Highly-specialised international arbitration – how many arbitrators are really at large?
23-05-08
Sarah Walker and Alejandro Garcia

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In a fast moving technological world, can arbitration offer a viable forum for parties to resolve specialist technical disputes? If so, how many of the arbitrators from the relevant pool are really available for such disputes and how many times can a party expect to appoint the same specialist arbitrator before raising concerns of bias? This brief article intends to investigate these questions and shed a little light upon some related issues.

Independence vs. impartiality?

That arbitrators – no matter whose appointee they may be – should be independent and impartial of both the parties and the issues in any dispute is a universally accepted principle in international arbitration.

Historically, a distinction has been drawn between independence and impartiality; the former concerns possible links between an arbitrator and one or more of the parties, the latter to the apparent or actual bias of an arbitrator in connection with the parties or the issues in dispute.

Assessing whether an arbitrator is independent of the parties traditionally involves an objective test[1] whereas – given that the existence of bias relates to a state of mind – the test to assess whether an arbitrator might be biased in favour or against a party has a far more subjective nature. Whilst this subjectivity presents certain difficulties on its face, as the appearance of bias is generally enough to disqualify an arbitrator, in reality such test is not entirely subjective and does not – of itself – necessarily create special hurdles for a party wishing to challenge the appointment of an arbitrator. It is interesting to note that impartiality can, in any event, cover certain situations not affected by the concept of independence, as an arbitrator can satisfy the
independence test and nonetheless be apparently or actually biased.

In practice, because of the difficulties of completely separating issues of independence from those of impartiality, in recent years both concepts have been considered as “the opposite side of the same coin”[2]; hence, usually inseparable one from the other. In this sense, the LCIA Rules[3], the WIPO Arbitration Rules[4], the AAA International Arbitration Rules[5] and the IBA Guidelines on Conflict of Interest in International Arbitration (the “IBA Guidelines”) provide that arbitrators must be “impartial and independent”.

**Big fish, small pool**

So how does this impact therefore on highly specialised arbitrations?

The rapid growth in the use of international arbitration in recent years has resulted in a discernable gap between the number of proceedings and the availability of experienced arbitrators, creating obvious issues in recurrent appointments of the same arbitrators. In the case of highly specialised and technical arbitrations, the situation is arguably thrown into even greater relief.

*The decline of inarbitrability?*

In recent years, arbitration has become more prevalent in sectors where litigation has traditionally been the preferred means of dispute resolution. Both economic globalisation and the receding scope of the doctrine of inarbitrability have contributed to such phenomenon.

Most jurisdictions exclude from arbitration the resolution of certain disputes; for example, issues relating to public policy or *ordre public* (as termed in some civil law jurisdictions) are considered inarbitrable. Certain disputes unquestionably constitute inarbitrable subject matter (issues relating to criminal liability and family relations, for example) and, historically, other disputes such as conflicts relating to intellectual property (“IP”) and competition law have created public policy concerns. The last 30 years, however, have witnessed the narrowing of the list of so-called inarbitrable disputes in a high proportion of active international jurisdictions.

**IP disputes**

Taking IP disputes first, Switzerland not only recognised the arbitrability of all sorts of IP disputes in 1975 but also accepted the cancellation of patent registrations, trade marks and other rights on the basis of arbitral awards.[6]

In the US, Congress passed 35 USC § 294 in 1983, which expressly provided for the arbitrability of all kinds of issues relating to patent disputes.[7] In 1984, the Belgian Patent Act was amended, permitting the arbitration of any kind of issues relating to patents and accepting the cancellation of these rights based upon arbitral awards.[8] Courts in other jurisdictions,
including Italy[9], Israel[10] and the UK[11], have recognised the arbitrability of IP disputes, including issues relating to the validity of registered rights. At present, most jurisdictions do not contemplate general provisions prohibiting the arbitration of IP disputes.

