, 2009), p. 366

S. Arbitraz Ct.), where the refusal by an arbitrator to suspend the arbitral proceeding, awaiting the translation of the contract, was considered to violate the equal treatment principle.(10) In this case the refusal to give additional time to one party for the translation of the contract was considered a violation of the equal treatment, as it was considered as advantage to the other party.

Yet, as William Park observed, the penalty for a breach of an arbitrator's duty of fairness carries a certain irony. The sanctions do not fall directly on the arbitrator who breached his or her duty. Instead, the price of the arbitrators' misconduct falls on the prevailing party, which must suffer annulment of an award for breach of fundamental procedural integrity.(11)

D. Immediate objection

The general rule of civil procedure is that matters relating to the conduct of the proceedings must be disposed of as they arise without awaiting the continuation of the proceedings. It follows that a party who considers that its procedural rights are violated must raise an objection immediately. A failure to do so entails the forfeiture of the right to complain of that violation at a later stage.

The Egyptian Court of Cassation held that the appellant attended before the arbitral tribunal in a hearing on 4 of May 2009, submitting his defense, commenting on his opponent documents in implementation of the decision of the court, but he remained silent in either that breach of the right to equal treatment between him and his opponent in the duration of the oral proceedings, despite being able to do so, is deemed to be as an implied acceptance of the validity of the procedure, the grievance was, therefore, unfounded.(12)

Also, the Swiss Federal Tribunal has consistently held that a party considering that its right to be heard has been breached must protest

(10) See , G. Born, Ibid, p. 3519

(11) W. Park, 'The Four Musketeers of Arbitral Duty: Neither One-for-all nor All-for-one', in Derains, Y and Lévy (Dossiers, ICC Institute of World Business Law, 2011), p. 25.

(12) Judgement by Egyptian Court of Cassation, the commercial department – Appeal no. 15091, Judicial year 72 rendered in 27 December, 2011, Journal of Arab Arbitration issued on December 2012

immediately, failing which it is deemed to have waived the right to complain at a later stage.(13)

The French Court of appeal held that, if a party has not protested to the arbitral tribunal that a procedural rule of public policy has been infringed immediately upon having knowledge thereof, it is deemed, unless the infringement only becomes apparent in the award itself, to have waived any right to rely thereon, and an application for annulment based on it must be rejected.(14)

III. Legal Framework

While the equal treatment principle is presented in practically all arbitration acts, rules of arbitration and international conventions, there is surprisingly no "uniform" formulation of the principle. This is partially due to the various interpretations of this principle, owing to different legal traditions and practices; associated with diverse standards in common law (adversarial system) and in civil law (inquisitorial system)(15).

Depending on the applicable arbitral rules or law, the principle of equal treatment may be articulated differently. In this regard, some will provide for a "reasonable opportunity" for a party to be heard while others provide for a "full opportunity". Therefore, it is necessary to examine how the equal treatment principle is being addressed in multiple sources of international commercial arbitration; New York Convention, national laws and rules of arbitral institutions.

A. The New York Convention

The New York Convention (NYC) has been referred to as one of the most relevant instruments of the modern ea of arbitration and one of the most influential forces in the development of trade in the last fifty years.

(13) See (2002) ASA Bull. 548, 550; (2000) ASA Bull.96, 102

(14) See decision of the Paris Court of Appeal, rendered in 12 January, 1995, Revue de l' arbitrage. 1996.72.

(15) U. Martin Laeuchli , 'Civil law and common law: Contrast and synthesis in International arbitration', 2nd edn, (American Arbitration Association Handbook on International Arbitration Practice, 2010), p. 40-46

Although the NYC does not expressly mandate equal treatment of the parties, among the seven grounds based on which the recognition and enforcement of arbitral awards may be refused, two of them relate to most possible situations of procedural unfairness or denial of opportunity to present a party's case, as shown below:

1. ***Article (V)(1)(b): '... not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'.***

Despite its popularity as a defense to enforcement, a recent survey of reported court decisions in which a party invoked Article V(1)(b) established that courts accepted the exception only in fourteen cases (approximately 10%). This outcome suggests that courts tend to interpret narrowly the due process exception, promoting effective recognition and enforcement of foreign arbitral awards in accordance with the spirit of the Convention. The survey indicated that only where parties effectively had been denied an opportunity to be heard would a challenge on the basis of Article V(1)(b) prove successful.(16)

2. ***Article (V)(1)(d): 'The composition of the arbitration authority or the arbitral procedure was not in accordance with the agreement of the parties...'***

In practice, Article V(1)(d) has rarely been raised successfully in enforcement courts because parties are generally in agreement over the composition of the arbitral tribunal and because the tribunal usually enjoys wide discretion regarding the arbitration procedure. Furthermore, courts have held that the party claiming a violation, such as a failure to give proper notice of arbitration, bears the burden of proof that the alleged violation was committed.(17)

It is also worth mentioning to refer to Article V(2) (b) which provides that Recognition and enforcement of an arbitral award may also be refused if *"the recognition or enforcement of the award would be contrary to the public policy of that country*".

(16) See 'Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention', Port, Otto, (Kluwer International Law, 2010). p. 233

(17) See Ibid, p. 282

Public policy is important due to the fact that equal treatment and procedural fairness are part of public policy in most countries and since judges are obliged *ex officio*, without any of the parties having invoked it, to examine the arbitrator's duties to treat the parties equally and respect their right to be heard, and in the case of infringement, to refuse the enforceability of the award.

Thus, arbitral tribunals shall always take the necessary measures to maintain equality of the parties, by refusing and/or granting the same to both parties in comparable situations.

B. National Legislations

Most national legal systems impose a mandatory duty on the arbitral tribunal to treat the parties equally. For example, Article 26 of the Egyptian Arbitration law, states that:

> "*The two parties to arbitration shall be treated with equality, and each shall be given an equal and full opportunity of presenting its case".*

In addition, the breach of these guarantees opens the way to the annulment of the award under Article 53 which provides that an arbitral award may be annulled:

> "*If either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control"*

Similarly, Article 182 (3) of the Swiss Law on Private International Law (PILA) states that:

> "*Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings".*

And the failure to do so may provide grounds for setting aside the final award pursuant to Article 19(2) (d) of the (PILA) which provides that:

> "an *award may be annulled if the principle of equal treatment of the parties or the right of the parties to be heard was violated."*

Under Article 182 (3) of the PILA, whether the arbitral procedure is agreed by the parties or determined by the arbitral tribunal it must in all cases comply with the two fundamental principles of procedural fairness. This article is mandatory in nature and forms a central part of procedural public policy in Switzerland and it also constitutes one of the minimum procedural standards applicable to arbitral tribunals.(18)

In France, these principles of fairness and equality do not appear as such among the rules the application of which is reviewed by the court of appeals in actions to set aside or enforcement of international arbitral awards. The only ground based on which such actions are admissible under Article 1502 of the New Code of Civil Procedure *"is the breach of due process"*, which concerns primarily the conduct of the proceedings and the violation of public policy.

