**Written Evidence from Dr.Guido Carducci**

## Call for Evidence on the Arbitration Bill

### Notes on the meaning of "independence" and the absence of a statutory duty

As a matter of brief introduction, I am a Law Professor in Paris, an Attorney-at-Law in Rome, a Chartered Arbitrator (FCIArb), International Tenant and Arbitrator with 4-5 Gray's Inn Square in London. I served as Chief, International Standards Section, UNESCO in charge of international standard-setting.

I submit this note on "independence" of arbitrators. It concerns the reasons why the revised Arbitration Act does not include a duty of "independence". At present it maintains the duty of "impartiality" ("acting impartially as between the parties", Section 33) and would add the proposed "Impartiality: duty of disclosure" (new Section 23A).

Excluding independence from the Arbitration Act could be deemed not in line with Art.6 of the European Convention on Human Rights, incorporated in English Law by the Human Rights Act, according to the argument that the Convention's requirement of "an independent and impartial tribunal" introduced independence in English arbitration law.[1] However, from the European Court of Human Rights' perspective respect of the guarantees set forth in Article 6 § 1 is imposed in case of a compulsory arbitration (imposed upon the parties by law),[2] while in a voluntary arbitration the parties may, in principle, waive the guarantees of Article 6.[3]

At least French and Swiss Arbitration legislations require independence and impartiality from arbitrators in both domestic and international arbitrations (French law, art.1456, al.2 and 1506[4] CPC; Swiss law, art 363 CCP and art.180 PILS). The institutional ICC Arbitration Rules (2021, art.11) read: "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration." The LCIA Arbitration Rules (2020, art.10.1) allow revocation of the arbitrator by the Court in case of justifiable doubts as to his impartiality or independence. The IBA Guidelines on Conflicts of Interest in International Arbitration set as general principle that "Every arbitrator shall be impartial and independent of the parties".

If one believes that independence and impartiality are distinct requirements that complementarily contribute to enhanced credibility and use of arbitration, arguably they would both deserve to be covered under the "relevant circumstances" to be disclosed under the new statutory duty (Section 23A).

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[1] Russell on Arbitration, 33rd ed. n.4-128 p.167. This question would deserve further analysis, beyond this note.
[2] Suda v. the Czech Republic, 2010, § 49.
[3] If the waiver is established in a "free, lawful and unequivocal manner". Mutu and Pechstein v. Switzerland, 2018, § 96.
[4] Unless the parties agree otherwise in international arbitration.

## I) Independence beyond a questionable excessive focus on "connections" and the risk to assume that a connection implies dependence

Since 1996 the Arbitration Act retains a duty of "impartiality" ("acting impartially as between the parties", Section 33), not of "independence". The latter per se is not a ground to challenge an arbitrator unless the lack of independence gives rise to justifiable doubts as to impartiality. The reason is, in the DAC Report's view[5], that "lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance" (n.101). Why focusing only on impartiality and considering independence of "no significance" ? The DAC Report (par.101, 102) rather focuses on the value of impartiality, leaves "independence" and "impartiality" undefined and does not elaborate extensively on objective grounds against a duty of independence. However, the DAC Report provides a practical ground (n.102) : "Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the "independence" of an arbitrator".

The idea that "any connection (however remote) has been put forward to challenge the "independence" of an arbitrator" appears also in the Law Commission's First Consultation Paper (2022) which oriented the consultation on "independence" around "connections", their existence and effect.[6] The Paper notes: "What matters is not the connection, but its effect on impartiality and apparent bias".
The earlier DAC Report and the Paper admit some approximation by leaving the key terms "independence", "impartiality", "connections" undefined.
The focus on "connections" of the consultation on "independence" is reflected in several responses and in the Law Commission's Final Report (Law Com No 413) which maintains (page 13) its proposed exclusion of a statutory duty of "independence". It reads:

"3.14 There were 78 responses to CP1 CQ2: 63 agreed, 12 disagreed, and 3 gave other responses.

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[5] DAC Report on the Arbitration Bill, February 1996.
[6] It reads as follows: "Independence
3.40 A duty of independence is express in some foreign legislation and in some arbitral rules. Nevertheless, we are not persuaded that it is a virtue in itself. To this extent, we tend to agree with the DAC that what matters is impartiality. If the arbitrator is impartial, and is seen to be impartial, it should not matter whether they have a connection to the parties before them. Of course, some connections are so close that there is at least the risk of unconscious or apparent bias. But other connections might be so trivial or tenuous that no-one could reasonably consider the arbitrator's impartiality to be in question. What matters is not the connection, but its effect on impartiality and apparent bias.
3.41 We have heard repeatedly that in some areas of arbitral activity, complete independence is perhaps almost impossible to achieve, given the limited number of professionals, and the inevitable encounters with others as those professionals develop their expertise over the years. Indeed, some arbitration clauses explicitly require what we might call immersive area expertise. This may be so particularly, for example, in maritime, commodity, insurance or sports arbitration. As discussed above, this has been noted judicially. To the extent that parties are kept informed, this does not appear to cause any problems in practice.
3.42 More generally, arbitrators with desirable experience will inevitably have encountered other professionals and actors in their field. Hermetic separation is not possible. Again, what matters is that arbitrators are open about relevant connections, and that parties are reassured that their tribunal is impartial.
3.43 For these reasons, we do not propose the introduction of a new duty of independence."

