Remarks on Arbitrators’ Independence, Impartiality and Duty to Disclose in Investment Arbitration

Loretta Malintoppi
Eversheds LLP, Paris

I would like to shift the focus of the debate to the topic of independence and impartiality of international arbitrators which presents some unique features. For reasons of time, I will limit my comments to a number of discrete points, with particular respect to investment arbitration.

Over the last decade, the debate regarding conflicts of interest and impartiality of arbitrators in the field of international arbitration has become quite lively. This, in my view, is due more to the extraordinary growth of arbitration than to an actual increase in the number of arbitrators’ challenges. With arbitration becoming more wide-spread and more practitioners from different legal cultures getting involved in this field, more tactical – and sometimes questionable – objections to the appointment or confirmation of arbitrators are being raised.

The landscape of international arbitration has particularly been affected by the proliferation of investment treaty disputes. Since these cases involve States, and may affect public interests, they represent quite a different type of dispute than conflicts between private commercial parties. Therefore, it is legitimate to ask, when it comes to investment arbitrators’ impartiality and independence, whether there exist any specific requirements in the field of investment arbitration, above and beyond what is required in international commercial arbitration. After all, all arbitrators (whether they serve in investment or commercial arbitrations) are under an obligation to be independent and impartial and must be perceived as being independent and impartial. The question arises whether in investor – State disputes the bar needs to be raised any higher or not.

It is true that, given the political and economic implications of investment disputes, investment arbitrators have the additional responsibility of
an award which may have over-reaching implications that go beyond the case at hand. Although there is no rule of precedent in international law, and no hierarchy of international tribunals, awards in the field of investment arbitration are often published and are cited copiously by litigants in investment disputes, particularly when they are rendered within the institutional framework of ICSID or NAFTA. Accordingly, they are relied upon by practitioners and tribunals as forming part of the growing body of investment case law, which has been equated to a *jurisprudence constante*. Some may argue that the authoritative force of these awards is enhanced by the fact that investment tribunals are called upon to decide similar legal issues, notably at the jurisdictional phase, the interpretation of similar treaties and the appreciation of frequently similar governmental actions. Others point to the inconsistent treatment of similar issues by different tribunals.

These peculiarities of investment arbitration, coupled with the fact that the same practitioners often act as both arbitrators and counsel, have led to the phenomenon of the so-called “issue challenges”, i.e. challenges of arbitrators who have acted as counsel (or as arbitrator) in another dispute of a similar character and may have adopted in that context certain positions regarding issues which are seen as being common to both disputes. The rationale of these challenges is that the arbitrator in question may not be able – or may not be perceived to be able – to maintain a totally unbiased approach to the same issues in the case where he or she is called to act as an arbitrator.

Ultimately, it boils down to the French notion of *indépendence d’esprit*: can an individual who has been appointed to decide certain legal issues maintain a neutral stance vis-à-vis the case if that individual is also acting as counsel in a separate arbitration (even if it involves different parties) where the same, or similar, legal issues play a central role?

If put in these terms, the situation is not entirely dissimilar from that of a challenge based on an opinion previously expressed by an arbitrator in an article, a speech or a legal opinion. There may be a duty to disclose this, and the parties should exercise their due diligence in investigating the opinions previously expressed by a potential arbitrator, but these should not ordinarily constitute grounds for disqualification, and usually they do not in commercial arbitration, unless of course the arbitrator has taken a position on the specific matter in dispute which may show bias or his/her