A party's right to put its case and answer the case of its opponent is a rule of French domestic and international public policy. The phrase '*droits de la défense'* (i.e. the party's right to present its case and answer that of its opponent) which is the usual terminology in France, means the right of every party involved in legal proceedings, whether public (i.e. conducted before a national court applying public or private law) or private (i.e. before an arbitral tribunal or other private bodies entrusted with resolving disputes), to present its case in a properly complete fashion by having adequate time to deal with the relevant facts and law which relate to it, and further to be informed of the case against it with sufficient notice to be able to answer it on a similar basis.(19)

To summarize, the right to equal treatment is one of the cornerstone of international arbitration, every legal system requires a minimum level of equal treatment and procedural fairness, in one form or another.

(18) G. Kaufmann-Kohlwer / B. Stucki, 'International Arbitration in Switzerland, A handbook for Practitioners', (Kluwer Law International, 2004), p. 57

(19) See Jean Rouche Gerald H. Pointon Jean-Louis Delvolvé, 'French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration', 2nd edn, (Kluwer Law International), 2009, p.122

C. International Arbitration Rules

All of the major institutional and ad hoc rules applicable to international arbitration provide for the equal treatment of the parties. For instance, Article 17 of The UNICITRAL Rules states that:

> "*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case".*

The Cairo Regional Center for International Commercial Arbitration (CRCICA) Rules provides in Article 17 (1) that:

> *"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an equal and full opportunity of presenting its case.*"

The International Chamber of Commerce (ICC) Rules of Arbitration establish in Article 22(4) that:

> *"…the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."*

Even though the rules do not expressly mention "equality", but the phrase "fairly and impartially and a reasonable opportunity" must encompass the requirement of equal treatment.

What is reasonable and fair in a given case is a matter for the Arbitral Tribunal to determine. An arbitral tribunal that manifestly breaches Article 22 (4) could be challenged or replaced on the Court's own initiative. However, challenges and requests for the replacement of an arbitrator that are based purely on the arbitrator's procedural misconduct very rarely succeed, because it is highly unusual for an ICC arbitral Tribunal not to comply with Article 22(4).[20]

(20) See the Secretariat's Guide to ICC Arbitration, (International Chamber of Commerce, ICC, 2012) p. 238

The Swiss Chambers' Arbitration Institution states also in its rules, Swiss Rules of International Arbitration (SRIA) in Article 15 (1) that:

> "*subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard".*

The arbitral tribunal has to ensure the equal treatment of the parties. What is required is a relative equal treatment, in the sense that only comparable situations have to be treated equally, while different situations should be treated differently, taking all relevant circumstances into consideration.

The principle of equal treatment of the parties is closely linked with the right to be heard: The arbitral tribunal must conduct the proceedings in such a manner that both parties are given the same opportunities to express themselves and present their case.

IV. Case Law

Since the principle of equal treatment is formulated in such a general and vague manner, it is inevitably important to see through a few selected examples how it is applied in concrete situations by arbitral tribunals and how national courts interpret it.

A. Arbitral Practice

A CRCICA Tribunal held that the equal treatment principle is to enable each party to present his case, his defense, evidence and to discuss them in an adequate and equal manner that shows respect to the principle of confrontation. The arbitrator has enabled both parties to present their claims and refute the corresponding allegations and which shows how that the tribunal granted the parties sufficent time to have access to claims and supporting documents of the other party and granted each party the opportunity to present his defense.

The tribunal granted the Claimant an opportunity to make a statement of his claim for a period of fifteen days and has awarded the Respondent the same period to respond. Also it enabled each party to the arbitration

to comment on submissions made by the other party. In addition, the tribunal set the hearing in which it enabled both parties to comment on submissions made by the other party. The tribunal thus concluded that both parties have been treated equally.(21)

With respect to equal treatment before an expert, an ICC tribunal held that this orinciple was breached in a case related to a contract between a Croatian shipyard (claimant) and a German company (respondent), for the construction of four deck cranes to be installed on a ship to be built by the claimant for a Liberian shipping company. The ship owner notified the shipyard of defects in the cranes. The claimant passed these claims on to the respondent. The two parties agreed to appoint an expert to check the cranes, their design and installation on the ship. The claimant refused to accept the findings of the expert commissioned by the respondent. Arbitration was commenced and an initial award was rendered on the validity and effect of the expert's report. Claimant was of the opinion that they were not equally treated by the expert. In its post hearing written submissions, claimant argued that they were totally kept in the dark and could not therefore exercise their supervision and their right to be heard with respect to the expert opinion.

It is undisputed that the expert visited respondent four times after he had returned from his visit to the ship in Nantong. According to the expert, this happened with the purpose to obtain additional information about new damage to the cranes and to discuss the further proceedings. It is not established that claimant knew of these visits. Consequently, they could not oppose to them. In order to observe the equal treatment of the Parties, the expert should at least have offered to have a meeting with claimant too, yet such offer was never made. At the witness hearing, the expert testified that he had also wanted to visit claimant but that respondent's sales manager had told him "at the moment no". Therefore, the equal treatment of the parties was violated by the expert's *ex parte* communications with respondent.

A second violation of the principle of equal treatment and the right to be heard lies in the fact that the expert did not ask claimant to supply

(21) See CRCICA Arbitration case no. 966 for the year 2014, Journal of Arab Arbitration, Volume 23, December 2014, p. 375.

him with documents, whereas he had received and accepted documents from respondent. A witness called by claimant stated in the witness hearing that claimant had a lot of correspondence they had thought could have been interesting for the expert in order to make a proper investigation, yet the expert had never asked for those documents. As a result, the arbitral tribunal held that the findings in the survey report made by the expert were not binding upon the parties.(22)

B. Courts' Practice

The issue of how to ensure equal treatment of parties in the process of arbitrators' appointment in multi-party arbitrations has been discussed for decades. In particular since 1992, when the famous decision of the French *Cour de Cassation* in the '*Dutco'* case was rendered; paving the way to an imminent change to both the interpretation and content of the ICC arbitration rules in 1998.

Under a consortium agreement, Dutco, BKMI and Siemens embarked on a project for the construction of a cement plant in Oman. This agreement included an arbitration clause providing for arbitration under the ICC rules to be settled in Paris.

As a result of conflicts between the parties, *Dutco* initiated the arbitration against BKMI and Siemens for the breach of the consortium agreement, with different claims against each of them. Successively, Dutco nominated one arbitrator consistent with the ICC rules at the time. However, the two respondent companies did not agree to designate one arbitrator between them, as they did not have the same views and causes to defend.

For these reasons, BKMI and Siemens contested the admissibility of the arbitration and requested separated arbitration procedures in order to have (each of them) the right to designate their own arbitrator. However, the Court of the ICC was not of the same opinion and following the normal practice, compelled them to designate an arbitrator jointly, failing which the court would appoint one arbitrator on their behalf.

