UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# Dispute Settlement

## International Commercial Arbitration

### 5.3 Arbitral Tribunal

# NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

This module has been prepared on the basis of a first draft by Mr. A. Garro at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed in this module are those of the authors and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL, the Advisory Center on WTO Law or the PCA.

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# WHAT YOU WILL LEARN

One of the more obvious features (and advantages) of arbitration, as opposed to litigation, is that in arbitration one may choose one's own judge. This comparative advantage is what makes arbitration a genuine neutral ground for the settlement of disputes, and the choosing of a truly impartial judge is centered on the appointment of the arbitrators.

This Module provides an overview of the qualifications required of an arbitrator and the process by which the arbitrators are appointed, challenged, removed, and replaced. More specifically, the following sections focus on the process of nominating the member(s) of the arbitral tribunal, the qualifications that those members should have and, the methods to secure the establishment of an arbitral tribunal in the absence of cooperation by one of the parties.

This Module also includes the grounds and mechanisms for challenging arbitrators, the rights and obligations of arbitrators, and the administrative and financial aspects of the arbitration.

# 1. APPOINTMENT AND MECHANISMS OF APPOINTING AUTHORITIES

***Objectives***

**On the completion of this section, the reader should be able to answer the following questions on how arbitrators are appointed and the possible back-up appointment procedures:**

- **If the agreement to arbitrate is silent on the number of arbitrators, will there be a sole arbitrator or a three-member tribunal?**
- **If there is to be a sole arbitrator, who will appoint him or her?**
- **If there is to be a three-member tribunal, who will appoint those members?**
- **How do appointing authorities select and appoint arbitrators?**
- **What are the qualities that an arbitrator must have and what are additional desirable qualities?**

## 1.1 Introduction

One of the most important aspects of international commercial arbitration is that the parties are free to choose the arbitrators or to provide the means by which the arbitrators will be chosen. A few arbitral institutions limit the choice of arbitrator to a list maintained by the institution, but the parties do not have to submit their arbitration to that institution. The few limits that exist regarding the qualifications of the arbitrators are examined in Section 2 below.

## 1.2 Sole arbitrator or arbitral tribunal of three

In the vast majority of cases the parties choose either a sole arbitrator or three arbitrators. The relative merits of these options are debatable, as shown by the discrepancy of the arbitration rules on the subject. In cases where a significant sum is at stake or, the parties come from States with different legal and commercial traditions, a panel of three arbitrators would be the normal pattern. This is more expensive and it will generally take longer to reach an award than an arbitration conducted by a sole arbitrator, but both the process and the award are likely to be more acceptable to the parties.

The AAA Rules Art. 5 and LCIA Rules Art. 5.4 provide that there will be one arbitrator unless the parties have agreed otherwise or the institution believes that there should be three. Article 8(2) of the ICC Rules also gives certain priority to the appointment of a single arbitrator.

***ICC Rules, Article 8(2)***

*Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators….*

The UNCITRAL Rules and the ICSID Convention, however, provide otherwise. In investment disputes between States which are parties to the ICSID Convention and the nationals of another contracting party, an ICSID arbitral tribunal consists of three arbitrators unless the parties agree otherwise (ICSID Art. 37(2)(b)). Article 5 of the UNCITRAL Rules provides:

***UNCITRAL Rules, Article 5***

> *If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.*

## 1.3 Appointment by the parties

The principle of equality of the parties leads to the rule that both parties must agree on the manner in which the tribunal is constituted. Any method of selection will be accepted. The parties may name a particular person or persons by name or they may indicate the office in which the individual serves.[1]

Whether the parties agree on a sole arbitrator or, on a tribunal of three or more arbitrators, it is not practical, and in most cases it is not convenient, to identify specific arbitrators by name at the date of signing the contract containing the arbitration clause. Therefore, the parties must either select the arbitrator or arbitrators after the dispute has arisen or provide in the arbitration agreement a procedure by which the arbitrator or arbitrators will be named.

If a sole arbitrator has been agreed upon, the parties have to agree on a specific person. If there is to be a three-member tribunal, the typical procedure is that the claimant nominates one arbitrator, the respondent nominates another and the two arbitrators so appointed designate the third arbitrator, who will serve as chairman. The parties may, of course, reserve to themselves the right to name the third arbitrator jointly.

Because the parties are unlikely to reach an agreement on the sole arbitrator or on the arbitrators once a dispute has arisen, it is most convenient for the arbitration clause in the underlying contract to define a method for the nomination and appointment of the members of the arbitral tribunal. A common method is to designate an arbitral institution to administer the arbitration, in which case the procedure for appointment of the members of the arbitral tribunal will be set out in the rules of that institution. Where the parties do not wish to submit the dispute to an arbitration organization, a person or institution may be named as appointing authority. In such a case, the parties should be sure that the person or institution is willing to function as an appointing authority.

[1] *AAA Rules Art. 6, ICC Arts. 8(3) and 8(4) LCIA Arts. 5-7, UNCITRAL Rules Arts. 6 and 7.*

## 1.4 Nomination rather than appointment by the parties

If an arbitral institution is to administer the arbitration, it has an institutional interest in the satisfactory conduct of the arbitration. One way whereby it may protect that interest is by appointing as arbitrators only those persons who are known by it to have the proper qualifications. The institution may require that appointment be from a list maintained by the institution. Another method often used is that the institution itself will appoint the arbitrators, though on the nomination by the parties. That is the method found in ICC Rules Art. 9 and LCIA Rules Arts. 5 and 7. In such a case, the institution will retain the right to refuse to appoint as arbitrator a person who it judges does not have the proper qualifications. Nevertheless, in general an arbitrator appointed by the institution on the nomination of a party is usually referred to as a party-appointed arbitrator, and that practice will be followed here.

