



Alternative Dispute Resolution in International Taxation

Independent Persons: Quis Custodiet ...



Sed quis
custodiet ipsos
custodes?

— Juvenal

« Quis custodiet ipsos custodes »

Who guards the guards?

- A. Who should be the « guards » - what are the applicable standards of independence?**
 - I. Standards for « independent persons » in int'l tax law
 - II. Interpretation of independence principles in international arbitration practice
- B. Who should « guard the guards » - how to safeguard the integrity of the system?**
 - I. Objection, challenge and disqualification
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Outlook



US Canada MoU

6. Board Member Appointment

...

e. ... *Every member of a board shall be impartial and independent of the Contracting States and Concerned Persons at the time of accepting an appointment to serve, and shall remain so during the entire arbitration proceedings and for a reasonable period of time thereafter.*

f. *Prior to accepting an appointment, a prospective Board Member shall disclose to both competent authorities any fact or circumstance likely to give rise to justifiable doubts as to the Board Member's impartiality or independence. If, at any stage during the proceeding, new circumstances or facts arise that may give rise to such doubts, a Board Member shall promptly disclose such facts or circumstances to both competent authorities.*

MLI (Part VI, Art. 20)

- a) *Each competent authority shall appoint one panel member ... The two panel members so appointed shall ... appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either Contracting Jurisdiction.*
- b) *Each member appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting Jurisdictions and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.*

Expl. Note 236. ..., the competent authorities may wish to require that any prospective arbitration panel member disclose to the competent authorities any fact or circumstance likely to call into question that prospective member's impartiality or independence....

EU Directive – Composition of AC

Article 8 The Advisory Commission

1. *The Advisory Commission referred to in Article 6 shall have the following composition:
 - (a) *one chair*;
 - (b) *one representative of each competent authority concerned. If the competent authorities agree, the number of such representatives may be increased to two for each competent authority;*
 - (c) *one independent person of standing, who shall be appointed by each competent authority of the Member States concerned from the list referred to in Article 9. ...**
6. *The representatives of the competent authorities and the independent persons of standing appointed in accordance with paragraph 1 of this Article shall elect a chair from the list of persons referred to in Article 9. Unless the representatives of each competent authority and independent persons of standing agree otherwise, the chair shall be a judge.*

EU Directive – Criteria of Independence

4. ... *the competent authority of any of the Member States concerned may object to the appointment of any particular independent person of standing ... for any of the following reasons:*

(a) that person belongs to or is working on behalf of one of the tax administrations concerned or was in such a situation at any time during the previous 3 years;

(b) that person has, or has had, a material holding in or voting right in or is or has been an employee of or adviser, at any time during the last 5 years prior to the date of his appointment, to any affected person concerned;

(c) that person does not offer a sufficient guarantee of objectivity for the settlement of the dispute or disputes to be decided;

(d) that person is an employee with an enterprise that provides tax advice or otherwise gives tax advice on a professional basis, or was in such a situation at any time during a period of at least 3 years prior to the date of his appointment.

EU Directive – Disclosure of Conflicts

Article 9 The list of independent persons of standing

- 1. ... each Member State shall nominate at least three individuals who are competent and independent, and who can act with impartiality and integrity.*
- 2. ... Each Member State shall also provide the Commission with complete and up-to-date information regarding ... any conflicts of interest that they may have. ...*

Disclosure template according to Standard Rules of Functioning

“I consider myself independent and impartial. To the best of my knowledge, and having made due enquiry, there is no interest, relationship or any other matter, past or present, that I should disclose because it might affect my independence or impartiality or that might reasonably create an appearance of bias in the proceedings.”

Interpretation of independence principles in international arbitration practice

IBA Guidelines on Conflicts of Interest in International Arbitration

Adopted by resolution
of the IBA Council
on Thursday 23 October 2014

„Red List“:

- **Unwaivable issues**
(„*nemo iudex in causa sua*“)
- **Waivable issues**
(must be expressly waived)

„Orange List“:

- objection possible within 60 days
after disclosure

„Green List“:

- No general presumption of lack of
independence, but assessment on
case-by-case basis

Non-Waivable Red List Issues

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

...

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

Waivable Red List Issues

2.2 Arbitrator's direct or indirect interest in the dispute

2.2.3 The arbitrator... has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

...

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

Orange List Issues (1)

3.1.3 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.

3.1.4 The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

Orange List Issues (2)

3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.

3.4.5 If the arbitrator is a former judge, he or she has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.

3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute.

3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

Green List Issues

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

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Outlook

Objection, Challenge, Replacement

- Legitimate vs. illegitimate objections?
- Who decides on challenge?
- What are legitimate criteria for challenge?
- Are there autonomous criteria or divergent national laws?
- How does replacement take place?
- Institutional rules on disqualification and/or replacement

Objections in EU Directive

- Member States may object on a case-by-case basis to the appointment of any potential member of an AC or ADRC on the reasons stipulated in Article 8 (4).
- Legitimate vs. illegitimate objections?
- **Numerus clausus** of criteria: (“... *the competent authority of any of the Member States concerned may object to the appointment of any particular independent person of standing for any reason agreed in advance between the competent authorities concerned or for any of the following reasons ...*”)
- Who decides?
- How deal with flagrant bias in the conduct of proceedings?

Challenge and Replacement in EU Directive

Art. 9 (3) ... Each Member State shall put in place procedures for removing any person whom it has appointed from the list of independent persons of standing if that person ceases to be independent.

Where, taking into consideration the relevant provisions of this Article, a Member State has reasonable cause to object to an independent person of standing remaining in the abovementioned list for reasons of lack of independence, it shall inform the Commission and provide appropriate evidence to support its concern. The Commission shall in turn inform the Member State that nominated such person of the objection and supporting evidence. On the basis of such objection and supporting evidence, the latter Member State shall within 6 months take the necessary steps to investigate the complaint, and shall decide whether to retain or remove that person from the list. The Member State shall then notify the Commission accordingly without delay.

Enforceability of awards (“opinions”) in case of a lack of independence

Art. 15 (4) EU Directive:

“The final decision shall be binding on the Member States concerned and shall not constitute a precedent. The final decision shall be implemented subject to the affected person(s) accepting the final decision and renouncing the right to any domestic remedy within 60 days from the date when the final decision was notified, where applicable. Except where the relevant court or other judicial body of a Member State concerned decides according to its applicable national rules on remedies and applying the criteria under Article 8 that there was lack of independence, the final decision shall be implemented under the national law of the Member States concerned...”

Summary of Possible Lacunae

- Unclear who decides on objections
- “Challenge” only against the list: abstract assessment of independence and therefore high threshold
- Challenge decided by appointing Member State
- Narrow list of criteria
- No autonomous criteria and no safeguards of harmonized approach
- Conclusion: risk of heavy criticism if public attention is drawn to the current set-up regarding appointment of tax arbitrators and the integrity of the system becomes an issue.

Outlook

Fiscalis Project Group (FPG) 093 on the Implementation of Article 10 of the Directive considers, among other options, a “Standing Committee” of full-time arbitrators.

Under such circumstances, the lack of independence due to other professional engagements would become less of an issue