(22) See ICC Award on Preliminary Issues in Case no. 12171 (Extract) ICC International Court of Arbitration Bulletin, Vol. 22 No. 1, Publication date, 2011, Award rendered on November, 2003

With no other option BKMI and Siemens were forced to designate one arbitrator as respondents.(23)

Following the designation of the President of the arbitral tribunal by the Court, it was then declared duly and legally constituted and able to continue its procedures, notwithstanding the defendants' claim for dismissal before the arbitral tribunal, based on a violation of the parties' agreement. The rational of the arbitral tribunal was based on: (i) the nature of the consortium agreement as a single undertaking, which was understood as meaning that any dispute arising from it would be resolved in a single arbitration; (ii) the failure of the parties to agree on any special provision for the designation of the three arbitrators; and (iii) the constitution of the arbitral tribunal was carried out under equal terms.

BKMI and Siemens then appealed to the Court of appeal in Paris demanding to set aside the arbitral award on the basis that it was constituted in a clear breach of equal rights of the rights of the parties to appoint the arbitrators, and that its recognition and enforcement were against international public policy.

However, the Court of second instance in Paris refused the claims of the respondents, based the following arguments: (i) the arbitration agreement of the parties in question was duly observed as the arbitral tribunal was constituted by three members as agreed by the parties ; and (ii) there was no violation of public policy or of the rights of the parties as they freely agreed on the single arbitration procedure and all the arbitrators were fully "independent", thereby assuring the strict equality of the parties.

The final decision of the French *Cour de Cassation* ruled that: "the principle of equal treatment of the parties regarding the appointment of the arbitrators is a matter of public policy which cannot be waived until after the dispute has arisen". Accordingly, the parties enjoy a right of equality that could not be waived *ex antea* in the arbitration agreement.(24)

(23) Y. Derains / Eric A. Schwartz, 'Guide to the ICC Rules of Arbitration', 2nd edn (Kluwer Law International, 2005) P.117

(24) BKMI Industrieanlagen GmbH, Siemens AG v. DUTCO Construction Co. Private Limited, Court d' Appel (Court of Appeal of Paris), May 05, 1989

Ultimately, it was the *Dutco* case that gave rise to a significant change of the ICC Arbitration Rules, and was one of the major reasons why the revision of the ICC Rules in 1998 incorporated in Article 10 (2) stated that "*In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate*". The requirement that the nominations are to be made "jointly" was intended to ensure that all, and not just some, of the multiple parties concerned agree on the nomination.(25)

Furthermore, the decision raised awareness of potential inequalities of parties in process of arbitrators' appointment in multi-party arbitrations. Nowadays, as parties are aware of the issue, they are able to take preventive measures to avoid the outcome in the Dutco case. For example, by reaching an agreement on the constitution of the arbitral tribunal as well as establishing a default procedure or referring to international arbitrational rules providing for a default process ensuring equality.(26)

As regards the current ICC Rules 2012, Article 12 (4) states that *"Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court*". It is crystal clear now that the Court is empowered to appoint a co. arbitrator where either side fails to nominate one.

The French courts constantly hold that the principle that each party must be given a proper opportunity to present its case and answer that of its opponent is fundamental to arbitration law, and a rule of both national and international public policy. Moreover the principle extends

(25) See also Article 10 (1) of ICC Rules in 1998 states that *"Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator"*

(26) See Julia/ Mair, 'Equal Treatment of Parties in the Nomination Process of Arbitrators in Multi-Party Arbitration and Consolidated Proceedings', Austrian Review of International and European law online, 2007, Vol.12 (1), p. 59-82, December, 2008

beyond the bounds of arbitration law, being of general application in dispute resolution, and is considered to be equivalent to a constitutional right of general application, so that only an enacted law is capable of changing the way in which it is to be applied.

In its decision in *the Brasoil case* of 1 July 1999, the Paris Court of Appeal held that, as one of the grounds for annulment of an award made in France in international arbitration, the fact that the arbitral tribunal had created a misunderstanding (which it allowed to persist) as to the purpose of a hearing which was scheduled, as a result of which the complaining party was deprived of an opportunity to present evidence in support of its case.(27)

By contrast in light of the Swiss Federal Supreme Court's definition of the ambit of arbitral proceedings, the principle of equal treatment has no bearing on the manner in which the tribunal assesses the evidence and applies the law.

Pursuant to Article 190 (2) (d) of the PILA, an award can be set aside if the parties' right to equal treatment or right to be heard has been violated. Although the statutory provision refers to equal treatment (i.e. the constitutional principle under which similar situations must be treated in a similar manner), in practice Article 190 (2) (d) of the PILA relates to cases of gross procedural unfairness.

With respect to the parties' right to be heard, the Swiss Federal Tribunal has found that this principle guarantees each party's right to submit relevant statements of facts, to present its legal arguments and to request appropriate evidence-taking measures before an award is rendered to its detriment. Furthermore, the right to be heard guarantees each party's right to participate in the evidentiary proceedings, to rebut allegations made by the opposite party and to bring its own evidence in rebuttal before an award is rendered to its detriment.(28)

Although these general principles of equal treatment are framed in rather broad terms, in practice, the Federal Tribunal interprets this

(27) See French Arbitration Law and Practice, Ibid, p.253

(28) See, International Arbitration in Switzerland, Ibid, p.147

ground for setting aside very restrictively. In particular, it has been held that:

- The parties do not have unlimited right to adduce evidence, but only such evidence which is material and relevant to adjudicate the case;(29)
- A party may not purport to argue a violation of its right to be heard, when in reality, it is merely criticizing the manner in which the arbitral tribunal applied rules on the burden of proof (i.e. which party has to prove which facts);(30)
- A party may not purport to argue a violation of its right to be heard when in reality it is merely criticizing the weighing of evidence by the arbitral tribunal, provided that each party has the opportunity to present its case on the other's evidence, whether in writing or orally;(31)
- There is no violation of a party's right to be heard merely because the arbitral tribunal replied on the adverse party's otherwise unsupported statements as evidence;(32)
- The insufficiency (or absence) of reasons is not a violation of the parties' right to be heard. The fact that the applicable procedural rules provide for reasons (which is the case for ICC Rules) is not relevant, as an award can only be set aside on the basis of a disregard of the applicable rules that violates the parties' fundamental procedural right to due process.(33)

V. Concluding Remarks

The equal treatment requirement is of utmost importance within international arbitration is guaranteed in all national laws and arbitration rules. The question remains where are the limits? How far shall the equal treatment and procedural fairness go? Are there possible limitations on

(29) Decision of the Swiss Federal Tribunal of the 14 July 2003 (4P.114/2003), section 2.2; (1999), ASA Bull.537, 541; (1997) ASA Bull.291, 306; DFT 117 II 346, 348.

(30) See also (1993) ASA Bull.68.

(31) Decision of the Swiss Federal Tribunal of 14 July 2003 (4P. 114/2003), section 2.2; (1999) ASA Bull. 537, 542; DFT 116 II 639, 642-643.

(32) See also (1998) ASA Bull. 653, 658.

(33) See (1999) ASA Bull. 537, 541; (1998) ASA Bull. 653, 658; DFT 119 II 386, 388-389.

the requirement of equal treatment itself or should it be applied as an absolute principle?

