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THE DUTY OF DISCLOSURE AS A BASIS FOR FAIR INVESTMENT ARBITRATION PROCEEDINGS

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Abstract. The duty of disclosure is a fundamental precondition of fair arbitration proceedings. Though the importance of this duty in investment arbitration is obvious, its content and application pose various questions which require complex analysis. The lack of common binding sources of the duty of disclosure leads to practical difficulties and may curb the effectiveness of arbitration proceedings and lead to successful challenges of arbitral decisions. The question arises as to which relevant information and circumstances arbitrators shall disclose to the parties and how. This research aims to reveal the standards for arbitrators to reveal information which may be relevant for ensuring the fairness of arbitration proceedings and how this duty should be exercised. The authors analyze the relevant rules on the duty of disclosure in the rules of arbitration and case law. Special attention is drawn to the protection of the right to a fair trial. The authors find that though there are no generally accepted standards of the exercise of the duty of disclosure in investment arbitration proceedings, arbitrators shall reveal to the parties all information which may be relevant to assess their impartiality. Furthermore, the exercise of this duty is continuous during arbitration proceedings. The latest development of the case law of the European Court on Human Rights in the *Beg S.p.a. v. Italy* case reveals the practical problems of the application of Article 6 of the European Convention on Human Rights in arbitration proceedings, and also highlights the importance of the proper exercise of the duty of disclosure in arbitration proceedings.

Keywords: right to the fair trial, investment arbitration proceedings, duty of disclosure in arbitration proceedings.

Introduction

Impartiality of the tribunal is a fundamental principle of fair proceedings (Clooney & Webb, 2020). The full disclosure of relevant information and circumstances by an arbitrator is indispensable not only to ensure the legitimacy of arbitral proceedings, but also to allow the parties to assess whether they wish to exercise their rights to challenge an arbitrator, or if they are of the view that the arbitrator meets the required standard of independence and impartiality (Born, 2011, p. 1620). This not only prevents a successful challenge that would otherwise disrupt the arbitral proceedings, but also lays the ground for the possible estoppel argument of the accepting party later seeking to challenge an arbitrator based on the same circumstances (Caron & Caplan, 2013, p. 195). The problems of the duty of disclosure of the relevant information and circumstances have already drawn scholars' attention (Leung & Chan, 2021).

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Nevertheless, there are uncertainties as to how far the arbitrator's duty to disclose should stretch. What exactly constitutes this duty? Should an arbitrator disclose only those circumstance that if not disclosed would constitute a successful challenge of the award? The question also arises as to what standards of impartiality should be applicable. Since the right to a fair trial established in the European Convention on Human Rights (hereinafter – the Convention), including the requirement for impartiality of arbitrators, is applicable in arbitration proceedings (Višinskytė, Jokubauskas, & Kirkutis, 2021), should this standard be the same as in the courts? To reveal the standards that constitute the duty of disclosure and how it should be exercised, the authors analyze various national laws and international soft law instruments which regulate this duty in arbitration proceedings. The relevance of this research is also confirmed by the current activities of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), which announced the Draft Code of Conduct for the Possible reform of investor-State dispute settlement (ISDS) in September 2022 (hereinafter – Draft Code of Conduct) which also establishes the duty of disclosure in arbitration proceedings. Thus, the international community is still looking for the optimal standards of the duty of disclosure, and this question remains unanswered.

This article focuses on an arbitrator's duty of disclosure for circumstances that may give rise to a successful challenge of arbitrator in investment arbitration proceedings. Thus, the aim of the article is to analyze the content and exercise of the duty of disclosure in investment arbitration proceedings and asses how the exercise of this duty is linked with the fairness of arbitration proceedings.

In certain situations, some circumstances, if not disclosed, will not have any "tangible" effects on the proceedings, yet they still fall within an arbitrator's professional duty of disclosure. The exact scope of the duty, as it largely depends on the circumstances of a given case, cannot be identified, though some common characteristics can be defined. First, the general framework regulating the duty is presented. The authors reveal the common standards for arbitrators to reveal relevant circumstances and how they should be exercised. Due to the limits and scope of this research, the authors focus mostly on the rules on disclosure established in the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (2014) (hereinafter – the Guidelines) and the UNCITRAL Arbitration rules (2013) (hereinafter – the Rules) which, in the authors' opinion, reflect the main common standards of this problem. Thus, the authors do not analyze other arbitration rules of arbitration institutions such as the ICC, the VIA, the SIAC, Swiss arbitration rules and others. The analysis of these rules is also not particularly relevant for this research since the crux of the research is an analysis of the fairness of arbitration proceedings and how the standards of the right to a fair trial shall be ensured in investment arbitration proceedings.

