

Arbitrators, Disclosure and Challenges – Are We Being Practical or Too Sensitive?

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1 Introduction

Independence, impartiality and disclosure are important topics. Important, sure, but maybe a bit worn out by all the discussion? Do we really still need to talk about them? We have already been programmed. In addition to well sedimented practices, we have the IBA Guidelines to help us not to lose our way and to always do the right thing and the same thing when it comes to deciding issues related to independence and impartiality and disclosure of facts or circumstances related to independence and impartiality. The IBA Guidelines on Conflicts of Interest in International Arbitration codify our common understanding the best practices and thus constitute a soft law instrument, but in terms of their argumentative power and wide-spread use the Guidelines seem to have a role comparable to transnational black letter law.¹

This article discusses two questions related to independence and impartiality: what should an arbitrator disclose and what should the arbitrator do if being challenged by one of the parties. The article asks whether our approach to disclosure and challenges should be revisited. These two questions seem to be intertwined and need to be discussed together.

A legal analysis with a goal to formulate concrete recommendations would, of course, rather start with an analysis of the *lex arbitri* and possible applicable institutional rules rather than with an analysis of a soft law instrument such as the IBA Guidelines or some more or less tacit understanding of best practices not even explicated in such an instrument. The purpose of this paper is, however, to ask whether the truisms related to disclosure and challenges should be revisited from the perspective of general doctrines of law of arbitration. For this purpose, the IBA Guidelines provide a good starting point for an analysis.

The first truism is related to disclosure. According to the IBA Guidelines, disclosure of facts and circumstances related to independence and impartiality is limited to facts and circumstances that give or could objectively give rise to

1 The IBA Guidelines on Conflicts of Interest in International Arbitration were first published in 2004. A revised version of the Guidelines was published in 2014. According to Voser and Petti (2015, p. 7), “The 2004 Guidelines have been a success. Not only have they been used by arbitration practitioners in their daily work, they have also been relied upon by the arbitral institutions and by State courts when developing case law addressing issues of arbitrator impartiality and independence.” *See* also the preface of the revised Guidelines “Since their issuance in 2004, the IBA Guidelines on Conflicts of Interest in International Arbitration (the ‘Guidelines’) have gained wide acceptance within the international arbitration community. Arbitrators commonly use the Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators, and arbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators.” Further, as explained in the introduction to the Guidelines (paragraph 4) the guidelines are “based upon statutes and case law in a cross-section of jurisdictions, and upon the judgement and experience of practitioners involved in international arbitration. In reviewing the 2004 Guidelines, the IBA Arbitration Committee updated its analysis of the laws and practices in a number of jurisdictions.” Also, “(b)oth the 2004 Working Group and the Subcommittee in 2012/2014 have sought and considered the views of leading arbitration institutions, corporate counsel and other persons involved in international arbitration through public consultations at IBA annual meetings, and at meetings with arbitrators and practitioners.”

doubts concerning the impartiality and independence of the arbitrator. This is further concretised by the Red, Orange and Green lists that classify typical situations and advise on what to do. This truism is challenged by application of legal principles to the scope of disclosure. The question is whether we should have a different and more open approach to disclosure? Should disclosure be limited to the situations where it is a rule-like minimum duty of an arbitrator? Or is the more you disclose the better?

The second truism concerns challenges. It seems that the idea has often been that one has to avoid challenges. This seems to be the starting point of the IBA Guidelines, too, in limiting disclosure. And if an arbitrator is challenged, it has often been seen as the best solution not to accept the appointment or step down voluntarily. This truism is challenged, too, and it is discussed whether we should be less delicate concerning arbitrator challenges and risks related to them.

2 The First Truism: Only Objectively Problematic Facts and Circumstances, Namely the Ones on the Waivable Red and the Orange List Should be Disclosed

The ratio of disclosure is linked to the due process requirement of independence and impartiality. The most fundamental rule of the IBA guidelines is set in General Standard 1: “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.” This is also the basis of most of the national law regulation and case law concerning the arbitrators and the requirements set for arbitrators. The requirement of independence and impartiality is one of the most essential transnational due process requirements for arbitration and one of the basic elements of “*lex proceduralia*” in arbitration law.²

The structure and content of the IBA Guidelines concerning the subjective and objective tests reflect a widely shared way of regulating and handling independence and impartiality. According to General Standard 2, the arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent (paragraph a). It is easy to understand that the subjective conviction of lack of impartiality or independence leads to the duty to decline the appointment or step down as an arbitrator. The subjective test is, however, not really usable as a legal test for protecting one of the most fundamental procedural rights. It is very hard to prove what happens within the mind of an arbitrator and thus the real and final test cannot be subjective. Like in most bias regulations, the test in IBA Guidelines is objective rational third person test. An arbitrator cannot accept an appointment or has to refuse to continue to act as an arbitrator “if facts or circumstances exist, or have

2 See Kurkela and Turunen 2010, p. 1–12 about the due process requirements and transnational “*lex proceduralia*” and p. 111–126 about independence and impartiality as due process requirements.

arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator" (paragraph b). According to paragraph c, "doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."³

Normally the objective third person test only has to be applied if the parties have not waived the circumstances that would risk impartiality and independence of the arbitrator. The parties can, at least to some extent, accept an arbitrator who is not impartial and independent. The choice, however, needs to be an informed one. So the parties can only accept circumstances that have been disclosed to them. This is why disclosure is central to the whole system of guaranteeing due process in arbitration in terms of the independence and impartiality of the decision maker.

