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International Arbitration: Essay
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Question 1 - Part b

"[T]he types of claims that are non-arbitrable differ from nation to nation. Among other things, classic examples of non-arbitrable subjects include certain disputes concerning consumer claims; criminal offences; labour or employment grievances; intellectual property; and domestic relations. The types of disputes which are non-arbitrable none the less almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect" per Born, International Commercial Arbitration (1st ed, Kluwer International, Alphen aan den Rijn, 2009) p 768.

NON-ARBITRABILITY DOCTRINE AND PUBLIC POLICY

International arbitration has become the major alternative practice to resolve commercial disputes in the context of international trade. The reason lays on its advantages, compared to the traditional method of litigation before the established courts. Mostly: the neutrality, efficiency and confidentiality of the arbitral proceeding as much as the finality of the award. Finally, the large number of States bound by an international agreement on the mutual recognition of arbitral clauses and awards.

Nonetheless, such mutual recognition is subject to some limitations, which arise from national mandatory rules that affect validity and/or legality of arbitral clauses and finally the enforceability of the award. The non-arbitrability doctrine is comprised within the aforementioned limitations. Its rationale is the unacceptable conflict between arbitration, which is a private proceeding, and its public consequences in some fields of the law, which are exclusive domain of the ***public policy*** of a specific State[1]. When such a conflict arises, competent national authorities can invoke non-arbitrability to refuse the enforceability of otherwise valid arbitral agreements or awards[2].

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[1] Gary Born, *International Commercial Arbitration*, (2nd ed, Alphen aan den Rijn: Kluwer Law International 2009) 771

[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) art V(2)(a)

However, it is important to understand what is intended for "public policy", within the meaning of the NY Convention. As described by some commentators: *Public policy consists of beliefs on various topics of general interest, which mirror the opinions of a State and finally define its attitude, character and status*[3]. In other words, the protection of some general interests, mostly constitutional or statutory rights, belongs to the core-values of an established society, in a way that such a protection becomes a matter of *ordre public*. Consequently, it needs to be warranted without the influence of the private interest, and over it.

The doctrine of non-arbitrability is internationally recognised, as it has been acknowledged by judicial decisions and legislation, and by the main conventions that regulate international arbitration[4]. However neither the formers nor the latter have so far given uniform principles of non-arbitrability, that would clearly designate particular disputes as non-arbitrable. As a result, it has been to the national courts to assess arbitrability of disputes, with a consequential heterogeneity of the *criteria* arisen.

Despite such a heterogeneity, a common core of factors is recurrent and can be appointed as a frequent set of general considerations taken into account for assessing arbitrability. Starting from the main concern, which regards – as already seen - the public values or public policy involved, courts usually assess whether or not:

1) arbitral proceeding is suitable to resolve the dispute;

2) unacceptable or systemic disparities of bargaining power arise between the parties (i.e. consumer law; employment law);

3) the decision particularly affects third parties (final character of the award);

4) the arbitral tribunal is able to grant legislative (public) aims (as it is private, established by privates[5]).

However, it is universally accepted that non-arbitrability is an exception to the general rule of arbitrability. Article V(2) of the NY Convention, and paralleling the UNCITRAL Model Law, considers its exercise limited to the

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[3] Christos Petsimeris, 'The scope of the doctrine of arbitrability and the law under which it is determined in the context of International Commercial Arbitration' (2005) 58 Issue 2 Revue Hellenique de Droit International 438

[4] *(note 2) Ibid. and* UNCITRAL Model Law on International Commercial Arbitration (amended 2006, 1985) art 1(5)

[5] *(note 1) Ibid.* 789

achievement of specifically-defined, articulated public policies only, **"which are not inconsistent with state practice under the Convention"**[6]. In other words, Article V(2) of the New York convention orientates the national courts' assessment, stating generally the principle of distinguishing the international character of the dispute from the domestic. Historically, this principle has been of paramount importance, because it prevented national courts to assess arbitrability only on domestic law basis.

COMPETITION LAW DISPUTES – The United States

Until the 1970s, American courts have pursued a 'parochial hostility[7]' against arbitrability, based on the belief that judicial dispute resolution and precedents where essential to guide future behaviours and protect the public interest in enforcing certain federal statutes, like those concerning antitrust law[8].

Since *Wilko v. Swan* (1953), the Supreme Court felt the need to strike a balance between the benefits of arbitration and its loss of constitutional guarantees. The imperative exigence to preserve rights like due process, findings of fact, federal pleading and discovery rules, as well as the need to prevent the possible risk to collateral estoppel or inconsistent verdicts led the Court to a "public interest" approach, ruling all claims within the Securities Act of 1933[9] as non-arbitrable.