Second, the main characteristics of the duty of disclosure are presented. Third, the problems of the application of Article 6(1) of the Convention on arbitration proceedings are analyzed. Since the procedural guarantees are to a certain extent applicable to arbitration proceedings, the authors analyze the current development of the case law of the European Court of Human Rights (hereinafter – the ECHR), which reveals the importance of the proper exercise of the duty of disclosure to ensure fair arbitration proceedings. This analysis reveals that the proper exercise of the duty of disclosure is intertwined with the requirement for fair arbitration proceedings, and the ECHR has established high standards for arbitrators for the time-proper implementation of this duty.

This article consists of four parts: first, it deals with the legal and regulatory framework of the duty of disclosure; second, it assesses the scope of the duty of disclosure; third, it analyzes the duty of disclosure and the right to privacy of arbitrators; and fourth, the standard of the duty of disclosure in the case law of the ECHR and the problematic aspects related to the right to fair trial are disclosed.

To reveal the problems of the research, the authors rely on methods which are common in such types of research (comparative, logical). Comparative analysis is the main method employed, and it is used for the assessment of the relevant rules which regulate the duty of disclosure in investment arbitration in both national laws and international soft law instruments. The logical method is used to make conclusions and provide suggestions as to how arbitrators shall exercise the duty of disclosure.

1. The Framework Regulating Disclosure

There are no generally accepted international standards as to the duty of disclosure in arbitration. Nevertheless, some developments can be recognized in this area. Pursuant to Article 12(1) of the UNCITRAL Model Law, prior to and during their appointment an arbitrator shall "disclose without delay any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". Thus, even before the appointment procedure of an arbitration is carried out, the arbitrator has a duty to reveal all circumstances which may raise doubts as to their impartiality. Some States, such as the United States (Federal Arbitration Act Sect. 10 (2)) or the United Kingdom (Arbitration Act of 1996 Sect. 24(1) (a)), opt not to mention the duty to disclose separately, but rather refer to the independence and impartially of arbitrators in relation to the challenge proceedings.

One of the codifications of the general standards of impartiality of arbitrators is the Guidelines. The Guidelines were first issued in 2004, and the renewed version was released in 2014. Even though the Guidelines are often referred to by counsels, arbitrators, arbitral tribunals and even national courts, they remain a soft law, non-binding instrument adopted by a private body. Initially, the Guidelines were intended to be applied to commercial as well as investment arbitration, yet their application in investment arbitration remains controversial (IBA, 2014, para. 167).

General Standard 3 of the Guidelines (IBA, 2014) is dedicated to disclosure. It states that an arbitrator shall disclose such facts or circumstances that may, in the eyes of the parties, give rise to independence and impartiality. Two aspects of this provision are important. First, the word "shall" leaves no discretion to an arbitrator to decide on whether to disclose, but rather imposes a duty to do so. In determining what information to disclose, an arbitrator should consider all circumstances known to them (Explanation to General Standard 3 (d), p. 9). Any doubt as to whether to disclose certain facts or circumstances should be resolved in favor of disclosure (General Standard 3 (d), p. 9). Second, "in the eyes of the parties" indicates that the arbitrator shall assess the situation through the position of the parties as to whether to disclose certain facts. The rationale here rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view (Explanation to General Standard 3 (a), p. 7). The Guidelines are intended to be a helpful tool to the arbitration community, and are not legal provisions that are either capable of or intended to override the applicable national laws or arbitral rules chosen by the parties.

The latter development regarding the regulation of the duty of disclosure is reflected in the Draft Code of Conduct (UNCITRAL Working Group III, 2022), which also provides certain guidance as to how this duty shall be exercised. According to Article 10 of the Draft Code of Conduct, a candidate and an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts – including in the eyes of the disputing parties – as to their independence or impartiality. Thus, this act also establishes the duty of disclosure of the relevant circumstances which may raise doubts as to the arbitrator's independence or impartiality.