Competition disputes

Moving then to competition disputes, in 1985, the US Supreme Court rendered its well known decision in *Mitsubishi Motors v Soler Chrysler Plymouth*[12], expressly permitting the arbitration of antitrust disputes and in 1992, the Swiss Federal Tribunal maintained the arbitrability of this kind of disputes.[13] Although the ECJ has not given a clear cut direction that these disputes are arbitrable, some authors suggest that the ECJ's decision in *Eco Swiss China Time Ltd v Benetton International NV*[14] may have provided, at least in principle, for the arbitrability of competition claims.[15] 2003 saw the Milan Court of Appeal recognise the arbitrability of competition disputes[16] and, two years later, the English High Court also held that competition disputes were arbitrable.[17]

Material Rules of International Private Law

On a more general level, some civil law jurisdictions in recent years have modernised their provisions on arbitrability, moving from the application of conflict of law rules to material rules of international private law, which in practice has further narrowed down the list of inarbitrable disputes. The traditional stance provided for in art 2059 of the French Civil Code – followed with some nuances by many civil codes inspired in the *Code Napoleon* – provides for parties to submit to arbitration only those disputes involving rights which they can freely dispose of.[18] In the case of disputes relating to rights constituted or protected under the laws of different countries, the question of arbitrability can only be answered by reference to those differing laws. This can prove a highly complicated exercise – with uncertain results – particularly in complex arbitrations.

In 1987, the Swiss Parliament passed a new act on private international law. Adopting a simplified and modern approach, art 177(1) of the new Swiss Private International Law Act provides that any dispute with pecuniary content can be submitted to arbitration. This provision constitutes a material rule of international private law that does not require the analysis of all the laws of the countries where the rights at stake may have been granted or recognised. In 1998, Germany followed suit and amended s 1030 of the German Code of Civil Procedure ("ZPO"), providing that any claim involving an economic interest ("vermögensrechtlicher Anspruch") can be arbitrated. For instance, in 2004, applying s 1030 ZPO, the German Federal Court of Justice held that a dispute between the administrative receiver of an insolvent company and some of its shareholders was arbitrable.[19]

The rise of economic globalisation

Notwithstanding all of this activity over the last thirty years or so, arbitration in these specialist
sectors remained fairly dormant until the effects of economic globalisation took hold. It may be said that it has therefore been trends in economics rather than the legislators that have provided the platform for the rapid growth of international arbitration in so called non-traditional fields over recent years. This trend is clearly noticeable in the IP field. From 1999 to this date, the WIPO Arbitration and Mediation Centre has administered more than 100 complex IP arbitrations, experiencing a sustained growth in its caseload. In the USA, as a testament of the steady growth in the use of arbitration to resolve IP disputes, in 2006, the AAA administered 375 IP cases. The ICC considers that, in recent years, around a 10% of the cases it manages has an IP element.

**Subject specialisation vs. arbitration expertise?**

International arbitration evolved as a specific and highly specialised discipline that combines procedural and substantive elements of both the common and civil law traditions. Indeed, international arbitration is not merely a method for resolving disputes but rather a complex field of the law that deals with some difficult issues such as jurisdictional disputes, the application of conflict of law rules, the interplay of different national laws and the enforcement of awards in various countries.

Specialist arbitration is often technically complex, by virtue of which those acting in or hearing such disputes are almost certain to require certain additional “non-legal” expertise – for example, a background in economics or science. Such skills are over and above traditional arbitration expertise as, if international arbitration were a simple discipline, parties would simply appoint as an arbitrator any individual that may have the adequate technical (non-legal) background. In reality, however, international arbitration is very far from being a simple discipline and, in some cases, it can create insurmountable difficulties for decision-makers who – whilst being technically specialist – lack the necessary arbitration experience.