## 1.5 Role of the party-appointed arbitrators

If the arbitral tribunal is to be composed of three members, each party normally nominates or appoints one of the three. The presence of a party-appointed arbitrator, if well chosen, provides the appointing party with some confidence that its case will be fairly presented and studied. To this extent, a fair hearing and a considered decision is somewhat assured. In an international case, where it is common for lawyers and arbitrators of diverse legal traditions to participate, the presence of a party-appointed arbitrator trained in the same legal culture as the appointing party tends to assure that the nuances of that legal culture will be properly understood by the other members of the arbitral tribunal.

As noted below in more detail, a party-appointed arbitrator is not a member of the "team" of the party who appointed him or her and, is expected to be independent and impartial in his or her consideration of the case.

## 1.6 Problems arising from the lack of cooperation by the parties

One of the main problems of international commercial arbitration is to secure an arbitral tribunal in the absence of cooperation by one of the parties. It would seem that the problem could be overcome if the parties were to name the arbitrators in the arbitration clause in the original contract. That is, however, a rare and normally unwise procedure. To the extent that a dispute has not yet arisen, the parties do not yet know the characteristics they might desire in the arbitrators. Furthermore, at the time a dispute arises the arbitrators named in the arbitration agreement may no longer be alive or may be unwilling or unable to undertake the tasks of arbitrating the dispute.

It cannot be assumed that the parties will cooperate to create an effective arbitral tribunal once a dispute between them has arisen. Where each party is to appoint one arbitrator, the refusal of one of them (normally the respondent)

to appoint its arbitrator, or the failure to agree on the third arbitrator, may prevent the arbitral tribunal from coming into existence. Even if both parties cooperate in the nomination of the arbitrators, the persons nominated by the parties may be unable or may refuse to accept their nomination and, one or the other party may then no longer be willing to cooperate. Thus, a party's failure to cooperate in the nomination of an arbitrator may cause the entire arbitration to fail or, at least, to be more difficult for the other party.

## 1.7 Appointment by an appointing authority established by the parties

There are a number of ways to establish a working arbitration tribunal despite the lack of cooperation of a party. The parties may name an "appointing authority" in their arbitration agreement or, they may provide that the arbitration will be administered by an arbitral institution, in which case the arbitrators may be nominated and appointed in accordance with the rules of that institution. Finally, the arbitration law may provide that assistance in the appointment may be rendered by a court.

Parties that do not wish their arbitration to be administered by an arbitral institution should nevertheless provide for an appointing authority in the arbitration agreement. The appointing authority may be a named person or preferably may be the holder of a particular office, e.g. president of a particular commercial court, or perhaps an arbitral institution. The functions of the appointing authority are limited to the naming of an arbitrator when the parties cannot agree on a sole arbitrator, when one of the parties fails to appoint its arbitrator in a three-member tribunal or when the two party appointed arbitrators, or the parties themselves, cannot agree on the third arbitrator. The appointing authority may also have the function of deciding on any challenge to an arbitrator.

Many arbitral institutions, including the AAA and ICC, are prepared to serve as appointing authorities in ad hoc arbitrations under the UNCITRAL Rules for a small fee (1.8.3). The UNCITRAL Arbitration Rules provide a means for an appointing authority to be named if one is needed but the parties have not provided for it in the arbitration agreement.

## 1.8 Appointment by an arbitral institution

If the parties entrusted their dispute to an institutional arbitration tribunal, the lack of their further cooperation with respect to the nomination of arbitrators and, the absence of detailed provisions in the arbitration agreement, would not render the arbitration agreement inoperative. Indeed, one of the main functions of arbitral institutions is to proceed with the appointment of the arbitrator or arbitrators who have not been appointed or cannot be agreed upon by the parties (e.g., ICSID Art. 38, establishing the Chairman of the ICSID Centre as the default appointing authority).

By choosing an arbitral institution the parties place the arbitration agreement against a normative background provided by the arbitration rules of that institution. There are, however, striking variations among institutional rules as to the methods of appointing arbitrators. The parties should be sure that the provisions of their arbitration agreement on nomination of arbitrators are compatible with the rules of the chosen arbitral institution or the institution may refuse to administer the arbitration.

### 1.8.1 ICC Rules

Under the ICC Rules, in a three-person arbitration the Claimant nominates an arbitrator in the request for arbitration submitted to the Secretariat of the ICC or the National Committee (ICC Art. 4(3)(e)). The Respondent must nominate its arbitrator within 30 days (with the possibility of an extension) of receipt of the documents from the Secretariat. If the Respondent refuses to nominate an arbitrator, or if the Respondent nominates an arbitrator but thereafter the parties prove unable to agree on the neutral third arbitrator, the ICC Court makes the appointment. The appointment, however, is made on the recommendation of an ICC National Committee. Where the ICC Court is to appoint an arbitrator on behalf of a party that has failed to nominate one, it makes the appointment upon a proposal of the National Committee of the country of which that party is a national (ICC Rules Art. 9(6)). Where the ICC Court is to appoint a sole arbitrator or the chairman of an arbitral tribunal, the National Committee chosen to make the nomination is one the Court considers appropriate, which is usually the Committee of the place of arbitration chosen by the parties (ICC Rules Art. 9(3)). If the parties have not agreed on the place of arbitration, the choice of the National Committee to propose the sole arbitrator or the third arbitrator normally is effectively also a choice of the place of arbitration. The proposal by the National Committee (usually a national of that particular country) is reviewed by the ICC Court, which in most cases confirms it.