Disclosure by the arbitrator is discussed in General Standard (3) of the IBA Guidelines. According to it "if facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them" (paragraph a). Disclosure does not imply the existence of a conflict of interest (General Standard 3, paragraph c). The purpose of disclosure is to allow the parties to judge whether they agree with the evaluation of the arbitrator and to explore the situation further.⁴

3 According to the explanation to the General Standard 2, "In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings."

4 According to the Explanation to General Standard 3, paragraph c, "A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met. Under Comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence,

According to the IBA Guidelines, in case of uncertainty whether a disclosure is necessary, one should decide for disclosure: “Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.” (General Standard 3, paragraph d). Situations that could never lead to disqualification under the objective test need not be disclosed. Examples of those situations are set out in the Green List of the Guidelines (Explanation to General Standard 3, d).⁵

The main contribution of the IBA Guidelines is not the objective test for independence and impartiality or duty to disclose as such, but rather to concretise the meaning and the content of objective test in context of practice international arbitration. In terms of disclosure the concretising means telling people what do disclose and what not to disclose in typical situations. This is done primarily with the “Lists” in the part II of the Guidelines. The “Lists” give direction for the practical application of the General Standards, namely examples as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. The lists naturally cannot cover all possible situations so they are non-exhaustive, and in all cases the General Standards are decisive and control the outcome.

The sample situations are categorised in three lists: Red, Orange and Green. The Red List consists of two parts: a Non-Waivable Red List and a Waivable Red List. These are lists of specific situations that typically give rise to justifiable doubts as to the arbitrator’s impartiality and independence. The Non-Waivable Red List includes situations in which the acceptance by party cannot cure the conflict. This derives from the overriding principle that no person can be his or her own judge. The Waivable Red List covers situations that are serious but not as severe. They should be considered waivable, but only if the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator.⁶

The Orange List is a non-exhaustive list of specific situations that may give rise to doubts as to the arbitrator’s impartiality or independence and in which the arbitrator has a duty to disclose the relevant facts and circumstances. The parties are deemed to have accepted the arbitrator if, after disclosure, no timely

does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.”

5 Further, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue (Explanation to General Standard 3, c).

6 Voser and Petti 2015 p. 14 - 15 summarise the Red List as follows: “Items on the non-waivable Red List per se raise justifiable doubts as to the arbitrator’s impartiality and/or independence, and as a consequence equate to a conflict of interest. Thus, an arbitrator should, if such circumstances are present, decline appointment or immediately resign. These facts or circumstances would therefore not be the subject of future disclosures as arbitrators cannot leave it to the parties to waive the conflicts arising of the facts and circumstances in such cases.” “Items on the waivable Red List also raise justifiable doubts as to the arbitrator’s impartiality and/or independence and, for the arbitrator to continue to act in his or her function, there must be a full disclosure of the conflict of interest and express agreement that the arbitrator may continue to serve despite the conflict of interest.”

objection is made. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. If a party challenges the arbitrator, he or she can nevertheless act, if the arbitrator or the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose are decisive.⁷

The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose facts and circumstances falling within the Green List.⁸

The first truism discussed in this article is that according to the IBA Guidelines (and thus according to common practice in arbitration), only facts and circumstances that are objectively problematic in relation to independence and impartiality should be disclosed. This is reflected both on abstract and concrete level. On abstract level, according to the General Standards, only the facts or circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence shall be disclosed. So the disclosure does not need to cover all the connections between the relevant persons in the arbitration or all the potential interests or predispositions that an arbitrator might have, and facts and circumstances that could never lead to disqualification under the objective test need not be disclosed. On concrete level, the Guidelines include a Green List of circumstances that do not normally constitute a conflict of interest and do not need to be disclosed.

In terms of procedural bias regulation in general, the Green List of things that need not be disclosed seems to be a rather unique solution. Normally bias regulation operates with specific criteria always constituting a conflict of interest (and thus disclosure) and additionally an open general clause. So normally the way to regulate is to specifically mention and point out clear problems and not discuss the non-problematic situations. The approach of the Guidelines can be explained with both the practical purpose and soft law nature of the Guidelines. The idea is to help professionals solve every day problems in a less complicated way. This is, however, dangerous as a regulatory strategy. It is difficult to predict all the constellations of facts and circumstances that could be linked to objective

7 The idea of the Orange List is summarised by Voser and Petti 2015 p. 15 as follows: "Items on the Orange List require disclosure from an arbitrator since the facts and circumstances are considered by the drafters as those which would give rise to doubts as to the arbitrator's impartiality and/or independence from the perspective of parties. Pursuant to the subjective and objective tests of General Standard 2, if these facts raise doubts in the arbitrator's mind as to his or her impartiality and independence, or would raise justifiable doubts from an objective third person's viewpoint, then the arbitrator does not reach the question of disclosure as he or she would be required to refuse appointment as arbitrator or resign from service."

8 Voser and Petti 2015 p. 15: "Items on the Green List by definition of the guidelines could not lead to disqualification under the objective test set forth in General Standard 2, let alone be considered from the eyes of parties as raising doubts as to the arbitrator's impartiality and/or independence, and thus need not be disclosed by an arbitrator."

independence and impartiality. In some situations, a typically unproblematic Green List issue, especially in connection with other facts and circumstances, could easily be problematic.

There is an additional element in the disclosure doctrine of the IBA Guidelines that, from general procedural law point of view, is even more particular. The Guidelines are based on the idea, or better, a soft law norm, that some things not only do not need to be disclosed but also *should not be*⁹ disclosed. This approach seems rather unique in procedural law – it is hard to imagine that there would be many attempts to set limits to disclosure.¹⁰ According to the introduction to the Guidelines (paragraph 2), there is a tension between the parties' right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence in order to protect the parties' right to a fair hearing, and the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing. Also timeliness of the proceedings has been seen as an argument and a reason for limiting disclosure in the Guidelines.¹¹ In the practical application part of the Guidelines it is also explicitly stated that "there should be a limit to disclosure based on reasonableness", and that "in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties".¹² The approach of limiting disclosure is further concretised in and by the existence of the Green List of the Guidelines.