A good example is perhaps in relation to the enforcement of awards. Where an arbitral award may be enforced in various jurisdictions and – as a result – scrutinised by judges with different backgrounds, an arbitrator has a duty (at the very least, an ethical one) to ensure that the decision given constitutes an internationally-enforceable award. The decision of an arbitrator concentrating only on the scientific background of any dispute may well fail to deliver such an internationally-enforceable award.

In an ideal world, therefore, sector specialist arbitrations should be resolved by arbitrators who combine a high level of international arbitration experience with particular expertise in the – often fast moving and technologically complex – factual background. Predictably, in many instances, only a handful of arbitrators would fit the mould. The resultant small pool of appropriate arbitrators creates not only practical problems (such as the physical impossibility of an arbitrator taking on cases) but, perhaps of more concern, it raises serious issues relating to the impartiality and independence of a prospective arbitrator. This is addressed below.
Appointing arbitrators from a small pool

A small pool of arbitrators will – for obvious reasons – prompt parties and their legal advisors to appoint the same arbitrator(s) on a regular basis. Such repeat appointments within a certain period of time may give rise to concerns of bias. Interestingly, neither institutional rules nor the arbitration acts of the leading arbitration jurisdictions set forth specific provisions stating the number of appointments *per se* that would suffice to create an appearance of bias.

Any determination of the existence of bias would, therefore, depend on the circumstances of each case, although it is clear that “[w]here an arbitrator accepts repeat appointments from the same party, the other party may have concerns about his independence, fearing that the arbitrator’s independence may be tainted by the wish to receive further appointments.” [20]

In contrast to institutional rules and arbitration laws, the IBA Guidelines do in fact set out two rules which expressly address the number of appointments that an arbitrator has received from the same source. They provide that the following circumstances will be included on the “Orange List” (i.e. mandatory disclosure, but waivable by the parties):

- “3.13 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.”
- “3.3.7 The arbitrator has within the past three years more than three appointments by the counsel or the same law firm.”

Clearly such grounds do not immediately disqualify an arbitrator, instead requiring that the challenging party believe that the situations described above would “from a reasonable third person’s point of view having knowledge of the relevant facts [create] justifiable doubt as to the arbitrator’s impartiality or independence.” [21]

The IBA Guidelines are simply recommendations. However, it is likely that most institutions might feel compelled to accept a challenge based on recurrent appointments when the thresholds set forth in them are met. As regards to R 3.3.7, two commentators state: “It has been noted that the ICC is far less likely to confirm an appointment if an objection is raised and it seems probable that the ICC International Court of Arbitration will err on the side of caution and refuse to confirm an appointment in the face of an early challenge.” [22]

In practical terms, therefore, the IBA Guidelines are likely to create an expectation that arbitrators will not accept arbitrations if acceptance will mean they fall foul of the IBA yardstick. It follows – for those parties chasing highly specialist arbitrators in an already limited group of arbitrators – that (theoretically at least) their choices have been yet further restricted.

What to do?
Parties trying to secure an experienced and technically specialist arbitrator whilst avoiding challenges based upon repeat appointments can often find themselves between the proverbial rock and a hard place.

What to do? Opt for an experienced arbitrator without the technical competence or choose an arbitrator with the requisite level of technical expertise but with no real track record in arbitration? Step back – perhaps the view is not so stark after all.

Shopping list

First, decide whether a technical background is indispensible or simply a “good to have”. This may sound obvious, but it is easily overlooked.

As most arbitrations arise out of arbitration clauses inserted in a wide array of commercial agreements, it follows that international arbitrations mostly deal with contractual issues. In many cases, the underlying dispute – even when it concerns highly specialised technological issues – is in reality concerned primarily with the interpretation of particular contractual terms. In such circumstances (and where it looks likely that the highly technical issues will be relevant but not central to the dispute), the parties may be better off by appointing a tribunal with experience in international arbitration and thereby prevent possible difficulties derived from the technical nature of international arbitration, particularly at the enforcement level, and, at the same time, avoid recurrent appointments.