### 1.8.2 AAA Rules

An alternate approach favoured (although not required) by the AAA Domestic Rules is to submit identical lists of potential arbitrators to the two sides, from which each side may cross off names that it regards as unacceptable. The AAA (or other appointing authority) then chooses a panel from among persons not crossed off by either party (AAA Domestic Rules Art. R-13, providing for appointment from a panel).

Under the AAA Rules applicable to international disputes, if the parties have failed to agree on an appointment procedure within 45 days after the commencement of the arbitration, the AAA appoints the members of the arbitral tribunal and its chairman upon the request of any party. The AAA also intervenes as the appointing authority in case the parties have agreed on an appointment procedure but fail to proceed with the appointment within the time limit provided in that procedure.

The AAA International Rules Art. 6.3 reads:

**AAA International Rules, Art. 6.3**

> *If all of the parties have mutually agreed on a procedure for appointing the arbitrator(s), but all appointments have not been made within the time limits provided in that procedure, the administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.*

### 1.8.3 UNCITRAL Rules

Unlike the AAA, ICC, or LCIA Rules, the UNCITRAL Rules are not attached to a specific institution. Lacking its own institutional appointing authority, an arbitration conducted under the UNCITRAL Rules provides a two-stage mechanism to secure the establishment of the arbitral tribunal when the parties have not agreed upon its members.

In the first place, parties to an ad hoc arbitration under the UNCITRAL Rules may select their own appointing authority. A number of arbitral institutions have agreed to act as appointing authorities in an arbitration conducted under the UNCITRAL Rules.[2] Pursuant to the procedure agreed by the parties, the appointing authority is expected to complete the composition of the arbitral tribunal in case the parties are unable to agree upon the appointment of a single arbitrator, or one of the parties fails to make the appointment pursuant to the agreement or, when both parties have appointed party-arbitrators but are unable to appoint the third arbitrator.

Where there is to be a three-member tribunal and one party fails to appoint an arbitrator, the other party may request the appointing authority to appoint the missing arbitrator. The appointing authority may exercise its discretion to do so. Where the appointing authority is to appoint a sole or the third arbitrator, unless the parties agree otherwise or, the appointing authority determines it is inappropriate, he prepares a list of three names to be circulated to both parties. Each party has fifteen days within which to return the list deleting the names it finds objectionable and numbering the remaining names in order of preference. After those fifteen days have elapsed, the appointing authority selects from the remaining names, as the case may be, the sole arbitrator or the un-appointed party-arbitrator or chairman. Article 6(3) of the UNCITRAL Rules also authorizes the appointing authority to select according to its discretion if the above mentioned mechanism does not work.

In the second place, if the contractually designated appointing authority fails to make its appointment within sixty days, or if the parties fail to designate an appointing authority, Article 6(2) of the UNCITRAL Rules provides that either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague (PCA) to designate an appointing authority. The Secretary-General of the PCA has agreed to fulfil the function.

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[2] *UNCITRAL Rules Arts. 6-8; AAA, Procedures for Cases under the UNCITRAL Rules (2000); ICC, Services rendered by ICC in ad hoc arbitrations under the UNCITRAL Arbitration Rules.*

## 1.9 Criteria for selecting arbitrators by an institution or appointing authority

Wide discretion is assigned to the AAA in the selection of arbitrators. AAA International Rules Art. 6(4) reads:

***AAA International Rules, Art. 6(4)***

> *In making such appointments, the administrator, after inviting consultation with the parties, shall endeavour to select suitable arbitrators. At the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.*

The LCIA is also vested with ample discretion to make the appointment, but the criteria for selecting the arbitrators is more specific than in the AAA rules.

In selecting arbitrators consideration is given, as far as possible, to the nature of the contract, and the nationality, location and languages of the parties. Where the parties are of different nationalities, then unless they have agreed otherwise, sole arbitrators or chairmen are not to be appointed if they have the same nationality as any party (the nationality of the parties being understood to be that of controlling shareholder interests). If the parties have agreed that they are to nominate arbitrators themselves, or to allow two arbitrators, or a third party, to nominate an arbitrator, the court may refuse to appoint such nominees if it determines that they are not suitable or independent or impartial. In the case of a three-member Tribunal the Court will designate the Chairman, who will not be a party-nominated arbitrator.

Under other arbitration rules the discretion of the appointing authority is limited by a list of arbitrators from which the selection must be made. This allows the parties to have some idea of the limits of the universe of potential arbitrators. The ICSID has a permanent and fixed panel of arbitrators, recommended to the Secretary-General of the ICSID by the contracting States. The parties to the dispute however, are not restricted to that panel. When the Secretary of the ICSID acts as the default appointing authority under Article 38 of the ICSID Convention, he is bound to select the arbitrators from the members of that list (ICSID Art. 40(1)).