3 Challenge: The More You Disclose the Better

3.1 The Logic of the Balancing Test in the IBA Guidelines and Reasons for Limiting Disclosure

To get started with the challenge, it is necessary to understand the logic of the balancing in the IBA Guidelines, and more specifically, the reasons for explicitly limiting disclosure. The idea of balancing different rights (in this case fairness

9 See Paragraph 1 of Part II of the Guidelines (Practical Application of the General Standards).

10 Most the times the term used in the Guidelines, too, seems to be "need not be disclosed", but the "should not be disclosed" seems to reflect a logic that goes further than just the wording of the Guidelines.

11 In addition to paragraph 7 of Part II of the Guidelines (Practical Application of the General Standards), see Voser and Petti 2015 p. 7 - 8. Voser and Petti point out that "It was also the goal of the 2004 Guidelines to set a balance between full transparency, on the one side, and unnecessary disclosures, on the other side, since excessive disclosures both hinder the arbitration process and impede a party's right to nominate an arbitrator of its choosing. This was done with the so-called "Green List" which enumerates certain situations that need not be disclosed." Voser and Petti also argue that "as to their core content, the 2014 Guidelines are no different to the 2004 Guidelines in that they try to strike an equilibrium between, on the one hand, the parties' right to disclosures of situations that may reasonably call into question an arbitrator's impartiality and independence and their right to a fair hearing, and, on the other hand, the parties' right to select arbitrators of their choosing." See also Witt Wijnen, Voser and Rao 2004 p. 433-458.

12 See Paragraph 7 of Part II of the Guidelines (Practical Application of the General Standards).

on one hand against right to select one's arbitrator and timeliness on the other) adopted in the Guidelines is as such usually a good way to approach legal problems – one rarely finds a topic where no balancing, on some level, is involved or where no balancing could be constructed. The question is, however, whether the construction of what needs to be balanced is functional. It is not evident how disclosing as such would impede the proceedings or limit the parties' right to select an arbitrator.

Firstly, the argument seemed to be that unnecessary disclosures would slow the procedure down. This is, however, not in any way self-evident. Disclosing does not necessarily take that much time. If the facts and circumstances are not objectively causing a threat to the appearance of independence and impartiality, even having to decide on the possible weak challenges should not take that much time.¹³ Even if the challenges have to be handled by an institute, the procedures could be timely and institutes have often proven to be very effective in many aspects. In any case a lot of time would be saved in comparison to potential challenges of the award, if the parties actually remained political, did not attempt useless challenges and would thus silently waive the potential grounds for post-award challenges. Maybe in some cases handling the procedures and potentially even the disputes related to challenges take some time, but then the problem seems to rather be handling the consequences in a more efficient way than disclosure as such. Further, one could argue that if disclosures lead to reactions and thus may take time, the disclosed facts and circumstances were such that the parties should know rather than things that should not be told to the parties. The logic of the argument seems wrong.

The second argument for limiting disclosure and to be balanced against fairness is parties's right to select their arbitrators. At the first glance the argument seems very indirect. It is hard to see the direct causal link between disclosure and not being able to choose an arbitrator. It would seem that actually only independence and impartiality (objective reasons for doubts concerning independence and impartiality) are the factors limiting the choice of arbitrators – not disclosure. Even if things are disclosed, the choice of arbitrators is in the end only limited if there would be objective reasons to doubt that the potential arbitrator would not be independent and impartial. One may, however, argue that if the (unconditional and absolute) duty to disclose would be very broad and broader than the actual test for independence and impartiality, there could be arbitrators that could not act as arbitrators because they could not, due to professional confidentiality, fulfill their duty to disclose, even though what would need to be disclosed would not raise doubts as to independence and impartiality.¹⁴ This does, however not justify limiting disclosure to the absolute

13 Lutrell 2007 p. 249 argues that “There are number of ways to derail arbitral proceedings, but crying bias is definitely one of the best. The reason for that is that the proceedings are usually suspended while the challenge and any subsequent appeals are heard”.

14 According to the explanation of the General Standard 3 (d), “If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.”

minimum in all cases, especially if the (absolute and unconditional) duty to disclose would be narrower than the optimal standard of disclosure.

3.2 *Is the Function of Disclosure in the System of the IBA Guidelines Purely Instrumental?*

Analysis of the balancing test of the Guidelines leads to ask whether there actually is a separate and independent duty to disclose that is broader than the duty of objective independence and impartiality, or whether the duty to disclose is actually just a corollary to the duty of objective independence and impartiality. The doctrine does not seem completely clear about this. One function of disclosure is clearly to allow the parties to know if there are things that would cause the arbitrator not to be independent and impartial and to offer them a chance to waive those facts and circumstances instead of the arbitrator stepping down. If this was the only function, then the only reason for any broader disclosure would be uncertainty and playing safe in the gray zone. The structure of the guidelines and the line of argumentation concerning the balancing above suggest that there are no other functions.

In the doctrine, however, it has been argued that disclosure may be necessary even if the facts or circumstances would not raise doubts concerning independence and impartiality. According to Voser and Petti, “(e)ven if facts or circumstances exist which, from the perspective of the arbitrator (subjective test) or a reasonable third person (objective test), do not raise doubts as to the arbitrator's impartiality or independence, arbitrators may nevertheless have a duty to disclose such information. This is due to the notion that parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view irrespective of whether they per se result in a conflict of interest.”¹⁵ This suggests that the subjective view of the parties or something non-instrumental in relation objective bias would have relevance. That is, however, most likely not the idea of Voser and Petti, since they further refer to the explanation of the General Standard 3 and argue that “the purpose of disclosure is to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further”.¹⁶ So it seems that in the end even arguments for the broader disclosure are related to gray zone problems or decisions within the margin of error, and that the basic function is still instrumental in relation to objective independence and impartiality.

