Should Arbitrators Come from Utopia Island?

Kluwer Arbitration Blog
December 6, 2018

Carlos A. Matheus López (CML Arbitration)

Please refer to this post as: Carlos A. Matheus López, 'Should Arbitrators Come from Utopia Island?', Kluwer Arbitration Blog, December 6 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/06/should-arbitrators-come-from-utopia-island/

The arbitrator's duty of disclosure is often subject to misunderstandings, particularly in regards to its content and scope, as well as its relationship with the independence and impartiality of the arbitrator. That is why for almost a decade I have been raising in my publications, both on international commercial arbitration and investment arbitration, various criteria to clear doubts about such concepts.

Recently, this academic work has paid off, as the Peruvian Supreme Court issued a landmark decision on November 27, 2017 (Cassation No. 2267-2017, Lima). [fn]The Peruvian Supreme Court has honored me by citing me and supporting its resolution on my relative criteria on the arbitrator's duty of disclosure and on the independence and impartiality of the latter.[/fn]

The case concerned an arbitral award that had been annulled on the grounds that an arbitrator had violated the duty of disclosure by failing to declare that he knew two of the plaintiff's lawyers, even though they did not participate in the arbitral proceedings. Furthermore, the arbitrator and one of such lawyers had once been part of the same arbitral tribunal; albeit one hearing and deciding an unrelated dispute. Therefore, the Superior Court (Judgment of March 1, 2017) considered that the mere omission of the disclosure of such facts, generated the existence of bias on the part of the arbitrator, with the consequent violation of their independence and impartiality.

For its part, the Supreme Court, in disagreement with the Superior Court, dismissed the decision of the latter, establishing in its decision various criteria that, due to their eventual usefulness for international arbitration, are detailed below.

First, as to the independence and impartiality of the arbitrator, it points out to us that -as I have argued *ad litteram* in one of my books– *"Independence refers to the position or situation of the arbitrator, while impartiality refers to an attitude of intellectual or psychological nature (…) independence, basically consists of a situation of non-dependence on a party, while in impartiality, it is important not to be partial, that is, not to demonstrate prevention, allowing itself to be invaded or dominated by preconceived opinions and external factors to the merits of the case"*.

Second, regarding the duty of disclosure, the Supreme Court points out -citing again another one of my books – that *"The duty of disclosure is a preventive means that helps to limit the risk of challenges to the arbitrator and/or annulment of the arbitral award, based on a supposed failure to fulfill the independence and impartiality requirements. In order to help the parties determine the independence and impartiality of the arbitrator, there needs to be complete transparency regarding all relationships that the arbitrator may have with the parties or the dispute"*. Only those circumstances that generate justifiable doubts about the independence and impartiality of the arbitrator should be revealed, since *"(…) the doubt that is admissible in the arbitration process is*

that, objective, justified in circumstances that causes the distrust or suspicion of an arbitrator, since its existence affects the independence and impartiality of the latter (…) we can indicate as characteristics of the "justifiable doubts" the following: 1) Motivation: The doubt must be "justified", not being arbitrary; and, 2) Objective character: The justification is objective because they are "the circumstances" that create doubt about the impartiality and/or independence of the arbitrator".

Third, regarding the scope of the duty of disclosure, it states that *"it is necessary to conclude that although the arbitrator is obliged to reveal all justified doubts that could cast serious doubts on or question his impartiality and independence in his arbitration practice, nevertheless, he must not fall in any way in that absurd or nonsense of revealing everything that comes to his mind, therefore it being logical to reason that the arbitrator was only obliged to reveal what is important or relevant to the proper conduct of the arbitration, but not that which is unimportant or irrelevant to the achievement of the same, given that there would be a serious risk that arbitration will unnecessarily be delayed and therefore not be fulfilled with the purposes for which it was created"*. In this sense, it must reveal *"only that which must be substantial and relevant to the proper functioning of the arbitration procedure and omitting everything that means unnecessary delay when it understands that there is nothing useful in pretending to inform even the most insignificant and irrelevant things, since if so, the arbitration procedure will be irrevocably condemned to oblivion as a useful alternative for the solution of disputes"*.

The Supreme Court's analysis on the scope of the duty of disclosure makes sense, because as we have argued in a book chapter, nobody is absolutely independent and impartial. Also, if that was the objective, arbitrators would have to come from Utopia Island, as imagined by Thomas More. Obviously, the arbitrators are not humans isolated in some strange island disconnected from the world, who are called to our world to arbitrate a case, and then when the case is done they return to their island to await, unpolluted, the call to arbitrate another case. Arbitrators are human beings who by nature establish relationships of different levels with people, places, things, ideas, and because of this, biases are inevitable. In such a way, the problem is one of intensity, so when deciding what to reveal, it is convenient for the arbitrator to report all the possible circumstances that may generate justified doubts about his independence and impartiality. In addition, we must be aware that excessive disclosure can generate as many problems as insufficient disclosure. Well, if an excessively scrupulous arbitrator reveals links that usually would not generate doubts, this could cause the parties to wonder if there is anything beyond what is apparent. Although, if you have any doubt about making a disclosure or not, it is preferable that you choose to reveal this conflicting circumstance to the parties.

Fourth, regarding the failure to fulfill the duty of disclosure, the Supreme Court states that *"the mere omission of the duty of disclosure does not immediately suggest the existence of any bias on the part of the challenged arbitrator nor the violation of the principles of independence or impartiality that the arbitrator is subject to, for in order to establish a breach of duty of information, it is required that such omission in the declaration is relevant or transcendental and that it therefore affects the proper conduct of the arbitration process, which is not evident in the present case since the challenged arbitrator was not obliged to disclose the aforementioned circumstances insofar as they were without interest for the proper conduct of the arbitration procedure. (…) Indeed, although the duty of declaration is a fundamental element in the development of the arbitration procedure, it should not be forgotten that not every omission in the information must necessarily lead to an infringement of the principles of independence and impartiality, given that (…) the omission in the duty of information must be of such an entity and significance that they affect the proper development of the arbitration process"*. And indeed, what is indicated makes sense, since the mere omission of the duty of disclosure does not per se suggest the existence of partiality and/or dependence on the arbitrator, which will only happen when the undisclosed circumstance constitutes a justified doubt about the

independence and / or impartiality of the arbitrator.

Finally, we consider that the criteria established by the Peruvian Supreme Court decision could not only be useful for the improvement of the Peruvian arbitration practice in the matter of the disclosure obligation, but also for the global arbitration community.