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The New RF CCI 2021 Rules on Impartiality and Independence of Arbitrators: A Precondition to Arbitral Justice in Russia

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The requirement that a tribunal be impartial is a fundamental procedural principle. It is not surprising, then, that under Art. 18 of the Russian Arbitration Act, arbitration proceedings are conducted, first and foremost, based on the principle of impartiality and independence of arbitrators. Although the Russian International Arbitration Act, based on UNCITRAL Model Law 1985, does not mention such a principle, it still sets out that arbitrators shall disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

The initial version of Russian Chamber of Commerce and Industry's Rules on Impartiality and Independence of Arbitrators was adopted in 2010 (the "**2010 Rules**"). The Rules significantly contributed to establishing arbitration as a reliable way to resolve disputes in Russia. The 2010 Rules determined the specific conflict of interest scenarios, procedures for disclosure by the arbitrators and challenge to them. In the wake of the 2015 arbitration reforms and the 2014 review of 2004 IBA Guidelines on Conflict of Interest in International Arbitration (which served as a model for a significant part of the 2010 Rules), the reform of the 2010 Rules became an increasing likelihood. It thus came as no surprise that, on 1 November 2021, the Russian Chamber of Commerce and Industry (the "**RF CCI**") adopted a new version of the Rules on Impartiality and Independence of Arbitrators ("**2021 Rules**").

The 2021 Rules implement some of the key changes made in the 2014 IBA Guidelines. These include those regarding the disclosure of third-party funders and disclosure duty of parties. Other amendments – such as introducing binding nature of the Rules and med-arb clauses or relating to the disclosure's lists and challenge procedure – are also addressed.

Binding Status of the 2021 Rules

In arbitrations administered under the auspices of the International Commercial Arbitration Court ("**ICAC**") and the Maritime Arbitration Commission ("**MAC**"), and in accordance with the RF CCI rules, the 2021 Rules are mandatory for arbitrators and parties. Beforehand, according to the

Preamble of the 2010 Rules and court practice, they served as advisory guidelines. However, 2021 Rules have omitted any reference to their advisory nature. In doing this, their wording is brought in line with the reformed arbitration acts as well as the long-accepted practice. By referring their disputes to ICAC or MAC, both parties and arbitrators should have regarded to the fact that Rules become part of the arbitration agreement.

Third-Party Funding

The authority of arbitral institutions to request that the parties disclose whether they are receiving support from third-party funders (TPF) is generally recognized today.

Article 4(7) of the 2021 Rules extends the subjective scope of duty of impartiality and independence to situations of funding or any other financial support of the arbitral proceedings and to reimbursement of related expenses by the persons who are not a party to arbitration but have an economic interest in its outcome. This would cover TPF – from both corporate entities and individuals – paying arbitration fees for a party in a dispute.

Combining Arbitrator and Mediator Powers

According to Article 9 of the 2021 Rules, the same person is allowed to exercise the powers of both arbitrator and mediator in the same case or a different case related by the nature of the claims, but with the consent of the parties. What is important to note is that combining such powers in a med-arb clause or their content-wise incongruity cannot, as such, constitute a ground for challenge.

The Lists

Like the IBA Guidelines, the Rules' Lists contain specific potential disclosure scenarios.

The situations included in Article 5 of the Rules (Red List) clearly indicate the lack of impartiality and independence, thus preventing an arbitrator from acting. Compared with the IBA Guidelines, all of them are non-waivable. However, unlike beforehand, where the parties assent, a public legal assessment of the dispute does not preclude the arbitrator from accepting the appointment.

Further, the Orange List (Article 6) identifies situations that the arbitrator should disclose but the

parties may waive. The revised version extends the personal scope of application of most scenarios of the Orange List and some of the Red List through the addition of the arbitrator's spouse, relative, or in-law relative.

Finally, the Green List under Article 8 includes facts that cannot give rise to disclosure, such as the arbitrator's general opinion on a legal issue in the press or in a lecture. The Green List was only slightly amended.