So it seems that in the model of the Guidelines the balancing between the right to fair hearing and the right to select the arbitrator of one's choosing, fair hearing is instrumentally linked to guaranteeing an objectively independent and impartial arbitrator. This leads to two questions. Firstly, shouldn't then the scope of disclosure be the same as the scope of objective doubts concerning independence and impartiality. This would, to be concrete, lead to the

15 Voser and Petti 2015 p. 14.

16 Voser and Petti 2015 p. 14.

disappearance of the Orange List, or better re-conceptualising of Orange list to be examples of situations in which the arbitrator needs to decide case-by-case whether he or she is independent and impartial and whether thus a disclosure needs to be made.¹⁷ Secondly, and more importantly, the approach of the Guidelines leads us to ask whether we really should believe that there is no other justification for disclosure than the actual independence and impartiality of the arbitrator. The second question seems more interesting both from theoretical and practical perspective.

3.3 *Disclosure and Fairness Principle*

As a rule, right to a fair hearing with an objectively independent and impartial tribunal has an on-off character. If the tribunal passes the test and the threshold of being independent and impartial the criteria is fulfilled and the rule followed. As a rule, also the (instrumental) duty to disclose is on-off by its nature and it is triggered only if the fact or circumstance at hand would objectively raise doubts concerning independence and impartiality of the arbitrator.

However, due process rights should not only be seen as rules but also as principles of law.¹⁸ As a principle, right to a fair hearing, or fairness principle, does not have the on-off character, but should be balanced against other principles and applied more or less, depending on the case and other factors to be taken into account.¹⁹ Also, in relation to independence and impartiality, the content is different and broader and related to more than just the minimum requirements of objective independence and impartiality of the decision maker. As a principle, fair hearing speaks for transparency of procedure in more general sense and enhancing the perceived fairness of procedure, in this case arbitration. It is not limited to the instrumental goal of legally unbiased decision maker and it includes additional value compared to only meeting the minimum standards or requirements of objective independence and impartiality.

Linking the general procedural principle of fairness into the discussion concerning disclosure changes the game. It was concluded above that the balancing test of the IBA Guidelines does not seem useful, since the rights balanced against fairness do not seem to be in conflict with it. Further, the focus is on the rule like minimum requirements related to independence and impartiality, and disclosure is seen purely instrumental in relation that.

In the principle orientated approach, firstly, fairness in balancing of different principles should not only be directly and instrumentally linked to independence and impartiality, but rather to all aspects of procedure and all functions and connotations related to disclosure. Taking this into account, also duty to disclose

17 One could, of course, say that this is exactly what the Orange List is about since it is a kind of a “short dial” for practical application. The idea of the Orange List is, however, that disclosure has to be made even if there would be no reason for objective doubts in the opinion of the arbitrator.

18 Kurkela and Turunen 2010 p. 12–14.

19 About procedural principles *see* Bayles 1987 p. 11–14, and Dworkin 1977 p. 22–28.

would have a different meaning than in the traditional IBA Guidelines sense and it would normally be broader, since there is more speaking for it than in the instrumental approach and less limiting it than in the IBA Guidelines approach. As discussed above, the starting point for the challenge was the limitation of disclosure in the Guidelines. In addition, the focus of the Guidelines' model is mapping out when there is an absolute rule like must to disclose. In principle orientated approach the duty is softer – it is more about legally correct thing to do in the absence of exact rules.²⁰ Even if potential disclosure is broad, it is not always absolute as in the Guidelines' model.

Secondly, it is necessary to revisit what is balanced against fairness. Timeliness as counterpart of fairness would only be relevant if disclosure as such would actually cost much time in the concrete case. Right to select an arbitrator does not seem to be, at least not directly and automatically, in conflict with disclosure. One could, however, easily claim that confidentiality as a principle could, in specific situations when an arbitrator is deciding whether to make a disclosure or when deciding on rules concerning disclosure, need to be balanced against fairness in broad sense. The limiting factor in the IBA Guidelines system, right to select one's arbitrator, would be relevant in all cases only if broad disclosure would always be a prerequisite of being an arbitrator and if disclosure was directly linked to independence and impartiality. If not being able to disclose (something that is not in arbitrator's opinion risking independence and impartiality) would not always result in arbitrator having to step down or not accept the appointment, the right to select an arbitrator would not automatically be in conflict with or exclude disclosure. In the principle orientated approach a potential conflict between fairness and confidentiality in some cases would not categorically rule out disclosure in all cases, just because there could theoretically be a conflict. The concrete balancing of relevant principles would be decisive in deciding whether to disclose or not. Further, since it would be question of balancing of competing principles of law, confidentiality might at times override fairness as long as the rule like minimum requirements related to objective independence and impartiality are respected.