Thus, the framework of the duty of disclosure varies heavily between States. The lack of binding international standards for the duty of disclosure opens doors for various interpretations of this duty by national courts and arbitration tribunals. Some States opt to include the requirement for the duty of disclosure expressis verbis in the law governing arbitration proceedings, while others simply establish the requirement of impartiality of an arbitrator which is deemed to also include a duty of disclosure.

2. The Scope of the Duty of Disclosure

The scope of the arbitrator's duty of disclosure cannot be clearly defined and largely depends on the factual circumstances of each case. A crucial question that must be answered when trying to define the scope of disclosure is whether it is enough to disclose all circumstances that may "cause doubts" or "justifiable doubts" in the eyes of the parties, or whether only those circumstances that are more likely than not to give rise to a challenge to an arbitrator. Can an arbitrator feeling that undisclosed circumstances would not amount to a successful challenge, despite knowing that they are relevant, decide not to disclose them? The authors argue that there seems to be no doubt that they can, yet there seems to be two positions as to whether by doing so they are complying with their disclosure duty.

In the Chagos Arbitration, Mauritius challenged the appointment of Judge Greenwood on the basis that he had acted for the United Kingdom within the past three years and that the relationship, according to Mauritius, continued. Mauritius argued that the standard applicable to the situation was the "appearance of bias", which implies that an arbitrator's independence and impartiality should be judged objectively as to whether the circumstances give rise to justifiable doubts. Mauritius very clearly reiterated that it did not allege actual bias against Judge Greenwood (*The Republic of Mauritius v. the United Kingdom of Great Britain and Northern Ireland*, 2011, para. 43). The Tribunal, after careful analysis, decided to reject the challenge; however, even though no actual bias was ever found or even alleged, the Tribunal stated that "the present proceedings to challenge Judge Greenwood's appointment to the Tribunal were not without object and purpose" (para. 184), this way implying that the "appearance of bias" standard should guide an arbitrator.

In another case administered under the auspices of the Permanent Court of Arbitration, Judge Schwebel was challenged on the basis of late and incomplete disclosure, multiple appointments, and an aggregate of the two grounds. Both parties agreed that the "justifiable doubts standard" under Article 10 (1) of the UNCITRAL Rules is an objective one (*Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador*, 2012, para. 72). However, they disagreed as to whether the standard required by Article 9 was an objective or a subjective one. The respondent argued that, based on General Standard 3 of the Guidelines which refers to "in the eyes of the parties", the standard was clearly a subjective one. At the same time, the claimant argued that Article 9, requiring the disclosure of "any circumstance likely to give rise to justifiable doubts", establishes an objective test and "presents a higher threshold for disclosure than the IBA Guidelines" (para. 74). When addressing the challenge, the Secretary General first assessed the "late and incomplete disclosures" of Judge Schwebel (para. 72–92). He concluded, with regard to the previous appointments, that "[t]hese circumstances clearly fall within the scope of his disclosure obligation" (para. 84). Then, when addressing the multiple appointments (para. 86–92), the Secretary General decided that "the prior appointments of Judge Schwebel while relevant disclosure items do not give rise to justifiable doubts in the eyes of a reasonable and fair-minded third person" (para. 92). Finally, Mr Siblez evaluated the circumstances in the aggregate and concluded that neither when viewed separately nor together did these circumstances give rise to justifiable doubts as to the independence or impartiality of Judge Schwebel. This reasoning, again, indicates that even through non-disclosed circumstances are not enough for a successful challenge, they do fall within the scope of what a prudent arbitrator should disclose.