Fifteen years later, the Court of Appeals applied the same analysis in *American Safety Equipment Corp. v. J. P. Maguire & Co.* (1968), finally generating the so-called "*American Safety* doctrine". The doctrine addressed specific concerns against the ability of arbitration to accomplish with the public law aims and protect statutory claims. Such concerns refer to the arbitral clause that preselects the forum for trying antitrust disputes, which may represent the attempt of a monopolist against automatic forum selection by contract[10]. They also refer to the inadequacy of the arbitral procedure (summary and confidential) to comply with the complicated nature of antitrust issues[11], which require sophisticated and economic analysis and

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[6] *Ibid.* 775

[7] *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)

[8] *Wilko v. Swan*, 346 U.S. 427 (1953)

[9] *Ibid.*

[10] *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2nd 821, 825 (2nd Cir. 1986), para 827

[11] *(note 8) Ibid.* para 827-828

mandatory disclosure. Finally, the doctrine wonders about the wisdom of allowing the business community to select arbitrators who may enforce policies designated to regulate the business community itself[12] .

The *American Safety* doctrine applied uniformly to all antitrust disputes in the following years. However, contrary decisions emerged by the early '70s, readily subsequently the implementation of the NY Convention. A strong presumption emerged in favour of arbitration, thus non-enforceability of freely negotiated provisions, such as contractual choice-of-forum, became tolerable no more.

The Supreme Court, although acknowledging the American Safety Doctrine, recognised the **need to set a distinction between issues arising out of a domestic and of an international transaction** in *Scherk v. Alberto-Culver Co.* (1974). According to the Court, the international nature of the claim "involves considerations and policies significantly different"[13], such as "orderliness" and "predictability" in the resolution of disputes, and "autonomy and confidence" of businessmen in their reciprocal willingness to enter into commercial agreements", which need to be safeguarded "within a fabric of international commerce and trade[14]". The expansion of American business and industry out of the domestic boundaries eventually drove the Supreme Court to set a limit to non-arbitrability of international antitrust disputes, at least in regard of the enforceability of the **choice-of-forum** clause, when the breach of antitrust rules is merely apparent.

A further step was taken in *Mitsubishi v. Soler* (1985), where the Supreme Courts finally reversed the *American Safety* doctrine and its concerns about the inadequacy of arbitral proceedings in solving the complex issues arising from antitrust matters. Contrarily, the Court acknowledged the "**adaptability and expertise of arbitration**[15]", as it explained that the anticipated subject matter of the dispute may lead to the selection of expert arbitrators.

Finally, the Supreme Court went beyond the main concern of *the Doctrine*, believing that international arbitration could sufficiently protect national interests in the enforcement of its antitrust laws. Although an arbitral tribunal is bound to follow the willingness of the parties, it will also be bound to follow the national law and its application in order to decide the dispute,

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[12] *Ibid.* para 827

[13] *Ibid.* para 515

[14] *Ibid.* para 516-17

[15] Bruce R. Braun 'The Arbitration of Federal Domestic Antitrust Claims: How Safe is the American Safety Doctrine? (1989) 16 Issue 5 Pepperdine Law Review S201

when the parties agreed so[16]. However, it remains within the national court's power to verify that arbitrators complied with this duty.

Over a 35-year period, the American courts have moved from an aprioristic non-arbitrability of international antitrust disputes to a strong presumption in favour of arbitrability. On the other hand, their surveillance on the application of national public policy has been shifted from a preliminary inquiry, under article V(2)(a) of the NY Convention, to an inquiry of the final award, under article V(2)(b).

COMPETITION LAW DISPUTES – Europe

Contrarily to the American 'historical hostility', European States have always shown to be more favourable to arbitration. For example, Swiss and German legislations expressly recognise arbitrability of disputes that involve "economic interests" in the international field[17].

However, concerns about the ability of a private tribunal to deal with matters of public interests arose also in Europe (i.e. France and Italian), especially within the field of competition law. Nevertheless, a judicial evolution paralleling the American courts' decisions in the 1970s led to results similar to the U.S. In brief, as it happened in *Scherk*, national courts set a distinction between domestic and international antitrust disputes and moved the public policy issue "within the courts hearing the application for an enforcement order[18]".