As a result, in the principle orientated approach there is not always a direct link between disclosure and not being able to act as an arbitrator due to lack of independence and impartiality. No direct link means that disclosure might be something that should be done even if the facts and circumstances to be disclosed would not result in lack of objective independence and impartiality. What needs to be disclosed is decided based on balancing different principles, such as fairness in broad sense, independence and impartiality, timeliness, confidentiality and right to legal representation, for example. The constellation and weight of the principles differs case by case. Independence and impartiality

20 Also Paulsson 1997 p. 16 points out the problems related to rule orientated approach: "It is important that facts which might cause doubts as to an arbitrator's impartiality and independence be disclosed, if for no other reason than to preserve the integrity of the future award. However, the infinite range of circumstances that might give rise to apprehension means that there is great scope for differences in interpreting the duty to disclose. There is a danger that over-emphasis on mechanical disclosure tests will tend to exclude the honest and do very little to combat truly pernicious machinations."

of the tribunal is naturally always guaranteed as a rule, also in the principle orientated model. So if there are facts and circumstances that give rise to doubts as to the arbitrator's impartiality or independence, it is a rule that the arbitrator shall disclose such facts in order to accept the appointment or continue as an arbitrator. If that is not the case, it should be decided based on balancing the principles that are relevant in the situation at hand.

The weight and balance of the different principles should be decided case by case, but as a general point it can be noted that the arguments related to fairness, the transparency of the procedure and enhancing the perceived fairness of the procedure for example are relevant in practically every case whereas the arguments related to confidentiality and right to select one's arbitrator only can be raised in some specific cases. Based on that, the general limitation of disclosure (some things should never be disclosed) adopted in the IBA Guidelines does not seem justified.

3.4 *Principle of Audiatur et Altera Pars as Support for Disclosure*

The procedural principle of audiatur et altera pars, opportunity to be heard, is one of the most central parts of due process and fairness principle in procedural law. It is also closely linked to the right to present one's case which is clearly one of the key elements in law of arbitration. Opportunity to be heard should be taken seriously also in procedural aspects. So one should not only have an opportunity to be heard on substantive issues but also on procedural issues, such as independence and impartiality of the tribunal. Also, for example Voser and Petti point out that parties have an interest in being fully informed of any facts or circumstances that in their view may be relevant for independence and impartiality irrespective of whether they per se result in a conflict of interest, and that the purpose of disclosure is to allow the parties to judge whether they agree with the evaluation of the arbitrator and to allow them to explore the situation further if they so wish.²¹ It's not a new idea or argument as such but placing that argument under the umbrella of opportunity to be heard gives it some additional weight.

3.5 *Parties Have an Interest in a Balanced and Receptive Tribunal, Not Only in a Formally Independent and Impartial Tribunal*

In the principle orientated model, which is not focused on the minimum requirements but genuine balancing, one could also revisit the object of disclosure. The legal criteria for independence and impartiality is most often quite open, as for example in the General Standard 2 of the IBA Guidelines (if facts or circumstances exist, which, from the point of view of a reasonable third person would give rise to justifiable doubts as to the arbitrator's impartiality or independence), and usually modern statutes and regulation concerning bias at

²¹ Voser and Petti 2015 p. 14.

least include a general clause in that style in addition to more specific criteria. Despite of that, both the regulation and the doctrine are often focused on the more specific criteria specified in the law, doctrine or soft law, and their application. According to this approach, quite correctly, an arbitrator is not biased unless there is some specific reason to question that. All and all, despite the general clauses, this could be described as a casuistic approach.²²

As in all forms of dispute resolution, a legally non-biased tribunal does not necessarily constitute a neutral or a balanced tribunal.²³ World is complex, and it is not safe to assume that a legally non-biased tribunal would also result in an objective view to facts and law. Ideology, religion, gender and history among other things result in people always observing the world from a certain perspective and having predispositions.²⁴ So no arbitrator is a *tabula rasa*, not even if the arbitrator would be non-biased in terms of law.²⁵

Even if the bias regulation is based on a casuistic approach, the balance of the tribunal and information related to the balance is not uninteresting. It could be asked whether it should somehow be taken into account that all the arbitrators in any event have some kind of a perspective into the world and thus a certain predisposition to the issues they work with. In arbitration, the idea of a balanced tribunal is actually the basis of the most common method of constituting tribunals, being that both of the parties appoint or nominate one party-appointed arbitrator. Also concerning due process requirements, it is often considered

22 Paulson (2007 p. 17) especially point out problems related to disclosure of acquaintanceships: "A particularly unpromising vector of disclosure relates to acquaintanceship. To oblige parties to appoint persons they do not know obviously defeats the very purpose of party-appointed arbitrators. Moreover, any attempts to codify this area by means of detailed reporting requirements (How many meals have you had with X? Were they lunch or dinner? How many other people were present? What did you discuss? Do you know the names of any children X may have?) is bound to backfire, causing honest people to appear suspect and not creating the slightest problem for the unscrupulous. Indeed, there is no assurance that arbitrator A, although he has never heard of lawyer X who appoints him, will not see the occasion as one which will allow him to make a new friend. Indeed, this temptation may be greater than with respect to a true friend, because true friendships are not affected by differences of opinion. In fact, the zest for regulation (as so often) might achieve an entirely undesired effect. It might create a climate propitious to the emergence of unsavoury networks of influence or information where A advises B that C is "reliable" and B returns the favour by telling A about D."

23 On definitions and meaning of neutrality in international commercial arbitration, *see* Luttrell 2009 p. 24–25. In this context it is meant to refer to a tribunal that no predisposition concerning any of the claims or the parties.

24 *See* Kurkela and Turunen 2010 p. 117 - 119, Turunen 2005 p. 149–155, Koulu and Turunen 2012 p. 190–195 and Bedjaoui p. 9: "An arbitrator is not a disembodied, floating being, without origins, or ethnic, cultural, religious, social and other attachments."