While everyone would agree that parties should be treated equally in any adjudicatory forum, it is more difficult to describe what the treatment should be. Aristotle made the point that identical treatment of unequal persons is not equality. It is suggested that equal treatment means '*relative*' equal treatment. It entails treating comparable situations equally and dealing appropriately with differences.(34)

Courts and tribunals had different positions when assessing whether there is a breach of the equal treatment principle, from which we can conclude that there are successful attempts to raise the unequal treatment argument when there is a substantial breach of equal treatment principle during the conduct of the proceedings made one party at a disadvantage comparing to the other party.

However, there are also unsuccessful attempts by raising breach of equal treatment principle, when under certain circumstances, the tribunal may have to sacrifice the equal treatment principle to some extent in order to comply with the fairness principle or to ensure that a party has a full and fair opportunity to present its case. In the end what matters is that each of the parties has an equal opportunity to present its case in a reasonable manner.

For instance, the tribunal can extend a time limit for a party if the time limit expires on a religious holiday in that party's country or its lead counsel had to undergo urgent surgery, without having to grant the same extension to the other party. Furthermore, some "inequalities" may be inescapable. For instance, the choice of a language for the proceedings which happens to be that of one of the parties but not of the other necessarily entails an "inequality".

Another concrete example is the allocation of time at the hearing, especially when the chess-clock method is used, can give rise to some adjustments. While the time allocated to each side should be equal as a rule, it can occur that one party must cross-examine a significantly

(34) See J. Waincmer, 'Procedure and Evidence in International Arbitration, Policy and Principles', (Kluwer Law International, 2012), p. 44-45

higher number of witnesses than the other (and no meaningful direct examination is provided). To comply with equal treatment, it may then be necessary to adopt a time allocation that it not absolutely equal, without, however, the time allotted being proportionate to the number of cross-examinations

In any event, equal treatment is not an absolute right. It only requires the arbitral tribunal to handle similar situations in a similar manner. There are circumstances where it may be justified to grant a different treatment to a party in a different situation. What ultimately matters is that none of the parties be at a disadvantage as a result of the manner in which the proceedings are conducted.

THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: INCREASING ACCESS TO JUSTICE OR MANAGING MARKET EXPOSURE?

Michael Dunmore(1)

ABSTRACT

Third party funding allows for parties involved in litigation and international arbitration to manage the financial risk of being involved in a commercial dispute. On the other side of the agreement, third party funding provides investors with high returns, relatively quick turn around times and predicable outcomes for their investments. There are several criticisms made against third party funding such as that third party funders exert too much influence over a party to a dispute, the confidentially provisions may lead to conflicts of interest between the funders and arbitrators as well as third party funding leads to the making of frivolous claims. This article will show that, none of these arguments are well founded. Third Party Funding is a new and developing industry related to international arbitration, this article outlines its development in a number of jurisdictions, particularly in relation to its regulation.

I. Introduction: Why Funding is Sought

Third Party Funding (hereinafter "TPF") in international arbitration may be sought for various reasons. The two most common are: (i) that a party cannot fund its arbitration and TPF is a means of providing access to justice; and, (ii) TPF is a means of leveraging the financial risk of engaging in an arbitration.

In regards to the suggestion that TPF has the potential to increase access to justice,(2) support for TPF providing access to justice in

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(2) William Park & Catherine Rogers, *Third Party Funding in International Arbitration: The ICCA Queen-Mary Task Force* in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION (2015), 113, 118 (Klausegger et. al. eds.,) *Citing, Philanthropists launch tobacco claims defence fund*, GLOBAL ARBITRATION REVIEW, http://globalarbitrationreview.com/news/article/33654/philanthropists-launch-tobacco-claims-defence-fund/ (last visited Oct. 10, 2015) (reporting that Bill Gates and Michael Bloomberg have launched the 'Anti-Tobacco Trade Litigation Fund' to help poorer states defend claims brought by tobacco companies.)

litigation has been given by the English Court of Appeal in the Jackson Report(3) as well as in *Arkin v. Borchard Lines Ltd*(4) where the court refereed to funders as those, "who provide help to those seeking access to justice which they could not otherwise afford." Others whom support this proposition similarly state that TPF increases, "access to justice and encourage[s] private enforcement of the law."(5) However, as will be demonstrated throughout this article, the aim of TPF in arbitration is not to provide access to justice but rather is for funders is to maximize returns on investments and for parties to disputes to minimize their financial risk, particularly within the sphere of international arbitration.

TPF in arbitration is an attractive investment for funders with high returns, reasonable turn around times with relatively predictable outcomes.(6) Generally, parties that seek funding are sophisticated commercial parties and not in need of access to justice. This presumption is made based on the fact that it is sophisticated commercial entities who are engaging in cross border transactions and international arbitrations; and that the parties which seek funding are aiming to minimize their financial risk. To this effect, TPF does not necessarily "level the playing field" rather it allows parties to manage risk.(7) In addition to minimizing risk, TPF theoretically increases a party's chances of success by better equipping them with increased capital at their disposal, as well as with expert advice on how to best utilize that capital.

Various types of funding arrangements exist across a spectrum. This includes: general funding arrangements where legal and administrative fees are paid by a funder, where, if the claimant wins, the funder is repaid and the Claimant and funder share in the amount awarded to

(3) Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report,* 117 (The Stationary Office, Norwich, 2009) https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (last visited Oct. 10, 2015).

(4) [2005] EWCA Civ. 655 at 38.

(5) Burcu Osmanoglu, *Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest in* J. INT'L ARB. 325, 326 (2015) Citing Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding,* MINN. L. REV. 1338 (2011).

(6) Lisa Bench Nieuwveld & Victoria Shannon, *Chapter 3: Ethical Considerations for Third Party Funding* in THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 1,10 (Bench Nieuwveld and Shannon, eds., 2015).

(7) Wayne Attrill, *Ethical issues In Litigation Funding,* 10

http://www.claimsfunding.eu/fileadmin/Documents/Ethical_Issues_Paper.pdf (last visited Oct. 10, 2015).

the Claimant. There also exists hedging arrangements where claimants may insure themselves against loosing a claim while receiving funding. Lastly, there is after the event insurance, a funding arrangement that covers fees associated with making an unsuccessful claim, namely paying the opposing party(ies) legal fees after a dispute has been determined. This third type of funding arrangement is typically used for international arbitration, or in litigation in jurisdictions where it is common for the loosing party to pay the winning party's legal fees, and as the name suggests, it acts as a type of insurance. As one would expect, the terms of the agreements as well as premiums and other costs to the parties who are seeking funding vary between the type of agreement that is entered into. Generally, all of the types agreements provide that, based on the success of a case (There exist diverging reports as to the minimum chances of success a case must have before a funder will accept it ranging between a minimum of 60%(8) to 78%(9)), a successful claimant will then reimburse the funders for their costs and provide a percentage of the amount awarded,(10) which in some instances can be a very substantial sum.

Before funding is provided to a party, a rigorous due diligence process must be undertaken,(11) essentially, a funder will not offer funds unless he is reasonably certain that the party requesting the funds will be successful and that he is making a good investment.(12) These considerations will be briefly touched on later on in this article.