The appointing authority is in most cases required to consult with both parties as far as possible before making the appointment (e.g., ICSID Art. 38). This consultation procedure is aimed at avoiding the appointment of unacceptable or problematic individuals by the appointing authority. Similar policies guide the limitation imposed, though in the most general terms, on the discretion of the appointing authority in ad hoc arbitrations under the UNCITRAL Rules. UNCITRAL Rules, Art. 6(4) reads:

***UNCITRAL Rules, Art. 6(4)***

> *In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent*

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*and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

## 1.10 Assistance rendered by municipal courts in appointment of arbitrators

Arbitration has been gaining recognition by asserting its independence or autonomy from the judicial process, as it has struggled to establish itself as a parallel means of adjudication with a standing equal to that enjoyed by the courts. However, it should be borne in mind that arbitration has become a viable alternative for settling certain types of disputes in certain given jurisdictions thanks to the increased availability of judicial assistance in the pre-arbitral and post-arbitral phases. Thus, many modern arbitration statutes provide for court assistance in the composition and establishment of the arbitral tribunal as well as in other stages of the arbitral process. Court assistance also extends to filling vacancies emerging after the constitution of the arbitral tribunal.[3]

Judicial assistance may be needed because an arbitration agreement inherently lacks means of assuring that it will be implemented and that an arbitral tribunal will be constituted. The cooperation of the courts may also be required due to drafting imperfections of the arbitration agreement, giving rise to difficulties in commencing the arbitration. In any event, the availability of judicial intervention varies from country to country, and the applicable procedural rules allowing such intervention range between those providing desirable and timely assistance to those imposing unwanted judicial tutorship in the arbitral process.

## 1.11 Judicial remedies in the appointment process

When the arbitration clause calls for the nomination of an arbitrator, failure to do so may be regarded as a breach of an obligation to do so, giving rise to a claim for damages or conceivably to a request for specific performance. It is difficult to foresee a court order compelling the recalcitrant party to nominate an arbitrator. It is also difficult to assess the amount of damages to be awarded for the refusal to cooperate in the constitution of the arbitral panel, especially if the merits of the claim are yet to be litigated before an arbitral tribunal or a court.[4]

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*[3] UNCITRAL ML Arts. 6, 11. See also national statutes such as United States : 9 U.S.C. sec. 392; Yugoslavia: Code on Civil Litigation, Art. 475; The Netherlands: Netherlands Arbitration Act, Arts. 1027-28, 1073; Canada: Commercial Arbitration Act 1986, Arts. 1, 6, 11, in 26 I.L.M. 714 (1987); France: New Code of Civil Procedure, Arts. 1457, 1493; Italy: Code of Civil Procedure, Art. 810; Austria: Code of Civil Procedure, Arts. 482, 582, 586; Germany: Code of Civil Procedure (ZPO) Art. 1035; United Kingdom: United Kingdom Arbitration Act 1996 Art. 18; Sweden: Swedish Arbitration Act, Sections 14-18; Switzerland: Swiss Federal Act Private International Law, Art. 179.*

*[4] Much of this difficulty may be avoided by providing for a penalty (liquidated damages) clause. See, e.g., Peruvian Civil Code Art. 1911 (1984).*

Even if the proper way to provide monetary compensation were to be found for breach of an agreement to arbitrate, the basic aim of settling the dispute by arbitration would not be achieved. That is why many legal systems provide for court assistance in the establishment of the arbitral tribunal as the proper and most effective remedy in case of a party's breach of the arbitration agreement.

As long as the arbitration agreement meets the minimum standards of coherence, clarity, and effectiveness to qualify for judicial assistance, courts will appoint an arbitrator when one party does not make the appointment. Courts will also step in if, according to the arbitration agreement, two arbitrators are supposed to agree on the third arbitrator but fail to do so. Judicial intervention may also be warranted under some legal systems for the purpose of re-examining the appointments made by an arbitral institution.

Typically, courts at the seat of the arbitral tribunal have jurisdiction to make a default appointment, but modern arbitration statutes may extend the court's competence to other connecting factors, such as when one of the parties has its domicile or residence in that particular country.[5]

Court intervention requires ascertaining which court is competent to assist with the nomination of the arbitrators or to re-examine the appointments made by an arbitral institution. In order to avoid delays, it is advisable to determine in advance which is the proper court to which the parties or the arbitrators may resort to seek cooperation and assistance (e.g., the court that would have exercised jurisdiction over that issue in the absence of the arbitration agreement).

Another recurring problem relates to the extent to which the court may enter to examine, at the appointment stage, the validity or enforceability of the arbitration agreement. It is at this point where the borderline between judicial assistance and judicial interference becomes disputed, because the assumption of judicial competence to investigate the validity of the arbitration agreement impinges upon one of the most important prerogatives of the arbitral tribunal, i.e., to decide upon the validity of the arbitration agreement representing the source of arbitral jurisdiction. On the one hand, it appears reasonable to refrain from assisting in the development of an arbitration that may be costly, time consuming, and ultimately doomed to failure due to the lack of validity of the arbitration agreement.[6] On the other hand, even an indirect scrutiny of the existence and validity of the arbitration agreement should be foreclosed at the appointment stage and left to the enforcement stage, unless the flaw is so conspicuous and the nullity so manifest that it would appear upon a mere summary examination of the agreement.

See the 1986 Netherlands Arbitration Act, Art. 1027.4 "[t]he President [of the District Court] or the third person shall appoint the arbitrator or arbitrators

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[5] *Netherlands Arbitration Act, Art. 1073 (1986).*

[6] *See Swiss Federal Act of Private International Law, Art. 179.3 (providing that the court shall not proceed with the appointment of an arbitrator if a summary examination shows that no arbitration agreement exists between the parties).*

without regard to the question whether or not there is a valid arbitration agreement".

