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Severe Breaches of Duty of Confidentiality and Impartiality in the Dispute between Croatia and Slovenia: Is Arbitration Immune to Such Violations?

Patricia Živkovi? (University of Aberdeen) · Wednesday, July 29th, 2015

On July 22, 2015, the transcripts and the audio recordings of the conversations between Dr. Jernej Sekolec, one of the arbitrators in the arbitration regarding the territorial and maritime dispute between the Republic of Croatia ("Croatia") and the Republic of Slovenia ("Slovenia"), and Ms. Simona Drenik, one of the Slovenian representatives in the proceedings, became a centre of a media scandal. The public was granted an opportunity to hear and read about their telephone conversations which took place during the proceedings and encompassed discussions on the tribunal's deliberations, the probable outcome of the case and development of further strategies, including the possibility of lobbying with other arbitrators. The tapes were not officially declared authentic. Dr. Sekolec resigned on July 23, a day after the recordings were made public. On July 27, 2015, the Prime Minister of Croatia announced Croatia's withdrawal from the arbitration and suspension of the arbitration agreement. However, Slovenia, determined to preserve the proceedings, nominated a new arbitrator on July 28, 2015. According to the Slovenian media, the newly nominated arbitrator is not a Slovenian national, but a French lawyer Ronny Abraham, President of the International Court of Justice. This case stands out as a precedent for many legal issues, which cannot be covered in one post. The focus of this post will, therefore, be the immunity of arbitrators to severe intentional breaches of duty of confidentiality and impartiality and the sufficiency of the procedural remedies which are available to the parties.

A brief reminder: Croatia and Slovenia entered into Arbitration Agreement on November 4, 2009, according to which they were to submit their territorial and maritime dispute to arbitration. The Permanent Court of Arbitration ("PCA") was to act as a Registry, and under Article 6(2) of the Arbitration Agreement the PCA Optional Rules for Arbitrating Disputes between Two States ("Rules") were the applicable rules of procedure. According to the Press Release published on the PCA's website on July 10, 2015, the arbitration has been in progress for three years, the two-week hearing was concluded in June 2014 and the award was planned to be rendered in mid-December 2015.

The current scandal, however, did not come out of the blue. It was preceded by serious signals in this direction. Namely, on May 5, 2015, a letter sent by the Tribunal to the Agents of both States was published on the website of the PCA. This letter addressed an issue "*that one Party would have been privy to confidential information related to the Tribunal's deliberations*" – a doubt which was raised after Slovenian Foreign Minister gave certain bold statements in media related to

the outcome of the dispute. The Tribunal reminded the Parties of their obligation under Article 10(1) of the Arbitration Agreement to "*refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal*", and referred to the confidentiality of the deliberations until issuance of an award as "a matter of highest priority". The Tribunal finished the letter by stating that is "*confident that no information about the likely outcome of any aspect has been disclosed*". Two and a half months later we are witnessing the opposite.

Putting aside the political sensitivity of the situation, legal analysis of this case confirms clear violation of the duty of confidentiality, or more specifically – the violation of secrecy of tribunal's deliberations. This duty is directly connected with preservation of the tribunal's independence and impartiality. The stakes which are jeopardized by these violations are set really high. The first one is, of course, the legitimacy and credibility of the arbitration proceedings at issue. The second one is the reputation of Dr. Sekolec, a renowned arbitrator who arbitrated in multiple institutional and *ad hoc* arbitrations. Finally, this jeopardizes the reputation of the institution which acted as the Registry, and also the reputation of arbitration community as a whole. The main question is: Do we have available legal remedies which could cure these proceedings from such severe violations?

When it comes to the reputation of the arbitrator, the answer is deeply rooted in the sociology of arbitration. Can an arbitrator redeem himself or herself after such manifest violation of his or her duties? Reputation of the arbitrators is built through years and years of experience. At the same time, one should not underestimate *the power of publicity*, the effect of which can sometimes undermine the negative aspects of an arbitrator's behaviour.

Furthermore, the issue is whether the breach of duty of confidentiality, i.e. violation of secrecy of tribunal's deliberations can trigger the personal liability of an arbitrator. The confidentiality of deliberations was granted directly in Section 9.1 of the Terms of Appointment which stated that

> "[t]he Parties shall not engage in any oral or written communications with any member of the Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings."

Moreover, Article 7 of the Arbitration Agreement provided for "no individual or dissenting opinions", which clearly reaffirmed the confidentiality of deliberations. Can there be any personal liability for an arbitrator who breached such a clear obligation? And under which applicable law? If there is immunity from liability, should such immunity survive intentional violations?

Furthermore, it is widely accepted that the principle that arbitrators should be independent and impartial is inevitable in international settings. The only exception to this rule is sometimes found in domestic arbitration in some jurisdictions, where party-appointed arbitrators can be deemed to be representatives of the parties' interests within the tribunal. Perhaps this is the perfect moment to pose the question whether there is such thing as an "arbitrator free from bias"? In the case at hand, the obligation for arbitrators to be independent and impartial was, however, undoubtedly imposed by several articles of the Rules (Article 6, 9 and 10). If challenge was successful and the arbitrator resigned, Article 13 of the Rules provides for a replacement of the arbitrator. However, under Article 14 the decision to repeat the hearings will be solely at the discretion of the arbitral tribunal.

The issue of the arbitrator's independence and impartiality is endlessly discussed in academic and practical circles. The centre of such a discussion is the challenge claim and a standard under which

such claim is decided: the reasonable or justifiable doubt standard, the quasi-certain standard or the standard of an apparent or actual partiality. This case sets its own standard – standard of certain partiality – and goes even beyond these discussions. The challenge in this case was obsolete due to the arbitrator's resignation and partiality is proven without any doubt. So, is the replacement of the arbitrator a sufficient remedy in a given case?

The moment in which such replacement takes time is also relevant. All the written stages already took place, and the hearing was held and closed a year ago. According to the words of the Tribunal itself "[t]*he Parties included with these pleadings nearly 1,500 documentary exhibits and legal authorities, as well as over 250 figures and maps.*" How much time will the newly appointed arbitrator need to get acquainted with such an abundant amount of submissions with due diligence? And more importantly, how much can he contribute in a situation where the outcome of the case is already decided?

On one hand, the principle of time and cost efficiency promotes the continuation of the proceedings in accordance with the Rules. However, it leaves the question open: do we have a remedy against such severe violations of integrity of arbitration proceedings? As mentioned above, Croatia announced withdrawal from the arbitration, but we are still waiting for the tribunal's response. Another solution might be to conduct the proceedings *de novo*, but in that case we are confronted with an issue who should bear the costs of such new proceedings.

In conclusion, the arbitration community is confronted with not so new, but definitely redefined issue. So far, the parties struggled to prove and present the circumstances in order to meet the standard under which the arbitrator is considered to be bias. But what if we are confronted with direct evidence, not just with strong circumstantial indications? How to address *severe* and *intentional* breaches of arbitrator's duty and to preserve the integrity of arbitration proceedings when one of the arbitrators turns out to be *actually* partial *without any doubt*? This kind of cases is still an exception, and will hopefully remain so. Still, this is an alarming reminder that perhaps rethinking the remedies for such misconduct should find its place on the arbitration table. The regulation of arbitrators' liability and procedural consequences of such breaches certainly deserve attention and possible harmonization on the global level. Otherwise, cases such as this one may be used as a basis for a development of hostility against arbitration as such, something that this community was fighting against for a long time.

This entry was posted on Wednesday, July 29th, 2015 at 9:05 am and is filed under Confidentiality, Croatia, Independence and Impartiality, Slovenia, State-to-state arbitration
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