Example in Practice: Non-Disclosure Ground for Challenge from the Red List

The non-waivable Red List grounds for challenge have to be applied at any stage of arbitration proceedings. Moreover, a party shall not be deemed to have waived its right for a challenge in the presence of the Red List situations (Article 14 (6) of the Rules). Nevertheless, in practice it might be difficult to successfully challenge an arbitrator at the final stages of proceedings.

In one ICAC case involving a late challenge, the arbitrator professor A., in accepting the appointment, disclosed incompletely his participation as an expert witness on Russian law in a running foreign award enforcement dispute. He contended that he would prepare the legal opinion solely for the foreign enforcement court's use. He would prepare that opinion through the international law firm (ILF), which at the same time was acting for the claimant in the ICAC case and as the counsel in the aforementioned foreign dispute. After the ICAC case hearing was closed, the newly-appointed respondent's counsel found out that the arbitrator's initial disclosure at the beginning of the process was likely misleading and asked the arbitrator to further disclose whether the ILF had appointed him as an expert and/or paid him a fee.

Where an arbitrator receives a fee from the party's counsel or acts as an expert in another case unrelated to the dispute (Article 5 (4) of the 2021 Rules), both situations shall prevent the arbitrator from acting. Since the arbitrator ignored the disclosure request, the respondent challenged him a month before the award's issue.

In denying the challenge, the appointment authority contended that the challenge motion was raised too late at the closing stage of the dispute (ICAC Letter of 27.01.2017 No. 1800-4/308 in the case MKAS No. 4/2015). Somewhat surprisingly, it closed eyes to the arbitrator's incomplete disclosure and his dual role involving engagement as an expert witness appointed by the same counsel's firm in the parallel Washington D.C. litigation connected with enforcement of an international award against the sovereign debtor.

Party and Representative's Duty of Disclosure

In line with the *Hrvatska case*, the new Article 13(1) of the 2021 Rules emphasizes that the parties and their representatives must take into account the requirements of arbitrator's impartiality and independence in order to prevent, within their capabilities, the appearance of grounds for challenge of any arbitrator. They must immediately report all the known facts that may be relevant to assess the arbitrator's compliance.

Challenge of Arbitrators

A party may challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. The 2021 Rules include some new provisions on challenge procedure.

For instance, when deciding on a challenge, a competent body may take into account whether an arbitrator has timely fulfilled their disclosure obligation. However, as per the new rule, their non-disclosure cannot, as such, serve as ground for a challenge. The nature of the undisclosed circumstances is subject to assessment by the Appointment Committee.

In practice, arbitrators often justify non-disclosure by invoking the supposed privileged nature of information. However, where the agreed Rules apply, under Article 7(4), an arbitrator's duty to act impartially and disclose the required information overrides their duty of privacy and confidentiality.

According to Article 7(4) of the Rules, modeled on *Canon II(H)* of the 2004 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, if certain circumstances to be disclosed belong to privileged or confidential information, the arbitrator must **[i]** previously request the consent of the authorized person to disclose the relevant circumstances, and **[ii]** absent such a consent within a reasonable time, they shall refuse to accept the arbitrator's powers or, if the arbitrator's powers have already been accepted, refuse to exercise them any further and voluntarily withdraw. The failure to obtain consent for the disclosure will mean that the arbitrator is not allowed to further sit on tribunal.

In one ICAC case, the claimant-appointed arbitrator, Professor B., did not disclose that the law firm representing the claimant had been providing legal advice to the arbitrator's employer. Although he contended that such disclosure is covered by the employment professional secrecy, the arbitrator refused to apply for his employer's consent to disclose the details of collaboration with the law firm representing the claimant. In accepting the challenge request, the ICAC Appointment Committee applied Article 7(4) of the Rules since, due to missing employer's consent, the arbitrator could not remove justifiable doubts as to his impartiality or independence.

Conclusion

The 2021 Rules preserve the style and format of the 2010 Rules on Impartiality and Independence of Arbitrators that greatly enhanced the neutrality and respect for arbitration in Russia. The 2021 Rules make it more in tune with modern practice and implement some of the best international rules for arbitrator's code of ethics.

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