## 1.12 Test your understanding

1. **What should a court check and verify before proceeding to make the appointment of an arbitrator?**
2. **Which courts may conceivably have jurisdiction to make a default appointment?**
3. **Who should be entrusted with the task of appointing arbitrators if the appointment mechanisms designed by the parties fail?**
4. **Which is the criterion to be followed by the back-up appointing authority in the selection of arbitrators? How much is the discretion of the back-up appointing authority limited when selecting the arbitrators?**
5. **How predictable are the qualifications of the arbitrators to be appointed pursuant to this back-up mechanism? Do the arbitration rules of some institutions offer a higher degree of predictability than others insofar as the selection of arbitrators is concerned?**
6. **Should the court with jurisdiction to make a default appointment scrutinize the validity of the arbitration agreement before making the appointment? - What kind of examination of the arbitration agreement's validity, if any, should take place when a court is asked to appoint an arbitrator?**
7. **What if the appointing authority designated in the arbitration agreement has ceased to exist by the time the default appointment is needed. Should the legal successor to that appointing authority take charge? Are the powers of an appointing authority inheritable? Can those powers of appointment pass to the legal successor of an institution or to the heirs of a natural person?**

# 2. QUALIFICATIONS OF THE ARBITRATORS

***Objectives***

**On completion of this section, the reader should be able to answer or address the following questions:**

- **If each party has the possibility to nominate an arbitrator, are there any restrictions on whom it can name?**
- **What are the relative merits of appointing a lawyer as an arbitrator as opposed to a technical expert in non-legal matters, a common law as opposed to a civil law lawyer, a law professor as opposed to a practitioner, etc.**
- **How does the nominating party or the appointing authority know the factual circumstances that might raise doubts about the nominee's suitability?**
- **To what extent a party-appointed arbitrator is or should be expected to remain neutral, impartial and independent?**
- **If the party-appointed arbitrator is not supposed to act as a member of the appointing party's team and is supposed to be independent, neutral, and impartial, then what is the role and the use of a party-appointed arbitrator?**
- **How can the required attributes of impartiality be more specifically described?**
- **How should the arbitral institution supervising the arbitration fix or determine what the arbitrator can and cannot do?**

## 2.1 Introduction

An arbitrator must have the capacity to evaluate conflicting statements of law or fact, as well as the wisdom, courage, and expertise to render a decision in such a way that the parties-especially the losing party-will recognize both the fairness of the procedure and the finality of the decision. This is the scenario in which an arbitration can achieve the relative economy, celerity and finality sought by the business community that is frustrated with litigation. Much of the success of the arbitration, however, depends on the skills of the arbitrator or arbitrators conducting the proceeding, and there are a multiplicity of changing elements to take into account in order to select the most suitable arbitrator for a particular dispute.

## 2.2 Freedom of choice

In deciding on an arbitrator, the parties' choice is virtually unrestricted unless the parties themselves require or exclude certain qualifications in the arbitrators to be appointed. In principle any natural person may be appointed as an arbitrator, so that each party can make up his own mind as to the kind of person who should be chosen to act as an arbitrator and in whom full confidence

shall be given[7].

This does not mean that a party is entitled to abuse this right by nominating someone manifestly biased or by selecting an arbitrator who is an obstructionist or is likely to resign in the most untimely and unjustifiable fashion as a dilatory act. This is why Art. 11 of the LCIA Rules makes clear that the arbitral institution (the LCIA Court) reserves the right to decide that a nominee is unfit for the mission, giving the nominating party the right to submit a new nomination. If a party submits a series of consecutive unacceptable nominations, the LCIA Court retains the discretion to refuse to allow the party to make a new nomination and will make the appointment itself. LCIA Art. 11 provides:

***LCIA Rules, Art. 11***

> *(1) In the event that the LCIA Court determines that any nominee is not suitable or independent or impartial or if an appointed arbitrator is to be replaced for any reason, the LCIA Court shall have a complete discretion to decide whether or not to follow the original nominating process.*
>
> *(2) If the LCIA Court should so decide, any opportunity given to a party to make a re-nomination shall be waived if not exercised within 15 days (or such lesser time as the LCIA Court may fix), after which the LCIA Court shall appoint the replacement arbitrator.*

If the parties fail to make up their minds, the law or chosen arbitration rules can suggest or even require the most important qualifications that an arbitrator should have.

In addition to considerations of impartiality and neutrality, the choice of arbitrators is influenced by professional competence and reputation, the national origin of the arbitrator, command of, or relative fluency in the working language of the arbitration, expertise in the specific field of the arbitration or in arbitration law and practice, and other qualities.

## 2.3 Nationality

It would probably be misguided to choose someone as an arbitrator solely because of his country of origin or nationality. The fact that the arbitrator is a national of a third country is more likely than not to be overshadowed by his or her ability, qualifications, and cultural background. Similarly, nationality may not be a sufficient reason to refuse to choose someone as an arbitrator. Thus, the UNCITRAL Model Law, after lengthy consideration, disregarded nationality as a relevant criterion for determining impartiality. UNCITRAL ML Art. 11(1) reads:

***UNCITRAL ML, Art. 11(1)***

> *No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*

[7] *By way of exception, under Spanish law and most Latin American legal systems, an arbitrator in a de jure arbitration (as opposed to an aimiable composition), must be a lawyer and, in many legal systems, must also be admitted to practice at the venue of the arbitration.*

The UNCITRAL Rules, concerning the appointment of a sole arbitrator by an appointing authority, show more sensitivity to the appearance of bias on the ground of nationality. UNCITRAL Rules, Art. 6(4) provides:

***UNCITRAL Rules, Art. 6(4)***

> *In making the appointment the appointing authority shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

The nationality of the arbitrators is a significant criterion listed in most arbitration rules as an indication of the impartiality, independence or neutrality of the arbitrator. Thus, both the ICC Rules (Art. 9(5)) and the LCIA Rules (Art. 6(1)) include a clear rule stating that the sole arbitrator or third arbitrator in a collegial tribunal, shall be chosen from a country other than those of which the parties are nationals, unless the parties agree otherwise. Furthermore, in other arbitration rules much significance is given to the fact that the sole arbitrator or the chairman/president of the arbitral tribunal be of a country other than that of any of the parties. A party-appointed arbitrator, however, may not be challenged on the basis of his nationality.