A different position present in the arbitral jurisprudence is that if the non-disclosed circumstances would not result in a successful challenge they do not fall within an arbitrator's duty of disclosure. In *AWG Group v. The Argentine Republic* (2007), Professor G. Kaufmann-Kohler was challenged on the basis of her failure to disclose the fact that she had been appointed as a board member of the UBS Group. UBS was partly paying Professor Kaufmann-Kohler via the Group's shares. This meant that the Professor was a shareholder in UBS, which in turn owned stock in two of the claimants in related arbitrations. Professor Kaufmann-Kohler did not disclose this information, neither did she disclose the very fact of her appointment to the board. She explained that she did not disclose the fact of her appointment because Swiss banking law imposed a strict separation between the management and supervision of the bank. As a member of the supervisory body she was not involved in the management part of the bank's activities (*AWG Group v. The Argentine Republic*, 2007, para. 39). The Tribunal interpreted Article 9 of the UNCITRAL Rules 1976 as requiring the disclosure of only the circumstances that might give rise to "justifiable doubts", and that since the appointment did not create circumstances giving rise to such doubts, she was under no obligation to disclose them (para. 26). It is difficult to see how shareholding can fail to amount to disclosable circumstances. Even though the actual circumstances may finally be judged to be insufficient for a successful challenge, they may still fall within an arbitrator's duty to disclose.
It is also important to note that "in the eyes of the parties" should not be interpreted as allowing arbitrators to not disclose information that is likely already known to the parties and especially their legal teams. No case is "too small" or "too well-known" to believe that it can be omitted from the disclosure. As the PCA Secretary-General, H. Siblez, rightly noted when addressing a challenge against Judge Schwebel, even if the Respondent and its counsel knew or should be presumed to have known of Judge Schwebel's appointments in two public and high-profile arbitrations, this would not exonerate this judge from his duty to make prompt and full disclosure (*Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador*, 2012, para. 84).

Another relevant question when analyzing the duty of disclose is to whom this duty is applicable. It seems that this duty of disclosure is primarily designed for arbitrators since they render the award. However, when the dispute

is heard in institutional arbitration, various persons are involved in the dispute settlement. For instance, arbitrations assistants, secretaries and other persons are involved in the dispute settlement and perform certain procedural duties. Therefore, it may be argued that such persons could also have a certain interest in the case and could even impact the course of the settlement of the dispute. Unsurprisingly, this question is also addressed by international arbitration rules. The Guidelines provide that "Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration" (IBA, 2014, p. 12). It is logical that persons working closely with an arbitrator are bound by the same duty of independence and impartiality as the arbitrator. However, interestingly, neither in national laws nor in the rules of the main arbitral institutions is the duty of disclosure of these persons mentioned.

This issue is particularly relevant in situations where an assistant to an arbitrator plays a significant role in the proceedings. An example of such a situation is the aftermath of the Yukos arbitration, where a request to set aside the awards was made (The Hague District Courts Judgement, 2016). The Russian Federation argued, inter alia, that the tribunal assistant played a decisive role during the deliberations as well as the drafting of the awards. Based on the disclosed fees and hourly rates, the assistant spent 65% more time on the case than the chairman of the tribunal. While it may be argued whether or not the assistant's role was decisive, the fact that he spent 3,006 hours working on the case (as revealed by the PCA) clearly shows that it was significant. The Court set aside the award without entering into deliberations of the question of the significant role played by the assistant. However, it would seem just that in such situations a duty of disclosure applicable to an arbitrator would be extended to encompass the assisting personnel. The authors argue that since the personnel of the arbitration can be involved in the decision-making process of the award, it seems that the duty of disclosure may even encompass not only arbitrators but also other persons working with the specific case.

Another significant aspect of the duty of disclosure is the continuation of this duty during dispute settlement in arbitration. So-called "advance waivers", i.e., declarations regarding possible future conflicts, do not discharge the arbitrator's ongoing duty of disclosure (IBA, 2014, Part I, 3 (b)). It is generally accepted that the duty to disclose ceases once the final decision is rendered, unless the final award is referred back to the original tribunal under the relevant applicable law or relevant institutional rules. A new round of disclosures may be necessary if the dispute is referred back to the same tribunal (IBA, 2014, pp. 4–5).

However, there are different opinions as to whether the duty to disclose is accompanied by a duty of due diligence. Should an arbitrator actively seek to find out about their potential conflicts of interest and other circumstances worth disclosing? The Guidelines state that "[a]n arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries" (IBA, 2014, p. 15). No reference to the active duty has yet been inserted into any of the main institutional rules, but it has found its way into some modern international agreements such as the Economic Partnership Agreement between the EU and SADC EPA States. Article 3.2. of the Rules of Procedure for Dispute Avoidance and Settlement States that "a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters, including financial interests, professional interests, or employment or family interests". Thus, it can be argued that the duty of disclosure is an active and continuous one which stretches during the dispute settlement in arbitration. Consequently, it requires an active role to be taken by the arbitrator to react to changes of circumstances which may show conflicts of interest in a timely manner.