"3.15 Consultees who agreed tended to emphasise the practical difficulty of *ensuring no connections between the arbitrator and the parties or their lawyers*, and that impartiality was really the key principle." (italics added)
"3.17 Consultees who disagreed tended to suggest that independence was an equally important principle, and that its absence from the Act was out of line with international practice."

As Par.3.15 summarizes, the alleged argument against a statutory duty of independence is, in the Final Report's view and summary of the responses received, in essence "the practical difficulty of ensuring no connections between the arbitrator and the parties or their lawyers".
Why ? While reducing or preventing such connections reduce the risk of challenge, if "connections" (left undefined in the Report) are found to exist their existence per se amounts neither to lack of "independence" of the arbitrator, nor to a certainly successful challenge on this ground. Assuming the opposite, that any "connection" (yet undefined) implies necessarily dependence, would be problematic and unrealistic. Even though cases in several jurisdictions illustrated that various types of connections (repeated appointments by the same parties, etc.) may lead to real or apparent lack of independence of an arbitrator.
Leaving the matter to courts, a reasonable test would be, not whether one or more "connections exist" as a fact (as in 3.15 of the Final Report), but rather whether the result of these or other facts (other than "connections") in the arbitrator's mind exclude his/her independence[7] taken as "freedom from outside control" (Oxford Dictionary, below II) or, in practice, according to the relevant judicial interpretation of "independence" for arbitrators in the relevant jurisdiction.

As the DAC Report and the Law Commission's First Consultation Paper, also the Final Report does not add clarity by defining the key terms "independence", "impartiality", "connections".

While one may agree with the Final Report's view (3.11) that "arbitrators with desirable experience will inevitably have encountered other professionals and actors in their field. Hermetic separation is not possible.", the Final Report's conclusion seems excessive, driven by its focus on "connections" and its probable implied assumption (as in 3.15) that existence of "encounters" (in 3.11) or "connections" (in 3.15) amounts per se to lack of "independence", when it reads:
"3.18 We continue to think that complete independence is not possible. This is so especially where arbitrators are drawn from a small pool with specialist expertise, or where they are expected to have immersive experience in a particular area of activity."

## II) The Oxford Dictionary's first meaning of "independent" is "free from outside control", the last is "not connected with another"

The Oxford Dictionary of English (3rd edition) provides four meanings of "independent", the first being "free from outside control". Only the Oxford Dictionary's fourth and last meaning is "not connected with another". Being the last and residual meaning of independence, "lack of connections" should not have

[7] This brief note does not cover caselaw, judicial interpretations and tests of independence (fair-minded observer etc.).

polarized the discussion. It has, however, in arbitration since the DAC Report, followed by the Law Commission's First Consultation Paper and Final Report. They did not consider, at least expressly, the existing meanings and focused on independence mainly under this fourth meaning (lack of connections).

The Oxford Dictionary's first meaning appears sound and reliable, possibly also in arbitration: can an arbitrator be "impartial" (i.e. "treating all disputants equally", Oxford Dictionary) under Section 33 of the Act if he/she is not also "independent" i.e. free from outside control ? An arbitrator "independent" as being "free from outside control" seems an ordinary requirement.[8] Whether such "freedom from outside control" occurs in circumstances with or without "connections" (yet to be defined) or other facts is a matter left to courts, case by case. For a reasonable test, above I.

I agree with the DAC Report and the Law Commission's Reports that the existing statutory duty to "act impartially as between the parties" in the Act since 1996 (Section 33) is key, and that to some extent impartiality (yet undefined) also covers some situations of independence (yet undefined).

However, the duty of impartiality (Section 33) in the Act since 1996 and the new proposed "Impartiality: duty of disclosure" (new Section 23A) combined with the debate on independence questionably focused excessively on "connections" and the risk of an unfortunate implied assumption that connection(s) imply per se a lack of "independence" (above I), should not lead to "throwing the baby out with the bathwater", i.e. a superficial dismissal of "independence", of its distinctiveness and complementarity to impartiality, of the question whether the current reform of the Arbitration Act should include a duty of independence. Such statutory duty exists, also in pro arbitration jurisdictions as France and Switzerland.

Lawmakers generally do not define statutorily "independence" and courts decide with the flexibility that the circumstances of each case require. In addition, as with the IBA Guidelines on Conflicts of Interest and other initiatives the arbitration community can contribute to elaborate on independence.

At least French and Swiss courts, as well as arbitral tribunals and institutions or national courts applying rules such as art.11 of the ICC Arbitration Rules or art.10.1 of the LCIA Arbitration Rules, develop their interpretation of "impartiality" and "independence" allowing both distinct notions and tests to coexist and complementarily contribute to enhanced credibility and use of arbitration.

Thank you,

Yours sincerely,

Guido Carducci

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[8] Some instances would be covered also by the existing duty of impartiality.