If the parties fail to agree on the chairman, the nationality of the chairman or of the sole arbitrator in an ICC arbitration may be predicted with a rather high degree of probability. Since the ICC Court will almost invariably turn to the National Committee of the seat of arbitration to designate the chairman or sole arbitrator, the designation of the venue of the arbitration in the arbitral clause suggests that it is more likely than not that the sole arbitrator or chairman of the arbitral tribunal will be selected from that jurisdiction.[8]

At times, corporate nationality of a party, generally attached to the place of incorporation, may be relevant to the ingredient of impartiality and independence. In order to avoid the appearance of bias, the appointing authority may also want to consider the nationality of the controlling shareholders of a corporation and pragmatically assess the national character of the economic interests underlying a given dispute. This approach is taken by Article 6.2 of the LCIA Rules, which looks through formalities for the purpose of ascertaining corporate nationality. LCIA Rules Art. 6.(2) reads:

***LCIA Rules Art. 6(2)***

> *The nationality of parties shall be understood to include that of controlling shareholders or interests.*

Multiplicity of corporate nationalities within a group, however, should not stand in the way to the appointment of suitable neutral arbitrators.

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[8] *Nevertheless, in choosing a national committee to name a third or sole arbitrator, the ICC Court is likely to choose a national committee from a jurisdiction as neutral as possible from the standpoint of the contending parties. Thus, in a dispute between a Norwegian company and a United States company with the seat of arbitration in Stockholm, the ICC Court is unlikely to rely on the choice of the Swedish National Committee for a third arbitrator on the assumption that a Swedish arbitrator is likely to share a similar legal outlook as the Norwegian.*

## 2.4 Expertise

Experience and expertise with the arbitral process are probably the most important qualifications to be expected from an arbitrator. Yet, legal expertise is certainly not the only one to consider. It is usual and convenient to appoint a lawyer as a sole arbitrator, due to the problems of jurisdiction and procedure, conflict of laws and applicable substantive law that are likely to arise even in the simplest of arbitrations. In the case of a three-member arbitral tribunal, the optimum qualification necessary for the understanding and adequate resolution of the dispute may call for a different kind of expertise. Thus, if a dispute arises out of an international construction contract, staffing the tribunal with one or more civil engineers is likely to be more appropriate than having all the arbitrators skilled in arbitration law.

## 2.5 Language

Adequate working knowledge of the language in which the arbitration is to take place, or even in the language of the seat of arbitration or of the applicable law, is a highly desirable or important (not to say essential) qualification. An arbitrator's lack of a good knowledge of the language of the arbitration is likely to result in a more time-consuming arbitration due to the extra time involved in translations and, to a less satisfactory result. It will also add considerably to the expense of the arbitration due to the interpreter's and translator's fees.

## 2.6 Independence

In nominating an arbitrator, a party is not supposed to nominate an individual who lacks independence, either because the arbitrator has a financial interest in the outcome of the case, or is unilaterally remunerated by the party which appointed him, or other similar grounds for doubting the arbitrator's independence. If there is such a relationship, the nominated arbitrator is required to disclose it.

An arbitrator concerned with safeguarding his or her independence may choose to avoid the same hotels, means of transportation, or restaurants as the parties. Avoiding these ostentatious displays of familiarity merely touch the surface of the state of mind and spirit generally referred to as independence. Equal treatment of the parties is actually the quintessence of the arbitrator's independence, a notion that must be complemented by the concept of neutrality and impartiality. This is also part and parcel of the duties of the arbitrators, to which more specific reference is made in the section on the *Rights and Obligations of the Arbitrators*.

## 2.7 Neutrality/impartiality

Neutrality points to those exterior signs suggesting that the arbitrator will remain equidistant from the parties in thought and action and throughout the arbitral proceedings, as shown by the absence of family or business ties with any of the parties and paying due consideration to his group affiliation (e.g., nationality, religion, ethnic background). In this sense, neutrality is easy to recognize as suggesting the likelihood of impartiality. Impartiality cannot be so easily translated into standards. It must be analysed on a case-by-case basis and tested in the context of concrete relations between the arbitrator and each of the parties.

Thus, no arbitrator may be deemed neutral unless he or she behaves with impartiality, but an arbitrator may be impartial without being neutral. In contrast, lack of impartialitysuggests either malicious intent to favour one party to the detriment of the other or, lack of due care as to the arbitrator's most elementary duties.

## 2.8 Impartiality in the relations between the arbitrator(s) and the parties

Impartiality may be gravely vitiated, with irreversible consequences on the independence of the arbitrator, every time the arbitrator chooses a procedure or way of thinking that is common to him or her and to one of the parties. Thus, impartiality *vis-à-vis* the parties may subjectively manifest itself by refusing to privilege the legal tradition with which the arbitrator (and probably one of the parties to the arbitration) is most familiar, going beyond his or her own domestic setting and favouring an approach that is more consistent with accepted practice in international trade. In setting procedural rules and conducting the hearings, an arbitrator who seeks to maintain a sense of impartiality should not privilege idiosyncratic approaches with which the arbitrator is familiar, regarding, for example, the mode of questioning the witnesses, the way evidence is produced and written submissions are presented.