Lastly, this article will deal with several core issues surrounding TPF. TPF in litigation is a hot topic, its use in international arbitration adds further complexities. Following an overview of whether TPF promotes access to justice or is a means of maximizing returns, this article will turn to deal with more contentious issues including the degree of

(8) Christoper Hodges, John Peysner and Angus Nurse, *Litigation Funding: Status and Issues* (Research Report, University of Oxford, 2012), at 69.

(9) Lord Justice Jackson, *Supra* note 2, at 161.

(10) The Hong Kong Law Reform Commission, *Third Party Funding For Arbitration Subcommittee Consultation Paper,* Para 3.34 http://www.hkreform.gov.hk/en/docs/tpf_e.pdf (last visited Oct. 20, 2015). (Stating that between 15 to 50 percent of the amount awarded is paid to a funder).

(11) Mick Smith, *Chapter 2: Mechanics of Third-Party Funding Agreements: A Funders Perspective* in THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 18, 33 (Bench Nieuwveld and Shannon, eds., 2015).

(12) Bench Niewveld & Shannon, *Supra* note 5, at 15.

influence a funder has over a party, the confidentiality arrangement between the funder and the party as well as the allegation that TPF leads to frivolous claims. The article will outline the doctrines of maintenance and champerty and their relationship with TPF and then shift to focus on the regulation and future of TPF.

A. Access to Justice

This article takes the position that the aim of third party funding in arbitration is not to increase access to justice for the reasons stated above. The argument that TPF promotes access to justice may however apply more readily to litigation in some instances, in particular when the party seeking funding is an individual. Nonetheless, this author concedes to a position made by Waincymer that in some instances in international arbitration, funding can level the playing field between parties in the sense that, in cases where the funded party actually does not have enough funding for a case it can be foreseeable at the time of entering an arbitration agreement that if a dispute arose, the party would seek funding.(13) It has also been stated that funding results in a "levelling" effect that leads to settlements earlier on.(14) In this regard, a counter party would consider that based on the funding received by a counter party, that counterparty is prepared to endure all of the costs of an arbitration proceeding that they would not otherwise expect from the counter party. However no evidence exists that this author is aware of that demonstrates that the number of settlements are higher when a party receives TPF. Despite this, there may be some exceptional circumstances where access to justice does have a role in international arbitration. One exceptional example are philanthropists who have started a litigation fund for poorer states to defend themselves against claims brought by tobacco companies.(15) This, however, appears to the exception to the norm.

(13) JEFF Waincymer, Procedure and Evidence in International Arbitration 1245 (Kluwer Law International, 2012).

(14) Oliver Cojo Manuel, *Third -Party Litigation Funding: Current State of Affairs and Prospects for Its Further Development in Spain* in EUR. REV. PRIV. LAW. 439, 450 (2014) *Citing* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding* in MINN. L. Rev. 1268, 1305 (2011).

(15) 'Philanthropists launch tobacco claims defence fund,' *Supra* note 1.

B. Maximizing Returns

When looking at commercial arbitration disputes that are funded, the amount in dispute is considerably high and has a high return for the funders. For example, for Harbour Litigation Funding (a leading funder) to fund a claim, generally the minimum threshold to accept a case would be the existence of a return of 10:1 against the cost of the case as well as a minimum claim value of £10m.(16) These criteria indicate that unless there is a high return, a claim will not be funded, regardless of any access to justice considerations.

When deciding whether to fund a party (based on the procedure used by Harbour Litigation Funding), a funder will conduct a broad initial case assessment that looks at a number of criteria such as: the recoverability, merits of the case and the legal team involved, and will conduct an economic analysis of the dispute. If the dispute is suitable, the funder will issue a letter of intent and will then commence detailed due diligence of the dispute. This due diligence will include: undertaking a review of the party seeking funding as well as the counterparty to the dispute, a review of the initial assessment or a second legal opinion, an analysis of the costs estimate and the preparation of a budget, interviewing key lawyers and witnesses involved in the dispute and a draft investment agreement is issued. Once the detailed due diligence is completed a report is provided to an investment committee which analyses all of the information. The investment committee makes a recommendation and the partners of the funder then decide whether to fund the dispute based on that recommendation. If approved, the agreement between the funder and party will need to incorporate any recommendations made by the partners. Following the entering into the agreement and commencement of a claim, the funded party will need to provide monthly updates to the funder and the funder will pay the costs of the dispute on a monthly basis. Overall, this process is considerably detailed and thorough.(17)

(16) 'FAQ,' Harbour Litigation Funding, http://www.harbourlitigationfunding.com/solutions/faq/ (last visited Oct. 10, 2015).

(17) 'About us,' Harbour Litigation Funding, http://www.harbourlitigationfunding.com/about-us/our-process/ (last visited Oct. 10, 2015).

II. Key Concerns

A. The Degree of Funder Influence

It has been alleged by critics of TPF that actions taken in an arbitration are heavily influenced by the "guidance" of funders. Namely, this takes place through the conditions of the funding agreement as well as "guidance" provided based on updates provided to the funders.

Critics of TPF further argue that funders may exhort undue influence over parties by: influencing a client to accept an unacceptable settlement because the funder wants a quick return on their investment, that a lawyer may be chosen by a funder or a funder promises the lawyer further clients which affect the actions of a lawyer.(18) Similarly, that a funder will only provide funds when certain law firms represent a claimant.

Along the lines of funders' influence, as we noted above, that in almost all agreements there exist provisions for a funder to monitor the dispute and receive monthly updates from the lawyers involved in the matter.(19) It has been argued that these updates have the lawyer looking after the interests of the funder rather than the client. Nonetheless, this would clearly compromise the fiduciary duty that lawyers across various jurisdictions owe to their clients, lawyers must act in the best interests of their clients, as such, this is a weak criticism. Rather, it is perfectly reasonable that as an investor in a claim, a funder would undoubtedly want to be aware of the status of their investment and monitor the progress of that investment. As a solution to this concern, Clause 7(c) of the Code of Conduct for Litigation Funders (the code applies to English funders and will be examined in greater detail below) (the "Code of Conduct") states that a funder will not seek to influence or cede control of the dispute. As such, so long as the Code of Conduct is adopted, the criticism of a funder exhorting undue influence over a party is unfounded.

(18) Susanna Khouri et. al., *Third party funding in international commercial and treaty arbitration - a panacea or a plague? A discussion of the risks and benefits of third party funding* in Transnational Dispute Management 7,8 (2011).

(19) Niccolò Landi, *Third Party Funding in International Commercial Arbitration – An Overview* in AUSTRIAN YEARBOOK OF INTERNATIONAL ARBITRATION (2012) 85 at 99, (Klausegger et. al. eds.,).

B. Confidentiality of funding Agreements

Another aspect of funding agreements that raise criticisms are confidentiality provisions. At the core of the controversy of this issue is that the existence of many funding agreements are kept confidential from arbitrators.(20) Clause 7 of the Code of Conduct indicates that the parties are to abide by the highest extent of confidentiality possible when entering into a funding agreement. This degree of confidentially can cause two issues when an arbitrator does not have knowledge of the agreement. The first is that the arbitrator may have some interest in the funder that they are not aware of, the second is that the funder may persistently suggest to various parties to nominate a certain arbitrator, which gives rise to a conflict. This gives rise to a unique potential conflict in the funding of arbitrations that does not exist in litigation funding.