25 Paulsson 2007 p. 14 sums this up well: "It is sometimes said that litigants are entitled to judges who will examine their case with an open mind. In support of this assertion, it is pointed out that attachment to preconceived notions can create a far stronger bias than friendship. However, a litigant will be certain to address perfectly open minds only if he is prepared to be judged by very young children. Ordinary judges are burdened with a host of preconceived notions which inhabit them as a *déformation professionnelle*; yet in most courts a lawyer will not have a ghost of a chance if he seeks recusal of a judge on the grounds that the latter is known to be skeptical of a legal theory on which the lawyer bases his case."

relevant how fair the procedure in whole is. Applying this to the tribunal and arbitrators, the balance of the tribunal could be relevant when deciding questions related independence and impartiality of one arbitrator.²⁶ The question here is, however, not independence and impartiality but rather disclosure. From party perspective the interest is also to have a tribunal that understands the party's approach to the case, party's arguments and party's interests, and not only a tribunal that is formally unbiased but shares the opposing party's perspective to world, business and law. One could well ask if in some cases an expert opinion given for a big corporation in another unrelated case would be lesser a risk than a shared socio-economical position or even intertwining social networks with one of the parties. One could claim that socio-economical position that business lawyers share with for example bankers and do not necessarily share with young startup game developers would affect deciding hard cases on facts and law more than a minor financial interest conflict that would, according to law, force an arbitrator to step down. Even if there would be no grounds for challenge, understanding the tribunal's commitments and approaches is not unimportant to the parties. When choosing an arbitrator the parties invest a lot of time trying to find arbitrators whose competence and understanding they could, from their subjective party perspective, trust. Even if a party cannot affect the composition of the tribunal, it could be highly beneficial for the party to understand where the tribunal comes from in terms of social and professional networks and professional activities, if not religious or political approaches which seem to belong more in the private sphere. One could even claim that this is part of an opportunity to be (actually) heard. That is why there would be an additional value in disclosure even if would not concern something that could lead to the arbitrator stepping down or declining the appointment.

The same logic concerns also social relations. The arbitration community is small, and especially in small countries, such as the Nordic countries for example, the whole legal community or dispute resolution community is often not too big either. From fairness and especially perceived fairness perspective, it would be beneficial if also case related and parties related social networks were at least to some extent disclosed. The conflict of interest regulation and soft law

26 Also the ECHR has taken this approach in relation to interest organisation related judges in state courts, *see* decision *Langborger v. Sweden*, 22 June 1989: "In the applicant's submission, his claim for a fixed rent and no negotiation clause was not examined by an independent and impartial tribunal. His true opponents, he argued, were the landlords' association and tenants' organisation inasmuch as his proposal to delete the negotiation clause from the lease threatened the interests of both organisations since they derived their very existence from rent negotiations. As the lay assessors sitting on the Rent Review Board and the Housing and Tenancy Court were committed to the defence of those interests, they could not assess his claim with the necessary independence and impartiality." The ECHR decided that a there had been a violation of Article 6 para. 1: "As regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court notes that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. As the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim."

and the facts and circumstances that might raise doubts about the independence and impartiality of the arbitrator are (naturally) focused on the relationship with the parties. The cases are most often, however, handled by lawyers. It would not be completely irrational to say that the social contacts between the lawyers (including the arbitrators) would be more likely to affect the arbitrators' attitude towards the case than the social contacts between parties and the arbitrators. Also, the contacts and relations between all the lawyers involved (including the arbitrators) are likely to be more visible in the course of the arbitration. Broad disclosure would clean the air, and the parties' representatives that possibly participate in the proceedings or the lawyers of the opposing party would not have to wonder what is going on if the arbitrators for some reason seem to know one of the lawyers better than the other. One often hears that the problem should be solved by keeping professional distance during the proceedings, and that could even extend to other lawyers in the same firm as the counsels of the parties. Of course *ex parte* impression or giving grounds to doubts about *ex-parte* communication should be avoided, but wouldn't it simply be better to disclose more so that one could act normally. From this perspective the rule of thumb should be that if one would need to change the way one acts, it would be better to disclose. This is not being overly sensitive or suffering of "due process paranoia"²⁷. It is rather to encourage not to stop doing things one would normally do and which would not objectively and seriously risk independence and impartiality. An arbitrator should rather simply disclose those facts and circumstances, since in the balancing of different principles fairness often does not even have a counterpart and thus disclosure does not even always have a price tag.

3.6 *Practical Consequences*

Broader disclosure has some practical consequences. Should this approach be accepted, the procedures related to disclosure should be adjusted to include also other issues than those directly linked to facts and circumstances that could, in the opinion of the arbitrator or the arbitrator candidate, raise doubts concerning the independence and impartiality. This could be something that arbitral institutes, for example, could take into account in the questionnaires and procedures related to appointments.

4 Second Truism: Avoid Challenges And Step Down if Challenged

One reason for restricting disclosure is the fear that broad disclosure would cause unsubstantiated challenges. This is not only reflected in the reasoning for limited

²⁷ Queen Mary and White&Case, 2015 p. 3: "A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ("due process paranoia")".

disclosure discussed above, but according to disclosure war stories, also in that people acting as arbitrators try and avoid situations that they think might lead to a need to disclose. For example, an arbitrator acting as a panelist in a legal seminar asked the prospective moderator of the seminar, an associate lawyer working in the same firm as the counsel of one of the parties in the arbitration, not to accept the moderator position to avoid the potential need to disclose the relation. The problem here was not the scope of disclosure but the tendency to avoid disclosure. Concerning the scope of disclosure, it might increase the fairness of the proceedings to disclose such connection even if it is absolutely clear that such a connection could not reasonably raise doubts about the independence and impartiality of the arbitrator.

Further, it is a practical rule of thumb, especially before the proceedings in the appointment phase, that a prospective arbitrator would not accept an appointment if there are already challenges due to disclosure or other reasons. Some argue that the same rule should also apply for challenges during the proceedings.²⁸ This is surely one of the reasons for tendency towards a narrow rather than broad disclosure.²⁹ Also, this approach might have some roots in the “old school gentlemanly model of arbitration” in opposition to procedurally orientated, business like and more adversary arbitration.