At an EU level, the leading case on arbitrability of competition disputes is *Eco Swiss v. Benetton* (1999). The EUCJ removed any doubt about the capability of private tribunals to guarantee the application of EU competition law, recognising the importance of international arbitration and of its finality protection[19]. However, the Court also acknowledged that "*Article 85 ECT (now: 101 TFEU) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market*"[20]. Therefore, "*any agreement prohibited* [therein] *are to be automatically void, included*

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[16] 473 U.S. 614 (1985), para 636-637

[17] *(note 1) Ibid*. 779

[18] Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, *on International Commercial Arbitration* (2nd Eng ed, Klwer Law International 1997) 331

[19] C-126/97 *Eco Swiss China Time Ltd v Benetton International NV.* [1999] ECR 1-3055 para 35.

[20] *Ibid*. para 36

arbitral agreements". Within this statement, the Court recognises that competition law claims involve a public policy issue and, as such, may fall within the exception of unenforceability provided in the NY Convention[21].

Finally, the Court struck a balance between the enforcement of EU competition law provisions and the "principles of legal certainty and of *res judicata*[22]". As a result, it is not required to national courts to disapply domestic rules on the exercise of rights subject to time limits, not even to examine whether an agreement is void under the EU competition law[23].

COMPANY LAW DISPUTES – a possible light at the end of the tunnel

Arbitrability of claims under company law is uncertain for the same reasons of competition law disputes, viz. for the involvement of third party (or more generally public) interests and of statutory rights. However, the English Court of Appeal recently has provided important guidance in favour of arbitrability[24].

First of all, The Court had to deal with uncertainty set out by two earlier conflicting decisions in the field: ***Exeter City v Football Conference Ltd*** and ***Re Via Net Works Ltd***. The former case held that a petition to wind-up a company could not be decided by private tribunals, because the 'life and death' of a company is ruled by statutory provisions in the interest of third parties, and cannot be subject to private contractual arrangement. The rule stays on the basis that the statutory rights conferred on shareholders, viz. the right to apply for relief, were inalienable and could not be diminished or removed by contract[25]. This reasoning was completely opposed to the latter Irish case.

However, recently the English High Court followed the decision in favour of arbitration. In *Fulham,* the Court differentiated between the subject matter of the dispute, the allegation of unfair prejudice, and the remedies which might be granted as a result. Although the judge acknowledged that certain remedies could not be warranted by a private tribunal, due to the

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[21] *Ibid*. para 39

[22] *Ibid*. para 46

[23] *Ibid*. para 48

[24] *Fulham Football Club Ltd v. Richards and another* [2011] EWCA Civ 855

[25] *Exeter City Association Football Club Ltd v. Football Conference Ltd* [2004]1WLR 2910

involvement of third-parties' interests, however such specific provisions did not make all company matters non-arbitrable.

Finally, Fulham was not seeking remedies that were outside of the arbitral tribunal's power (such as ordering a winding-up of a company under the Insolvency Act 1986 or making an order regulation the conduct of the company's affairs under the CA 2006). However, the Court stated in an *obiter* that even where a party of an arbitral agreement is seeking for a remedy which could only be granted by the court, that agreement should operate, to first let the arbitrator decide on whether a lesser remedy would be suitable before approving an application to the court.

Question 2 – part A

The International Bar Association has formulated Guidelines on Conflict of Interest in International Arbitration (the 'Guidelines') to ensure that international arbitration proceedings are not hindered by a lack of uniformity in the application of rules concerning the independence and impartiality of arbitrators. Please discuss the duties of impartibility and independence imposed upon arbitrators in international arbitration and discuss how the Guidelines operate.

DUTIES OF IMPARTIALITY AND INDEPENDENCE IN INTERNATIONAL ARBITRATION

Parties' autonomy in international arbitration plays a core role, as they choose substantial and procedural matters of the process, such as the place of arbitration, the substantive law to be applied and the identity of the arbitral tribunal. However, parties' freedom to select their "own" arbitrators is limited by fundamental external factors, or standards, which are aimed to ensure the integrity of the arbitral process[26]. These factors are – *inter alias* – the duty of neutrality of arbitrators, which requires them to be independent and impartial to both the parties and the attendant subject matter of the arbitral dispute.

The rationale lays on the fact that arbitration is an adjudicatory process and the award is a binding decision disposing of the parties' legal rights, subject to minimal appellate review[27], as also stated in a leading U.S. case[28].

Historically, arbitrators have been obliged to the duty of impartiality and independence for centuries. The word "*koines*", used for addressing "arbitrators" in Ancient Greece, was itself synonymous of impartiality[29]. In the modern age, many developed countries prescribe standards of independence and impartiality for international arbitration in their statutes and national courts decisions. Mostly, arbitral rules prescribe a duty of disclosure of all facts and circumstances that may give rise to justifiable doubts of partiality[30].