As for the rebuttal of this issue, in terms of repeat appointments Clause 7(c) of the Code of Conduct provides a solution to this issue as this clause provides that funders will not seek to influence the dispute. As such, the issue of repeat nominations should not arise, as the funder should not try and influence a dispute. However it is not entirely clear whether suggesting the potential arbitrators is seeking to "influence a dispute."

However, the recent General Standard 6(b) of the IBA Guidelines on Party Representation 2014 provides that a party that is receiving funding must disclose both to the counterparty and to the tribunal the existence of the funding arrangement. This particular guideline effectively addresses critics concerns around the confidentiality of funding arrangements.

C. Frivolous Claims

The English High Court recently addressed an overarching concern of the funding of frivolous claims (albeit concerning a litigation). In *Excalibur Ventures LLC v Gulf Keystone*(21) the High Court ordered a third party funder who funded "a hopeless case" to pay the winning side's costs on an indemnity basis. This decision is particularly important as it asserts that funding frivolous claims will entail consequences for the funder. While this case emphasizes the concern for the funding of

(20) Park & Rogers, *Supra* note 1, at 113.

(21) [2014] EWHC 3436 (Comm).

frivolous claims, this author suggests that the "hopeless case" is an exception considering the due diligence funders engage in. This being an exceptional circumstance is in line with comments made by the Texas Court of Appeal which stated that, "[a]n investor would be unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit."(22) As a safe guard to prevent the funding of frivolous claims, funders retain the right to terminate finding agreements at the funders' discretion if the claim funded is no longer meritorious.(23) In further support of the proposition that TPF does not lead to the funding of frivolous claims, Waincymer states, "litigation funders are likely to be a barrier to unmeritorious claims as they will consider all funding decisions on a careful cost/ benefit basis, thus indirectly helping parties evaluate claims."(24) Others share this view,(25) including the Jackson report, which stated that TPF goes so far as to benefit opposing parties by filtering out such unmeritorious claims because funders will not take on such risks.(26)

Overall, it is not in the interest of investors maximizing their investments to fund frivolous claims; the concern of the funders is to achieve a high yield return from disputes where there is a high degree of certainty of success.

D. The Doctrines of maintenance and Champerty

In most jurisdictions, TPF is a thriving industry. However in the few jurisdictions where the doctrines of maintenance and champerty exists, TPF is in violation of public policy.(27)

Singapore, which is one of the most popular seats for international arbitrations and home to the newly established Singapore International Commercial Court, still uphold these doctrines, which have been long abolished in other jurisdictions. The rational in Singapore for upholding these doctrines is that:

(22) Bernardo Cremedes Jr., *Third Party Litigation Funding: Investing In Arbitration* in Transnational Dispute Management (2011) *Citing* Court of Appeals of Texas in *Anglo-Dutch Petroleum v. Haskell,* 193 S.W.3d 87 (Tex. 2006), at 35.

(23) Attrill, *Supra* note 6, at FN 36.

(24) Waincymer, *Supra* note 12, at 1244.

(25) Landi, *Supra* note 18, at 94.

(26) Lord Justice Jackson, *Supra* note 2, at 117.

(27) Otech Pakistan Pvt Ltd v Clough Engineering Ltd. [2007] 1 SLR 989 at 38

> "Champerty exists where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. Public policy is offended by such an agreement because of its tendency to pervert the due course of justice."(28)

This rationale follows the reasoning in *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 in paras 219–220:

> The reason why the common law condemns [maintenance(29) and] champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law.

Waincymer implies that maintenance(30) and champerty are outdated doctrines stating. "[C]hamperty and maintenance would never be needed, given that modern contract law principles such as unconscionability, conflict of interest, duress and misrepresentation would cover all legitimate policy concerns with litigation funding."(31) In this respect, Waincymer presents an alternative to the outright banning of TPF that would operate within constraints defined by principals of contract law. Waincymer indicates that many common law courts have changed there views on this issue with a focus to funding as a way to promote access to justice. However, as mentioned at the outset of this article, generally, this author does not perceive entities that are involved in international arbitrations in need of access to justice (although there are limited exceptions). Nonetheless the author agrees with Waincymer's rationale as to why the doctrines of maintenance and champerty are outdated.

(28) M P Furmston, Cheshire, Fifoot and Furmston's Law of Contract 639 (Butterworths Asia, 2nd Singapore and Malaysian Ed, 1998).

(29) Maintenance is defined as "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference." Massai Aviation Services v Attorney General [2007] UKPC 12.

(30) Note: Singaporean case law generally refers to the doctrine of Champerty while other jurisdictions refer to both Maintenance and Champerty doctrines. TPF falls under both maintenance and champterty doctrines.

(31) Waincymer, *Supra* note 12, at 1245.

III. Regulating TPF

A. Developments

i. Singapore

Following the above discussion on maintenance and champerty, the doctrines continued existence in Singapore is particularly topical considering the burgeoning dispute resolution (concerning both arbitration and litigation) industry that exists there. As a result, there has been tremendous debate in Singapore on whether Singapore should consider amending its laws to provide for TPF. In 2014 the Law Reform Committee of the Singapore Academy of Law concluded in a paper on TPF that TPF should be permissible so long as TPF regulations are in place. More recently the Singapore High Court in *Re: Vanguard Energy Pte Ltd.*(32) dealt with TPF in an insolvency case, in it's decision the court mentioned in *obiter* that assignment agreements would not offend the doctrines of maintenance and champerty. Following these developments, it appears very possible that the TPF industry could soon enter Singapore, however, before this would take place Singapore must first determine how TPF would be regulated. In making this determination, it may be helpful to look at the regulation of TPF in other jurisdictions. Two notable jurisdictions where the TPF industry is burgeoning are England and Australia.

ii. Hong Kong

Similar to Singapore, the doctrines of maintenance and champerty still exist in Hong Kong. However, the application of the doctines is not clear. In *Winnie Lo v HKSAR*(33) and *Unruh v Seeberger*(34) the Hong Kong Final Court of Appeal indicated that there exist several exceptions to the application of doctrines those being when a third party has a "genuine interest" in the case or where the applicant had problems with access to justice in litigation. In Unruh v Seeberger,(35) the court left open the question of whether TPF in arbitration specifically is permissible.

(32) [2015] SGHC 156.

(33) (2012) 15 HKCFAR 15.

(34) & othes [2007] HKFCA 10.

(35) Unruh v Seeberger (2007) 10 HKCFAR 31, at para 123.