5 Challenge: Challenges are Business as Usual and Nobody Should Step Down If There Are No Reasonable Doubts about Impartiality and Independence

The general understanding in arbitration circles seems to be that challenges are getting more and more common, more like part of business as usual than a rare

28 *See* for example Trakman 2007 p. 126: “The second view, less popular perhaps, is that, when a party raises a conflict before or during an arbitration proceeding, the rule of thumb is for the arbitrator to step aside, even if that arbitrator does not believe the conflict is sustainable. The perceived risks in not declining the appointment or stepping down, is fear that the proceedings might be disrupted, a challenge might follow, and the reputation of the arbitrator might be impaired.” Concerning the Finnish practice, Ovaska 2009 p. 114 argues that the arbitrators rarely have to decide on a challenge, since normally the challenged arbitrator steps down whether he considers the challenge justified or not. This is also the view adopted in government’s proposal 202/1991 for the Finnish arbitration act.

29 As stated in the IBA Guidelines Introduction (paragraph 1), “The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues. Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.”

event due to a fatal mistake.³⁰ Arbitration, as all practice of law, has become a business. At times the interest of a party is to delay and complicate the proceedings and in these cases there is less to stop or limit the lawyer from doing this in the business-like approach. Dealing with guerilla tactics has become a common discussion topic in arbitration events.

This is an on-going development regardless of revisiting the doctrine of disclosure. Should the approach to disclosure change towards being even more open, it can be assumed that the amount of challenges might increase. As already discussed above, challenges as such are not necessarily dangerous but how one reacts to and handles them is what makes the difference. If disclosure would not be limited to only situations in which, according to the arbitrator, doubts concerning independence and impartiality could objectively raise, this should be taken into account in handling the challenges.

One should not be afraid of challenges – irrational fear like “due process paranoia” rarely leads into anything good. If we continue to discuss the example above about the panelist arbitrator who asked the moderator working in the same firm as one of the counsels to step down from the moderator role, the problem was not disclosure as such, but rather the fear of disclosure and its consequences. The arbitrator tried to avoid disclosure for no good reason. Actually, the result and the paradox in that case was that from bias point of view there would have been more reasons to disclose the favor which the moderator associate lawyer did to the arbitrator by giving up moderating after being asked for that by the arbitrator than the fact that the associate lawyer would have moderated the panel in question. Even being in the same panel without disclosing it would have been better than asking for a favor and not disclosing that.

So the challenges should be seen as everyday business and handled accordingly. This should concern parties, arbitrators and the institutes. Arbitrators should not step down or not accept appointments due to unsubstantiated challenges where no reasonable doubt about independence and impartiality exist.³¹ The due process paranoia discussed in the Queen Mary

30 Trakman (2007, p. 124) discusses a challenge by V.V. Veeder claiming that the Guidelines have provided “a well-sprung platform for new tactical challenges to arbitrators, a malign practice that appears to be increasing everywhere”. Trakman argues that the problem is not caused by the Guidelines: “Nor should the Working Group and Guidelines be held responsible for a pervasive problem that has plagued modern international commercial arbitration from the outset. Parties to international commercial arbitration have taken advantage of the Guidelines in part because of the vexing problem of overly litigious counsel that international commercial arbitrators have faced since long before the Guidelines came into effect.” Also Luttrell 2007 p. 4 points out that the number of challenges has been increasing and refers to “black art” of bias challenge in international commercial arbitration. See also Luttrell 2007 p. 249: “Pleading the appearance of bias is one of a raft of tactics deployed by parties who seek to delay and disrupt International Commercial Arbitration proceedings and deprive their opponent of the arbitrator of their choice”.

31 See also Trakman 2007 p. 126, who argues that “an arbitrator should not be intimidated to resign by the allegation of a conflict, or even by the proffering of evidence of one. A decision not to accept an appointment, or to resign after appointment, should be well considered and informed; it should also be guided by fathomable standards and rules of disclosure.” According to Heuman 2003 p. 240, “an arbitrator may prefer to resign of his own free will

survey is not healed with less due process but rather with less paranoia. This is not just a practical argument but also legally relevant point of view.

The justification for limited disclosure was, as discussed above, need for timeliness and right to select one's arbitrator. It seems that the real place for those arguments is not in connection with disclosure but rather in connection with what to do with challenges. The procedures are not necessarily slowed down by challenges, but surely by the decisions to unnecessarily step down or not accept an appointment. So the argument is as such legally sound but has less logical connection with disclosure than with challenges. Also the parties' right to select an arbitrator of choice would not be risked by disclosure but rather by stepping down or not accepting an appointment due to unsubstantiated challenges. Probably the most concrete risk to parties' right to select an arbitrator of choice would be the chosen arbitrator stepping down or not accepting the appointment for no good reason.

Further, and most importantly, if one could slow down the proceedings by having the arbitrator resign due to unsubstantiated challenges, access to justice would be risked, or better, reduced. Access to justice, or providing access to arbitration and effective protection for the substantive rights of the parties is one of the most central principles of procedural law and also the law of arbitration. The track to protecting one's substantive rights has to be accessible and effective. An arbitrator has a duty to enhance access to justice by handling the challenges effectively and accepting them only when they are substantiated. Access to justice, just as fairness of the proceedings, is a principle of law and has to be balanced against other principles. There are many fairness based and rule-like minimum requirements concerning independence and impartiality and in those cases obviously fairness overrides access to justice as an argument for not accepting a challenge. This does not mean that access to justice would not be important. In situations where the minimum requirements related to objective test of independence and impartiality would not be infringed, on general level guaranteeing access to justice provides for not resigning. In hard cases where it is not clear whether the arbitrator actually could be biased, the two principles will need to be balanced, taking into account their relative weight in the situation at hand. The more important not resigning would be for providing access to justice, the more serious the objective doubts concerning independence and impartiality should be to justify resigning. It should be noted that at times resigning would provide for more effective access to justice, especially if the post-award challenge would be likely to succeed and if the delay or costs caused by resigning would not be significant.