### *2.8.1 Prior and continuing financial interest in the dispute*

The arbitrator's financial interest in a dispute is probably the greatest impediment to his independence and impartiality, for it is reasonable to fear that such an arbitrator will be subject to pressure to render an award favourable to the party that appointed him. A financial interest may be merely indirect, but nevertheless damaging to the integrity of the arbitral process.

### *2.8.2 Prior and continuing professional, financial or subordinate relationship with the parties*

Other than the existence of a financial interest in the dispute, another serious threat to impartiality is represented by a financial relationship between the

arbitrator and one of the parties. No arbitrator should entertain private relations or contacts with any of the parties, before or during the arbitral proceedings. Any such relation or contact is likely to have adverse consequences, genuine or apparent, on the independence of the arbitrator.

The most obvious example is when the nominated candidate works or has worked as legal counsel for the nominating party or, has an ongoing employment relationship of any sort. Not only does such a nominee have a financial interest in keeping his job, but he is also by definition in a subordinate relationship to his employer.

The case of a party nominating one of his employees as an arbitrator is unlikely to occur, but it is not so uncommon to find that employment of the arbitrator by a related company or individual may also affect the impartiality of the arbitrator. Thus, the nomination of the general counsel of a multinational company as an arbitrator may provide a plausible ground for challenge when proven that he was an employee of a holding company that had an indirect interest in the outcome of the arbitration, for example that it owned shares in an operating company having a joint venture interest with one of the litigants.

One of the most recurring and vexing problems is represented by the nomination as arbitrator of a lawyer who is a partner in a large law firm. In most circumstances and regardless of his or her recognized ability and international reputation, such a partner will not be allowed to serve as arbitrator if one of the other members of his firm has advised the party that nominated him, even on completely unrelated matters. The reason for upholding this type of indirect relationship rests on a financial conflict of interest: the law firm in which the partner has a financial interest will profit from the continued relationship with the party, and an adverse arbitral decision might trouble that relationship.

Financial or personal interests threatening independence and impartiality are not necessarily absent even if the professional or subordinate relationship was in the past. A long prior employment or previous business relationship with a party may also pose an impediment to impartiality. A nominated arbitrator with that past may hope to resume the business relationship, remain closely related to the nominating party or, be cognizant of facts unknown to others, and not revealed by the evidence presented before the arbitral tribunal. His opinion may thus be influenced by information and sentiments not shared by the other arbitrators, hence compromising his neutrality. Therefore, although past relationships generally do not raise serious or strong grounds for challenge, it is always convenient for the nominated arbitrator to disclose past, even if occasional, business relationships with the nominating party.

### 2.8.3 Bias or previously expressed opinions

In principle, an arbitrator who has rendered a prior opinion may want to decline an appointment whenever issues likely to be debated in the arbitration are covered by the opinion in question. A challenge will not ordinarily succeed,

however, simply because the nominated arbitrator had expressed views on points at issue in scholarly publications or even in prior arbitrations. Such previously expressed opinions should not preclude him or her from deciding a case in a completely impartial manner, based only on the evidence, arguments, and applicable law in the case at hand.

There are exceptions which raise difficult and delicate problems. One example might be a case in which the standard of compensation for the nationalization of property is in issue and the nominated arbitrator has a record of being an ardent supporter and frequent speaker on the necessity of full, adequate, and prompt compensation. No appointing authority would want to appoint a presiding arbitrator who had publicly taken extreme and detailed views on political or economic issues central to the arbitration. However, the success of a challenge to such an appointment very much depends on whether the challenger has met his burden of establishing that real bias does in fact exist or, that it is reasonable to presume it under the circumstances.

## 2.9 Scope of the duty to disclose

A nominated arbitrator should spontaneously and without delay disclose, *ab initio*, any and all reasons that could be seen as adversely affecting his or her neutrality and or impartiality. If an arbitrator fully discloses the relevant facts at an early stage of the arbitration, such disclosure greatly diminishes the risk of being subsequently challenged and, of a subsequent refusal to enforce the award on the part of the enforcing forum. More importantly, even if the enforceability of the award were to be assured, early disclosure by an arbitrator is far better than late discovery by a party, at a stage when the removal of an arbitrator would entail a great waste of time and money.

Many arbitration institutions require a statement of independence before they will appoint a person as arbitrator, whether the prospective arbitrator was nominated by a party or is to be named by the institution. ICC Rules Art. 7.(2) provides:

***ICC Rules, Art. 7.(2)***

> *Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence* ***in the eyes of the parties****.*

This duty extends to the whole period between the arbitrator's appointment or confirmation and the notification of the final award (ibid.). The phrase "in the eyes of the parties" is intended to stretch the arbitrator's mind, to lead him to disclose facts that the arbitrator himself would not consider compromising of his independence, but which might do so in the eyes of the parties. Completion of this form, in fact, has reduced the number and frequency of subsequent challenges.

## 2.10 Impartiality in the relations among arbitrators

Neutrality and impartiality represent important criteria of independence in the relations among the arbitrators themselves, which should be guided by transparency and fairness. Unless the presiding arbitrator is vested with special powers, either by the applicable law, arbitration rules, or by the other co-arbitrators, it is clear that the chairman of the tribunal remains a *primus inter pares*. Although in charge of conducting the arbitration and speaking on behalf of his or her colleagues, the presiding arbitrator must consult with the others in order to ensure the independence of the panel of arbitrators as a whole. If faced with the lack of independence on the part of his or her co-arbitrators, no member of the arbitral tribunal should react by losing his or her own impartiality. By maintaining the standards of independence which he swore to respect, an arbitrator not only serves the cause of justice but also the interest of the party who appointed him.