As a result of this uncertainty, the Secretary of Justice and Chief Justice of Hong Kong asked the Hong Kong Law Reform Commission (the "Commission") to review whether Hong Kong should permit TPF.(36) After a considerable review, the Commission concluded that TPF should be provided for in Hong Kong so long as adequate ethical and financial guidelines are put in place. The report weighed various considerations including one major consideration that being, TPF would add to Hong Kong's competitiveness as an arbitration centre. It will be interesting to see the developments in the coming years in Hong Kong, particularly the structure of the financial guidelines, as no doubt other jurisdictions will be watching.

b. the regulation to third-party funding thus far

In many domestic spheres as well as internationally there have been calls for the regulation of TPF. Thus far, there has been more regulation of litigation funding in comparison to arbitration. It can be said that in regards to arbitration, there are various concerns of how to regulate TPF of international arbitration.(37) Nonetheless, various regulations and codes relating to TPF are relevant to both litigation and arbitration funding.

In terms of arbitration, internationally applicable regulations would be ideal. However, thus far, no Arbitral rules or guidelines such as the IBA Guidelines on the Conflicts of Interest in International Arbitration require disclosure of funding arrangements. In contrast, some rules of court do require such disclosure.(38)

TPF is an area that is considerably developed in certain jurisdictions such as England and Australia, TPF is permitted in most civil law jurisdiction in Europe.(39) In other jurisdictions, the TPF is currently being reconsidered, such as in Spain,(40) Malaysia, Singapore and Hong Kong.

(36) The Hong Kong Law Reform Commission, *Supra* note 9, at Para 1.26

(37) Park & Rogers, *Supra* note 1, at 119.

(38) For example, Part 44.15 of the Civil Procedure Rules of England; The Federal Courts of Australia has released a practice note to a similar effect PRACTICE NOTE CM 17, http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm17 (last visited 9 October, 2015).

(39) Osmanoglu, *Supra* note 4, Citing Catherine Rogers, Ethics in International Arbitration 199 (OUP, 2014).

(40) Cojo Manuel, *Supra* note 13, at 442.

The major start of the regulation of TPF in England was the creation of the Code of Conduct in November 2011 (mentioned above) as recommended in the Jackson Report. The Jackson Report is a review of civil litigation costs in England and Wales conducted by Lord Justice Jackson in 2009. In relation to TPF, the report concluded that parties who utilize TPF are those with full legal advice and as such a statutory instrument was not needed. The report indicated that there was however the need for a voluntary code, which has been created.(41) However, the application of the code is confined to funders operating in England.

A second major development towards regulation was taken in 2013 by the Australian Securities and Investment Commission which issued regulatory guidelines clarifying how funders should manage conflicts of interest dealing with particular provisions of their funding arrangements. Both the Australian and English reforms affected what terms could be included in fee agreements, discovery rules and cost allocations in those jurisdictions.(42) However these changes focus on the funding of litigation and not international arbitrations. One further anecdote to TPF in Australia is that several funders are publicly traded companies (as opposed to private equity funds or other structures), where potential investors may learn about the disputes that the funders are involved in on their websites.(43) This is starkly different to other jurisdictions where the funding agreements provide for the highest degree of confidentiality. This last point illustrates that at least in some respects the regulation of TPF is not consistent worldwide.

It should be mentioned as well that the recent consultation paper published by the Hong Kong Law Reform Commission has recommended clarification to arbitration legislation to provide for TPF. This is a particularly welcome approach to regulation, especially considering that the Hong Kong Arbitration Ordinance is based on the UNCITRAL Model Law. Such an approach has the potential to provide other Model Law jurisdictions with an example of how to regulate TPF, and potentially a framework for regulating TPF of arbitration internationally.

(41) Lord Justice Jackson, *Supra* note 2, at 119.

(42) Victoria Shannon, *Recent Developments in Third-Party Funding,* in J. INT'L ARB. 443 (2013).

(43) IMF Bentham Cases, http://www.imf.com.au/cases (last visited 15 October, 2015).

IV. Conclusion

The preceding discussion surrounding TPF has touched on various core concerns that many have, as well as briefly outlined how a handful of jurisdictions have dealt with and continue to deal with this issue. Various jurisdictions have considerable experiences with TPF, while in others TPF is an unregulated new phenomenon and in some jurisdictions it is not part of the legal landscape. It is clear that, there are a number of concerns over TPF, particularly in regards to international arbitration in comparison to litigation. Through it is the author's opinion, as has already been expressed throughout this article that these concerns are not well founded.

While critics argue that TPF provides access to justice, this is unlikely the situation for most of the large commercial disputes. Similarly as mentioned, the criticism regarding the degree of influence a funder exhorts seems to be exaggerated considering the duties of a lawyer to their client and other ethical guidelines. Though this author does not totally disregard this criticism and notes that a claimant has to work within the confines of a funding agreement, the confines of such agreement are unlikely to impose considerable constraints on a party.

As for the issues of the degree of confidentiality of funding agreements, this seems to vary between jurisdictions. From an arbitrator's perspective, they should be vigilant as to whom they are affiliated with. On the funders' side, it seems that at least in England there are appropriate regulations in place to ensure that the concerns particularly relating to repeated appointments are unfounded. Similarly, there is now a roadmap in place for TPF in Hong Kong.

Critics have suggested that TPF may lead to unnecessary and increased litigation by bringing frivolous claims. However, this does not seem to be the case as all applications for funding go through rigorous scrutiny; it seems unlikely that investors will fund a dispute, only on the chance that a settlement may take place. Furthermore, as indicated in *Excalibur Ventures LLC v Gulf Keystone*, a party who brings such claim will be sanctioned if this occurs. However, in international arbitration, if a frivolous claim was brought before a tribunal based on a funder

encouraging such claim, even if a tribunal had no knowledge of the funding arrangement, surely, a tribunal was faced with a frivolous claim; the tribunal would award the loosing party to pay the legal costs of the winning party. Thus in terms of arbitration, there is the tool of cost orders in place to deal with frivolous claims.

In terms of the future of TPF, it is noteworthy that TPF has developed to varying degree in a number of different jurisdictions. Australia has found an interesting solution of how to regulate TPF through the Australian Securities and Investment Commission, which contrasts the approach taken in England. Considering the nature of international arbitration, there are several potential solutions to regulate TPF internationally: one is the amendment of arbitration laws, which is unlikely, although it seems that Hong Kong may take this approach via amendments to its arbitration law. However, Hong Kong it is yet to make the determination on how the industry would be regulated. A second potential solution is the implementation into sets of arbitral rules. A third method would be to implement guidelines on TPF into the IBA guidelines. In this respect, the author notes that the 2014 IBA Guidelines on Party Representation indicate that parties who have TPF arrangements now must disclose the existence of a funding arrangement to the tribunal and other parties but not the details of the agreement. Fourth would be for funders to adopt internationally self-imposed regulations. It should be noted that the Jackson Report indicated that a voluntary code by funders would be adequate, which is currently in place in England (Code of Conduct). However, the Jackson Report went on to state that a statutory code may be needed in the future to cope with the expansion of TPF.

Overall, TPF is an area of international arbitration where further regulation is expected to take shape both domestically and internationally, currently it can be said to be at its infancy stage. TPF is a commercial relationship where parties involved in TPF are exercising commercial judgments taking into account economic considerations when entering into TPF arrangements, the funders involved are interested are trying to maximize their returns on investments while parties involved are minimizing their financial risks.