Further, even if technical issues are at stake, the parties should consider whether the complexity of them requires a decision-maker with a highly specialised technical background. By way of example, not every patent dispute involves “rocket science”; there are many such disputes that involve very simple technology, accessible to arbitration specialists as well as perhaps more technologically expert arbitrators.

It should also be remembered that in most civil law jurisdictions, the majority of legal practitioners – even those seasoned in disputes involving scientific issues – have legal training backgrounds only. Given the length of legal studies in civil law jurisdictions, it is generally unusual for lawyers to have a “dual background”. Therefore, in arbitrations where the applicable law is the law of a civil jurisdiction, this debate will often be academic. In such circumstances, counsel for parties should commit to educate the arbitrators in the respective background, as lawyers do with judges in most civil law countries and as US attorneys do, particularly in respect of jurors.

Secondly, look and see whether arbitration experience will be indispensible. Looking at matters from the flip side (and without in any way undermining the relevance of arbitration experience) in particular circumstances, parties may not need to appoint decision-makers with particular arbitration experience. Perhaps the most obvious example is where an arbitration (albeit international) has a clear gravitational centre in a single jurisdiction. Take the following
scenario:

- A technology/fact-heavy international arbitration with a London seat;
- The dispute arises out of a licence agreement;
- The licence agreement contains an English law clause; and
- The dispute involves only UK patents.

Against such a backdrop, the parties may wish to prioritise having arbitrators with a scientific background over arbitration experience. This is perhaps a limited sample as – given the increasingly global reach of international disputes – situations where arbitration experience does not seem essential may become increasingly infrequent.

Thirdly, consider whether it is appropriate to agree on the use of the administering services of specialised institutions as – in certain cases – the potential issues associated with appointing a decision-maker without acknowledged international arbitration expertise can be successfully counterbalanced by using the services of certain specialised institutions. For example, the Arbitration and Mediation Centre of WIPO provides specific support in international arbitration issues to arbitrators appointed in proceedings under the WIPO Arbitration Rules. With the assistance of the WIPO Centre, many arbitrators have been able to combine their highly specialist technical expertise with specific international arbitration requirements. This is perhaps even more relevant when parties agree to appoint a sole arbitrator.

Fourthly, parties should choose a three-member tribunal that combines different areas of specialist technical expertise, so that they may nominate arbitrators with the technical skills they consider necessary for the case. Equally – and always dependant on any arbitration rules or agreement of the parties – the arbitrators or the administering institution should ideally choose as chairperson someone experienced in international arbitration. In most cases, this combination of international arbitration experience and specialist technical expertise may provide a workable resolution whilst providing the parties with a wider choice of possible arbitrators.

Finally, consideration should also be given at the outset to how one might resist a challenge based on recurrent appointments. The parties have some scope to argue matters as, even if an arbitrator is appointed in excess of the numerical limits set forth by the IBA Guidelines, it must be judged in all the relevant circumstances. Where there is a very small pool of experienced arbitrators in the relevant field, therefore, parties may be able to argue this is a relevant factor. Further, other factors such as the amount of fees received by the specific arbitrator resulting from the repeated appointments should also be taken into account. For example, an arbitrator is likely to be disqualified if the amount of fees received is such that appearance of favouritism is created as regards the appointing party in order to receive further nominations whereas if sums are relatively small, this may not be the case.
Conclusion

In short, whilst choosing an arbitrator for highly specialist disputes — and at the same time avoiding challenges to that appointment from the other side — can be tricky, taking a step back and focussing on the salient elements of any dispute can often provide a way through.

[1] For example, the Rules of Arbitration of the ICC follow this approach (Art 9).
[7] Specifically, § 294(a) provides: “A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.”
[9] Italian Supreme Court, 3 October 1956 (case 3329).
[10] Golan Work of Art Ltd v Bercho Gold Jewellery Ltd, Tel Aviv District Court civil case 1524/93.
[18] “Toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition.”