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[26] Gary Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2009)

[27] *Ibid*. 1464

[28] *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. (U.S. S. Ct. 1968) para 148-150

[29] *(note 26) Ibid*. 1462

[30] *Ibid*. 1777

The NY Convention addresses indirectly the matter in articles II(1), II(3) and V(1)(d), by requiring recognition and enforcement of the terms of the parties' arbitration agreement. In fact, the context of the parties' agreement, rather than abstract wording of statutes, can have a significant impact on what is regarded as satisfying, or not, standards of impartiality and independence[31].

On the other hand, the UNCITRAL Model Law expressly addresses the arbitrators' obligations, prescribing remedies for any lack of compliance with them. According to the Model Law, remedies can be either challenging an arbitrator or objecting to a proposed arbitrator[32] (interlocutory judicial challenges or preventive removal of an arbitrator); as well as annulment or non-recognition of arbitral awards, based upon an arbitrator's lack of independence or impartiality under the law of the arbitral seat[33].

Although there is a universal agreement on the arbitrators' obligations of neutrality and disclosure, neither national nor international legal sources give an unequivocal definition of the content of impartiality and independence. As a result, today the content of such duties is controversial.

In the DAC *Report* on Arbitration Bill (UK, 1996) was stated that **impartiality** means that an arbitrator will not favour one party more than another, as they are subjectively unbiased; while **independence** requires that the arbitrator remains free from the control of either party. Thus, while the requirement of impartiality could be considered a *subjective* inquiry, that demands a certain state of mind on the arbitrator, independence is an *objective* inquiry, as long as it demands the absence of factual connections or relations (financial, employment, personal), which are likely to result in subjective bias.

From the wording of the *Report*, it is possible to infer two issues. Firstly, the obligation of independence is always connected to the obligation of impartiality, since a lack of independence would be generally relevant insofar as it hinders arbitrator's impartiality. Secondly, proving partiality would require a *diabolica probatio*, as long as it belongs to a state of mind.

Given the interdependent relationship between the duties, the better legislative approach is that of the UNCITRAL Model Law, according to the commentator *Born*. The Model Law uses both terms, but the same results should apply even where only one of the principle is used[34]. Regarding the

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[31] *Ibid*. 1465

[32] UNCITRAL Model Law (2006) art 12(2)

[33] *Ibid*. art 34(2)(a)(iv) - art 36(1)(a)(iv)

[34] *(note 26) Ibid*. 1471

burden of proof, since partiality is a state of mind, it can be proved only through external facts and circumstances, thus certainty will never be reached. The Model law incorporates the concept of "*justified doubts*" into standards of impartiality and independence[35]. It is not necessary for a party to show either a certainty or a possibility of partiality; it is instead sufficient to prove "enough doubt" as to an arbitrator's impartiality, which may lead even only to a **risk of partiality**.

The standard of "justified doubt", or anyway the mere risk of partiality, has been adopted in many countries. However, the UNCITRAL Model Law fails to address an important issue: what degree of risk should be reached in order to disqualify an arbitrator from the appointment.

Such an omission led to uncertainty because of the judicial use of heterogeneous – and often divergent – benchmarks to assess partiality. For instance, lower courts in the U.S. stated that an arbitral award would be vacated where "***a reasonable person** would have to conclude*" that an arbitrator is partial[36] or anyway where there was a "*reasonable impression of partiality*[37]". In contrast, in another case a recent appellate decision held that "*appearance of bias*" was insufficient to warrant vacating an award[38]. In the U.K., English Courts adopted a variety of standards, ranging from "reasonable suspicion" to a "real danger" or "real possibility" of bias, to a rule of automatic disqualification in any case involving an arbitrator's pecuniary interest. However, the prevailing English courts' benchmark currently used to assess the "likelihood of bias" is the "**fair-minded and informed observer**"[39].