The Draft Code of Conduct (UNCITRAL Working Group III, 2022) even establishes the list of information which shall be included in the disclosure: (a) any financial, business, professional, or personal relationship in the past five years with: (i) any disputing party or an entity identified by a disputing party; (ii) the legal representative(s) of a disputing party in the International Investment Dispute (hereinafter – the IID) proceeding; (iii) other arbitrators and expert witnesses in the IID proceeding; and (iv) any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder; (b) any financial or personal interest in: (i) the outcome of the IID proceeding; (ii) any other IID proceeding involving the same measure(s); and (iii) any other proceeding involving a disputing party or an entity identified by a disputing party; (c) all IID and related proceedings in which the candidate or the arbitrator is currently or has been involved in the

past five years as an arbitrator, a legal representative or an expert witness; and (d) any appointment as an arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years. Thus, the provisions of the Draft Code of Conduct tackle two main elements: economic, business, and professional links with the parties; and the previous involvement of the arbitrator in disputes between the parties. This development reveals that the duty of disclosure is primarily coupled with the disclosure of information which may include previous economic links and (or) involvement of the dispute resolution between the party to the dispute and the arbitrator.

3. Duty of Disclosure and the Right to Privacy of Arbitrators

Though the duty of disclosure plays a particularly relevant role in ensuring the fairness of arbitration proceedings, it should not cause imbalance in the rights to arbitrators. One may argue that an arbitrator's duty to disclose goes well beyond the duty to disclose the circumstances that may result in a successful challenge. An arbitrator's disclosure is crucial for the legitimacy of the arbitral process in general, which makes setting limits on it a very difficult task. At the same time, an arbitrator is a human being that has a right to privacy. This is particularly important regarding personal relationships. Each relationship is difficult and cannot be evaluated in any way other than on a case-by-case basis. An ICSID tribunal with regards to the challenge brought against Professor Kaufman-Kohler came up with a four-point test to establish whether the connection indicates a "manifest lack of the quality of independence of judgement and impartiality" as required under the ICSID Convention. The Tribunal looked at the proximity, intensity, dependence and materiality of the relationship. Due to the particularities of the challenge procedure under the ICSID, where a challenge is first decided by the co-arbitrators and the nearly-impossible standard of manifest lack of independence or impartiality, the ICSID jurisprudence is not of much use when discussing the duty of disclosure. However, the test formulated by the prominent arbitrators could serve as useful guidance. Nevertheless, this important aspect of the duty of disclosure is not mentioned in the Draft Code of Conduct.

However, though an arbitrator also has the legitimate expectation of protection of privacy, the authors argue that an arbitrator primarily has to ensure lawful arbitration proceedings. Without denying the right to privacy, an arbitrator should reveal all necessary information which is important for the proper exercise of the duty of disclosure to the parties, or simply reject an appointment if it could possibly lead to the annulment of the award due to the lack of impartiality.

4. The standard of the duty of disclosure in the case law of the ECHR

The requirements of the right a fair trial are also applicable in arbitration proceedings. According to Article 6 of the Convention, one of the founding principles of the right to a fair trial is impartiality of the tribunal. The development of the case law of the ECHR suggests that violation of the duty of disclosure of relevant information, which is important for the assessment of the impartiality of an arbitration, can led to the violation of the right to a fair trial.

There are no provisions in the Convention that stipulate that the requirements of the right to a fair trial are also applicable in international arbitration (especially investment arbitration) proceedings. However, the application of the standard of the right to a fair trial to arbitration proceedings is not a novelty in the case law of the ECHR. The ECHR has already dealt with the problems of impartiality of arbitration and the protection of the right to a fair trial. First, it should be noted that the conclusion of an arbitration agreement does not mean that the parties will not enjoy all procedural rights deriving from Article 6 of the Convention, since such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6 of the Convention (*Suovaniemi and others v. Finland*, 1999; *Tabbane v. Switzerland*, 2016; *Mutu and Pechsteins v. Switzerland*, 2018; *Deweer v. Belgium*, 1980). Also, the general principles of litigation, such as the independence and impartiality of adjudicators, apply in a very similar manner in litigation before both national courts and arbitral tribunals (Hodges, 2007).