THE NEED FOR MINISTERIAL APPROVAL FOR ARBITRAL AGREEMENTS IN EGYPTIAN ADMINISTRATIVE CONTRACTS

Ismail Selim[1]

Dissenting from its pro-arbitration stance, the Egyptian Court of Cassation decision dated 12 May 2015 upheld a relatively anti-arbitration interpretation of Article 1(2) of the Egyptian Arbitration Law which reads as follows:

> "*With regard to disputes relating to* ***administrative contracts****, agreement on arbitration shall be reached upon* ***the approval of the competent minister*** *or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect*". [emphasis added]

Prior to analyzing the said decision, it is worth clarifying that under Egyptian law a contract is administrative if three conditions are fulfilled. First, at least one of the parties to the contract must be a public juristic person (i.e. the State, public institutions and professional bodies) or if all the parties are private persons, at least one of the parties must be acting on behalf of a public juristic person. Secondly, the contract must be pertinent to the functioning of a public utility. Thirdly, the contract must comprise an "onerous" clause or condition from the public law (for example the possibility for the contracting authority to terminate the contract). The most common examples of administrative contracts are concessions of public utilities agreements, public works contracts, and supply contracts.

1. Historically, there have been two opposing interpretations for the aforementioned Article 1(2) of the Egyptian Arbitration Law, one of which is a pro-arbitration one and in line with the doctrines of good faith and estoppel, and one which is not (yet appears to be in conformity with the legislator's intent).

(1) Partner and Head of Dispute Resolution (Cairo Office)

2. The first interpretation, which has been honoured by some arbitral tribunals and applied in several CRCICA cases, considers that the absence of the ministerial approval would not lead to the annulment of the arbitration agreement but solely to the disciplinary liability of the official who consented to the arbitration agreement without obtaining such approval.
3. The second interpretation, as adopted by the Administrative Courts of the Conseil d'Etat, is that the absence of ministerial approval causes the annulment of the arbitration agreement enshrined in an administrative contract.

There were justified hopes that the Ordinary Judicial Courts, whose commercial chambers are known for their pro-arbitration approaches, would adopt a stance different from the Conseil d'Etat's conservative position. Unfortunately, the winds do not blow as the vessels wish.

The ruling of the Court of Cassation relates to a dispute between National Gas Company ("NGC") and the Egyptian General Petroleum Corporation ("EGPC") arising out of a contract from 1999 by which NGC was under the obligation to provide certain areas of Sharkia Governorate with natural gas. The dispute was settled by an arbitral award rendered according to CRCICA rules in the case No 567/2008. The arbitral tribunal rejected EGPC's plea against its jurisdiction and stated that the obligation to obtain the ministerial approval of the arbitration clause lies on the administrative entity (i.e. EGPC). Therefore, the failure to obtain such approval shall not cause the nullity of the arbitration clause.

EGPC initiated setting aside proceedings invoking the nullity of the award based on the absence of the Petroleum Minister's approval. On 12 September 2009, Cairo Court of Appeal rendered a decision annulling the award. NGC challenged the said decision of the Cairo Court of Appeal before the Court of Cassation. The statement of challenge before the Court of Cassation ("Statement of Challenge") was based, among other things, on the following grounds:

First, NGC contended that (i) the Minister of Petroleum had approved the arbitration clause pursuant to two addendums to the agreement dated

6 January 1999, by which he ratified EGPC's assignment of its rights and obligations under the disputed contract, including its arbitration clause, to the Egyptian Natural Gas Holding Company ("EGAS").

The Court of Cassation rejected this argument for lack of evidence since NGC had failed to enclose the disputed contract and its addendums with its Statement of Challenge. The Court of Cassation finding in this regard is in conformity with Article 255 of the Egyptian Code of Civil and Commercial Procedures which should be carefully considered by parties when filing appeals before the Court of Cassation in civil and commercial matters.

Secondly, NGC invoked the aforementioned pro-arbitration interpretation of Article 1(1) of the Egyptian Arbitration Law according to which the conclusion of the contract, by EGPC's Chairman, is sufficient to validate the arbitration clause without need for further ratification by the Minister of Petroleum. NGC further affirmed that the arbitration clause should be given effect according to the principle of good faith and the "Appearance Theory".

The Court of Cassation rejected NGC's position. The Court stated that whenever it becomes impossible for the judge to infer the legislator's intent from the plain wording or the indications of a statutory provision, the judge may have to consider extrinsic elements like preparatory works for the law, historical sources and the legal rationale behind the provision. Further, the Court of Cassation reiterated its definition of Public Policy which has constantly been affirmed:

"Rules aiming to achieve a public interest, whether political, social or economic, pertaining to the society's high order and which prevails over the individual's interest".

The Court of Cassation referred to the Preparatory Works for the law No. 9/1997 and found that the legal rationale of the law was to resolve a pre-existing controversy over the arbitrability of administrative contracts through a conclusive statutory provision leaving no room for opposing opinions and which explicitly "*validates the agreement to arbitrate in administrative contracts, determines the administrative authority entitled to ratify such agreement in order to regulate and*

ensure that the agreement to arbitrate complies with public interest considerations". Such balancing of public interest and agreement to arbitrate in administrative contracts is entrusted to "*the competent minister or the official assuming his powers with respect to public juridical persons which are not subordinated to any ministry like the Accounting Central Authority".*

Accordingly, the Court of Cassation concluded that "*the validity or nullity of the arbitration clause based on the exclusive approval of the competent minister is a public policy rule since it has been enacted for a public interest thereby permitting both parties to a contractual relation to invoke the nullity"* of the arbitration clause whenever the competent minister's approval has not been granted.

Finally, NGC contended that the challenged decision of the Cairo Court of Appeal should be quashed for lack of reasoning and violation of the right of defence as it rejected the documented arguments evidencing the implicit approval of the competent minister which is inferred from the attendance of the Minister of Petroleum to the contract signing ceremony and EGPC's enforcement of two arbitral awards in the cases No. 400/2004 and 490/2006 settling other disputes arising out of the same contract without invoking the absence of the ministerial approval.

This was rejected by the Court of Cassation. The Court of Appeal has a discretionary power to assess whether there has been a tacit approval or implicit ratification even if the challenged decision has not addressed some immaterial documents.

Conclusion

Conservatism in this area is not exclusive to Egyptian law. Indeed, under French law the non-arbitrability of administrative contract disputes is the rule and their arbitrability is the exception.

The source of such restrictions may be found in public international law, where public acts of nation states (*jure imperii)* enjoyed immunity from adjudication by foreign courts.

The added value of this important decision resides in the predictability and certainty of the rule of law governing the arbitrability of administrative contract disputes.

The Egyptian Court of Cassation has confirmed the precedents of the Conseil d'Etat that without Ministerial approval arbitration clauses in administrative contracts are ineffective, and any award made as a result of them will be annulled. Persons who are negotiating administrative contracts to be entered into with Egyptian public bodies must therefore be vigilant should they wish to select arbitration as the means of resolving any future dispute with the Egyptian State or any other Egyptian public juristic person. Written approval of the competent minister must be obtained on or before the date of signature of the administrative contract.