All these arguments strongly support the claim that an arbitrator should not and does not have a right to resign or withdraw without a reason.³² Regardless whether the mandate and the position of an arbitrator is constructed to derive from contract or law, an unsubstantiated challenge does not constitute a

before a challenge has been decided, e. g. as soon as one party has challenged the arbitrator or he has disclosed a circumstance which may be disqualifying. Unless both parties accept the termination of his mandate, the arbitrator is not entitled to resign merely to avoid a difficult situation".

32 Born 2009 p. 1612–1613.

justification to resign. This is supported by legal principles and balancing access to justice and fairness on a general level and in a concrete case, not just by authoritative statements in the doctrine or some soft law instrument.

Raising the question of the duties of the arbitrator leads naturally to questions of liability. One of the reasons why arbitrators worry about decisions on challenges might be fear of liability. It is possible that a failure to disclose a fact or a circumstance that would objectively raise a doubt as to the independence and impartiality of an arbitrator could lead to the arbitrator being liable for the damages caused by the proceedings leading to an award which is set aside.³³ In any event, it is difficult to imagine that liability would be extended to a *ex-post* false procedural decision concerning independence and impartiality. If the arbitrator considers his independence and impartiality differently than a court later on, it is not likely that anything else than manifestly wrong decision could lead to damages.³⁴ It would even seem more likely that the arbitrator could be liable for damages related to stepping down for reasons not good enough. Depending on whether and how the arbitrator can be replaced the damages could be comparable to damages in cases of setting the award aside or the award not being enforceable. If there is a duty not only to perform the task agreed but also to safeguard access to justice, timeliness and right to select one's arbitrator, the decision to leave without grounds is just as wrong as the decision not to disclose something that should be disclosed.

6 Conclusion

The first truism was that disclosure needs to be limited. According to the IBA Guidelines disclosure should be limited to facts and circumstances that could

33 *See* for example the decision KKO 2005:14 by the supreme court of Finland (31.1.2005). The Finnish Supreme Court awarded damages to a party who claimed that the arbitrator had breached his duty to disclose that he had given expert opinions in another case to one of the parties, which was a major Finnish bank. The costs of the arbitration incurred to a party could have been avoided, if the arbitrator had disclosed and tribunal would have decided on the challenge. *See* also the commentary on the decision by Möller 2006 *passim*. According to Möller (2006 p. 98), if the arbitrator "had not failed to disclose the ground for challenge he would not have been liable to compensate the damage caused to the Ruolas, even if the challenge had not been accepted by the arbitral tribunal and the award had then been set aside." Möller does not answer the question whether an arbitrator could in some cases be liable despite a disclosure Möller 2006 p. 98): "Does this mean that an arbitrator cannot be liable for damages when an award has been set aside on the ground that he was disqualified, if he had disclosed the ground for challenge but the arbitral tribunal had not sustained the challenge? It seems open to doubt whether this dictum allows such a conclusion. In such (hopefully only theoretical) cases in which an arbitral tribunal has rejected a challenge so obviously justified that any honest and knowledgeable arbitrator would have accepted the challenge, it would — at least not in a country where arbitrators do not enjoy total immunity — hardly be reasonable not to hold an arbitrator liable for damage caused by the fact that the award was set aside."

34 According to Born 2009 p. 1640, "despite the possibility of civil liability, virtually all legal systems accord arbitrators a substantial degree of immunity from civil claims arising out of their conduct of arbitration."

raise objective doubts about the independence and impartiality of the arbitrator. In this article this is challenged on the basis of general doctrines of law of arbitration and, more specifically, balancing of legal principles. Fairness should not only be seen as a reason for a set of rule-like minimum requirements concerning disclosure, but also as a legal principle. In addition to following the minimum requirements, one should determine the scope of disclosure by balancing the principle of fairness against other relevant principles. The arguments for limited disclosure, namely timeliness of the procedure and the parties' right to select an arbitrator, are not always in conflict with fairness supporting broader disclosure. If other principles are not in conflict with and do not outweigh the principle of fairness in a specific case, limiting disclosure to the minimum requirements is not justified. Further, *audiatur et altera pars* (opportunity to be heard) as a part of the fairness principle concerns also procedural issues and facts and circumstances related to independence and impartiality. Furthermore, the parties have an interest in understanding the tribunal's predispositions even if the tribunal would be legally independent and impartial. Especially in relation to social and professional contacts between the lawyers in different roles in the proceedings a rule of thumb is suggested: it is better to disclose than to change the way one acts with the colleagues. In general, if there are no limiting factors, the more you disclose the better.

The second truism was that challenges should be avoided and that an arbitrator should resign if challenged. The view in the article is that challenges are business as usual and that an arbitrator should only resign for a valid reason. To start with, gentlemanly behaviour is not a proper justification for stepping down. One has to take into account the duty to provide access to justice to the parties and in hard cases balance that against fairness. Due process paranoia is not healed with less due process but rather with less paranoia.

The topics also raise a broader question about law of arbitration: in addition to the agreement of the parties, the decisions should always be primarily based on law and legal principles embodied in the general doctrines rather than on soft law instruments. After all, it is about law, not a question of vote or power of the loudest.

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