The latest developments and problems of the duty of disclosure are revealed in the *Beg S.p.a. v. Italy* (2021) case, in which the ECHR found a violation of Article 6(1) of the Convention because of the failure of an arbitrator to

disclose relevant information to the parties. In order to reveal the problems of this case, a short summary of the basic facts is provided.

The applicant, Beg S.p.a., contacted ENEL (a formerly State-owned electricity and gas provider) to see if it would be interested in distributing the power generated from a hydroelectric plant it was building in Albania. At that time, N. I. was vice-president and sat on the board of ENEL. The agreement between the applicant and ENEL was signed in 2000, and included an arbitration clause according to which future disputes between the parties should be settled by the Arbitration Chamber of the Rome Chamber of Commerce (ACR). In mid-2000, a dispute arose between the parties since ENELPOWER was unsatisfied with the audit of the applicant company's concession in Albania. The applicant commenced arbitration proceedings which sought the termination of the cooperation agreement and damages of around €130 million. The dispute was opened and the parties appointed respective arbitration. ENELPOWER appointed N. I. as its arbitrator. Around this time, N. I. was representing ENEL in a civil dispute. During arbitration proceedings, Beg S.p.a. became aware that N. I. had been working as counsel for ENEL. The ACR made its award against Beg S.p.a. on 25 November 2002, dismissing complaints, including a demand for the withdrawal of N. I. The Rome District Court also twice rejected applications to have N. I. withdrawn.

The applicant also lodged a claim against the ACR for negligence, seeking compensation of €374,482.91, which was dismissed by the Rome District Court. The court ruled that the ACR could not be held responsible for N. I.'s failure to declare a conflict of interest and it had no obligation to require an explicit negative disclosure. The applicant company appealed against the arbitral award. That appeal was dismissed by the domestic courts. The applicant brought the dispute to the ECHR and complained that the arbitrator, N. I., had not been impartial owing to his professional links with ENEL, impinging on its rights.

First, the ECHR found that though the parties to the dispute voluntarily concluded an arbitration agreement this did not mean that the parties waived their right to fair arbitration proceedings. This is a particularly important aspect of arbitration proceedings – that though the parties may waive the possibility of settling their dispute in court, it does not mean that the parties denounce the fundamental principles of fair arbitration proceedings.

Second, the court turned to the analysis of the duty of disclosure. The Rules of the ACR establish a requirement to disclose information before the arbitral proceedings which may reveal conflicts of interest between the parties. Pursuant to Article 6 of the Rules of the ACR, "All the arbitrators shall be impartial and independent of the parties to the proceedings. The arbitrator, having received notice of his or her appointment from the Arbitration Chamber, shall accept within 10 days. Together with the acceptance, the arbitrator shall indicate, by means of a written declaration: Any relationship with the parties or their counsel that might have an impact on his/her independence and impartiality. Any direct or indirect personal or economic interest in the subject matter of the dispute". Thus, said article of the arbitration rules compels the arbitrators to indicate, in their written declaration, any relationship with the parties or their counsel that might have an impact on their independence and impartiality, and any direct or indirect personal or economic interest in the subject matter of the dispute, but it does not compel arbitrators to explicitly indicate the absence of such relationships and/or economic interests. The court did not assess whether said article ensures the sufficient protection of the right to fair arbitration proceedings. Instead, it emphasized that the arbitrator, N. I., failed to reveal necessary information. The court found that N. I. had simply accepted the appointment and found in favor of the applicant's argument that, in the absence of an explicit negative disclosure, one could legitimately presume that such relationships and/or economic interests did not exist. Furthermore, the court dismissed the argument that the arbitrators were well-known figures and noted that though the applicant, through its arbitrator G.G., was most probably aware of the professional links between N. I. and the ENEL group, this did not mean that the applicant waived the safeguards provided in Article 6(1) of the Convention.