THE IBA GUIDELINES ON CONFLICTS OF INTEREST

Elaborated on aspects of IBA Ethics (1986) and approved on May 2004, "The Guidelines" contributed significantly to a unification of the standards for assessing the "justifiable doubts" of partiality, and in general harmonised the content of impartiality and independence in the field of international commercial and investment arbitration. Although they have admittedly no

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[35] *(note 32) Ibid.*

[36] *Morelite Constr. Corp. V. N.Y.C. Dist. Council Carpenters' Benefit Funds*, 748 F.2nd 79 (2nd Circ. 1984)

[37] *Sheet Metal Workers etc. v. Kinney Air Conditioning Co.*, 756 F.2nd 742, 745-46 (9th Circ. 1988)

[38] *Sphere Drake Ins. Ltd v. All Am. Life Ins. Co.*, 307 F.3rd 617, 621 (7th Circ. 2002)

[39] *(note 26) Ibid.* 1473

statutory value, the Guidelines demonstrated to be not void of influence in the practice of arbitral institutions and they have been widely accepted[40].

The Guidelines set out a baseline duty of impartiality and independence of the arbitrators "*at the time of accepting an appointment* […] *until* […] *the proceedings have otherwise finally terminated*[41]". Furthermore, an arbitrator is required to "*decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubt as to his or her ability to be impartial or independent*[42]".

The Guidelines also provide a detailed – although non-exhaustive – list of particular circumstances in which an issue of conflict of interest, and therefore of partiality, may arise. Furthermore, standards 2(b) and 2(c) univocally provide the benchmark of the "**reasonable third party**" to assess "justifiable doubts". Accordingly, "*if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case presented by the parties in reaching his or her decision*".

Furthermore, an arbitrator has a duty of disclosure, as well as he or she is required to make "reasonable enquiries" to identify any fact or circumstance that may give, in the eyes of the parties, rise to doubts as to the arbitrator's impartiality or independence[43]. Finally, interesting is the General Standard 4, which provides a list of circumstances that may potentially disqualify the arbitrator "*unless the parties have accepted the arbitrator*[44]" (waiver by the parties).

Regarding the three "Application lists", they constitute the first attempt in the international arbitration framework to make general standards of impartiality and independence more practical[45]. The first list is the "Red List", divided in two parts: a "non-waivable red list" and a "waivable red

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[40] James Ng, 'When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethich through IBA Guidelines on Conflict of Interest and Published Challenges' (2015) 2:1, McGill Journal of Dispute

[41] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (London: IBA, 2014) pt I, general standard 1.

[42] *Ibid*. pt I, general standard 2(a)

[43] *Ibid*. pt I, general standard 3(a)

[44] Ibid. pt I, general standard 2(b)

[45] *(note 40) Ibid*.

list". The former involves situations driving from the overriding principle that no person can be his or her own judge, even with a waiver by the parties[46]. The latter covers less severe situations where the arbitrator may still participate if the parties provide a knowledgeable waiver[47]. The second list is the "Orange list", which covers specific circumstances, such as previous or current service for one of the parties or relationship between arbitrators that, depending on the facts of the case, may give rise to justifiable doubts or duty to disclose[48]. Finally, the "Green list" involves "specific situations where no appearance and no actual conflict of interest exist from an objective point of view" and the "arbitrator has no duty to disclose"[49].

Very interesting, in order to understand the way in which the standards of the Guidelines may be interpreted and applied, are the London Court of International Arbitration decisions in regard of many challenges filed against arbitrators, on the basis of the same circumstances listed in the IBA document.

An epitomizing case is LCIA Reference No. 97/X27 (October 23, 1997), where the Division scrutinised the circumstances represented in the Orange List at paragraph 3.1.1. "the arbitrator […] has served as counsel for one of the parties". The court rejected the challenge ruling that an arbitrator cannot be disqualified when such a role is minor, negligible, and cannot give rise to justifiable doubts. The same principle was expressed for a circumstance in which the challenged arbitrator had served for a few weeks[50].

In conclusion, IBA Guidelines Application Lists, read through a comparative analysis with published challenges, may be a real touchstone parameter to guide courts in the evaluation of the (increasing) challenges to arbitrators. It is no doubt true that one of the core ethical standards set out in the Guidelines is that an impartial and independent arbitrator cannot have any substantial financial stake in the outcome of the case. Moreover, the Guidelines try to strike a balance between the arbitrators' duties and the circumstance that, especially in international commercial arbitration, arbitrators are selected precisely because of their specialized experience and familiarity to the parties and their counsel. Consequently, forbidding arbitrators from having past or existing professional and social contacts with

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[46] IBA Guidelines (2004) pt II, para 2

[47] *Ibid*.

[48] IBA Guidelines (2004) para 3

[49] *Ibid*. para 7

[50] *(note 40) Ibid*.

the parties (in the same manner that might apply to national court judges) would risk impairing one of the basic characteristics of the arbitral process[51].

[51] *(note 26) Ibid*. 1485