Third, the ECHR turned to the crux of the disputes: whether the failure of N. I.'s disclosure amounted to the violation of Article 6(1) of the Convention. The court found that the appointment of N. I. as an arbitrator raised doubts about his impartiality, and consequently found that the right to a fair trial was breached. The court employed a standard objective impartiality test, which requires ascertaining the relevant circumstances which may raise doubts regarding arbitration impartiality. A number of facts allowed the court to find a lack of N. I.'s impartiality in this case. It was found that N. I. had been Vice-Chairman and member of the Board of Directors of ENEL from June 1995 to June 1996. It is also an undisputed fact that the formal invitation to participate in the

project was sent by the applicant to ENEL, and ENEL's first positive reply was sent in 1996. It was not established that N. I. knew about these negotiations. However, the court emphasized that even appearances may be of a certain importance and found that, given the importance and the economic stakes of the business project, N. I.'s senior role in the entity which had conducted the first negotiations and whose subsidiary ENELPOWER would later oppose in the arbitration proceedings, seen from the point of view of an external observer, could legitimately give rise to doubts as to his impartiality. The court also found that N. I. had represented ENEL in some domestic civil proceedings. Moreover, the court assessed the corporate links between ENEL and ENELPOWER and N. I. It was established that N. I. was the counsel of ENEL and not of ENELPOWER, and that the latter had been created, as a separate entity from ENEL, in 1999. However, at the relevant time ENELPOWER was wholly controlled by ENEL, which held 100% of its share capital. Therefore, the senior position of arbitrator N. I. in ENEL; their possible knowledge of the negotiations between the parties before the agreement was made; the economic stakes of the business project; and the close corporate ties between the corporations were sufficient to find that arbitrator N. I. lacked impartiality, and the objective test of impartiality was thus found to exist.

This judgment has great relevance for the further development of the application of Article 6(1) of the Convention in arbitration proceedings and the exercise of the duty of disclosure. First, the ECHR affirmed its constant rationale that the conclusion of a voluntary arbitration agreement is not a waiver of the procedural guarantees of the right to a fair trial and the arbitration tribunal shall ensure these guarantees. Second, the court employed the standard subjective and objective tests of impartiality to test whether the arbitration proceedings were compatible with the right to a fair trial. Economic and legal links between the arbitrator and the parties, and possible awareness of the relevant circumstances of the legal relations between the parties before the dispute arises, may be found as sufficient to raise doubts about the impartiality of the arbitrator. Third, and most importantly, the court found that the duty of disclosure of the circumstances which may reveal conflicts of interest between the arbitrator and the parties to the dispute is an indispensable part of fair arbitration proceedings. This finding is crucial for the arbitrator and the arbitration institution in ensuring that the arbitrator clearly reveals the relevant circumstances to the parties before the hearing of the dispute. The failure to reveal such circumstances may result in the violation of Article 6 of the Convention and the annulment of the award by the national courts.

Conclusions

1. Fairness of investment arbitration proceedings depends on the independence and impartiality of the arbitrators. An arbitrator conveys the possession of such qualities by disclosing any relevant circumstances that may cast doubts. While there is a general broad framework regulating this duty, and some common denominators as to what falls within it can be identified, ultimately, no clear formula can be established. All of the above-mentioned binding and non-binding instruments are supposed to guide an arbitrator when deciding on what to disclose. However, only one's professionalism, experience and sense of duty determines the final decision. The newest development of the duty of disclosure is revealed in the Draft Code of Conduct, which establishes the list of information which shall be disclosed to the parties.

2. The duty of disclosure is an active and continuous one which stretches across the dispute settlement in investment arbitration. It requires the active role of the arbitrator in reacting in a timely manner to changes of circumstances which may show conflicts of interest. Nevertheless, a proper balance between the right to a private life of an arbitrator and the duty of disclosure should be established.

3. Exercise of the duty of disclosure is closely linked with the fairness of arbitration proceedings. Since the right to a fair trial does not cease to exist during arbitration proceedings, the principle of impartiality of the tribunal is applicable to the full extent in arbitration proceedings (subjective and objective tests of impartiality). The duty of disclosure is part of the principle of impartiality of arbitration proceedings. This means that violation of this duty may lead to violation of Article 6(1) of the Convention and also possible annulment of the arbitral award. The latest case law of the ECHR suggests that an arbitrator shall reveal all information to the parties before the appointment regarding the circumstances which could mean conflicts of interest. Circumstances such as previous employment with one of the parties – considering the term of employment, position in the company which is a party to arbitration proceedings, and possible knowledge of the factual situation of the dispute – shall be clearly announced to the parties.

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