The standards of independence, neutrality and impartiality are the same in both administered and *ad hoc* arbitration. In administered arbitration, however, the requirements of independence, neutrality, and impartiality are generally included, and in some cases defined, in the arbitration rules adopted by the institution. Although many of the most delicate and complex questions connected with the impartiality and neutrality of the arbitrators are beyond the range of legal norms, the administering body throughout the arbitral proceedings may effectively check the actual application of those standards. In *ad hoc* arbitration, in contrast, there is no administering body to monitor the expected standards of independence.

In the United States, codes of ethics have been adopted in an effort to standardize arbitrator behaviour with mixed results. In 1977, the American Arbitration Association and the American Bar Association produced a Code of Ethics for Arbitrators in Commercial Disputes (ABA/AAA Code of Ethics).[9] Ten years after the adoption of the ABA/AAA Code of Ethics, the International Bar Association produced in 1987 a set of ethical guidelines as Ethics for International Arbitrators (IBA Guidelines).[10] Both ethical codes, although not law properly speaking, are nevertheless helpful in determining the standards of independence, neutrality, and impartiality that can reasonably be expected from arbitrators.

## 2.11 Expected standards of behaviour: neutral as opposed to party-appointed arbitrators

Granted that all arbitrators must be independent, questions remain as to the standards of impartiality to be observed by the party-appointed arbitrator as opposed to the standards of impartiality to be expected from the chairman or

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[9] *ABA Code of Ethics for Arbitration in Commercial Disputes (1977) (hereinafter cited as ABA/AAA Code of Ethics), reprinted in 10 Yearbook of Commercial Arbitration 131 (1985).*

[10] *International Bar Association. Ethics for International. Arbitrators, reprinted in 26 I.L.M. 583 (1987) [hereinafter IBA Guidelines].*

neutral, presiding arbitrator. This is a delicate and most controversial subject, often fraught with terminological imprecision and dangerous misunderstanding across different legal traditions. While the general principle is that all arbitrators should be impartial, some United States legal commentators suggest that there is, or should, be a substantial difference in the standards to be observed by the party-nominated arbitrator, as opposed to the chairman or presiding arbitrator. The United States position regarding the level of impartiality expected from party-appointed arbitrators suggests that it may be hypocritical to pretend that arbitrators nominated by one party could be totally detached from the party that appointed them.[11] However, if one were pressed to identify a worldwide consensus or trend on the matter, the prevailing one leans towards the point of view that all arbitrators, including those proposed by the parties, should be neutral and independent.

In a collegial tribunal in which its members come from different legal traditions and legal systems, the party-appointed arbitrator is expected to see to it that the position of the party that appointed him or her is fully presented. This presentation, however, must be done fairly.

In the case of a party-nominated arbitrator, the principle of independence and impartiality must be weighed against the right of a party to nominate an arbitrator compatible with its national and economic circumstances. No such counterbalancing interests exist with respect to a chairman or sole arbitrator. This difference explains why, at least within the United States, the ethical standards for arbitrators tend to distinguish between the degree of impartiality expected from a neutral chairman of the arbitral tribunal or from the sole arbitrator, and a more flexible standard of impartiality expected from the party-appointed arbitrator. Thus, the AAA domestic rules fail to include the requirement of independence of party-appointed arbitrators and refer to the third arbitrator as the neutral arbitrator, as if not all arbitrators need to be neutral. In contrast, the AAA International Rules, more in line with international practice, call for independence and impartiality on all arbitrators (AAA Rules Art. 7).

The ABA/AAA Code of Ethics, which is meant to apply only to domestic arbitrations in the United States, recognizes that on occasion and within reasonable limits party-appointed arbitrators are not held to standards of impartiality similar to those applicable to a genuinely neutral arbitrator, i.e., a sole arbitrator or the chairman or presiding arbitrator in a three-members arbitral tribunal. Whereas the ABA/AAA Code of Ethics requires arbitrators to remain independent, they may be predisposed to the party that nominated them and, to this extent, they may be non-neutral arbitrators.[12] This approach cannot hide a sceptical view of an arbitral tribunal composed of three impartial decision makers.

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*[11] See generally, Robert Coulson, An American Critique of the IBA's Ethics for International Arbitrators, 4 J. Int'l. Arb'n. 103 (June 1987).*

*[12] AAA/ABA Code of Ethics, Canon VII (A)(1): Non-neutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness.*

The IBA Guidelines draws no distinction between arbitrators who are party-appointed and those who are not. Thus, Section 2.1 of the IBA Guidelines provides that [a] prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias. Bias, under this conception, amounts to lack of impartiality, that is, when an arbitrator favours one of the parties, or where the arbitrator is prejudiced in relation to the subject matter of the dispute.

Granting full disclosure so that each party is aware of the status of the other's party-appointed arbitrator, the ABA/AAA Code of Ethics deems such non-neutrality acceptable, to the point of requiring the nominated arbitrator to advise the other parties and arbitrators that he intends to communicate *ex parte* with the party who appointed him. Non-neutral arbitrators are nevertheless required to disclose any relationship they may have with the party that appointed them and they are still required to act in good faith, with integrity and fairness, even if they acknowledge that they are predisposed towards the party that appointed them. In other words, even non-neutral arbitrators should not trespass certain limits of fairness and honesty.

Even under this nuanced approach, departing from the classic criteria of neutrality and impartiality expected from all arbitrators, an arbitration in which one of the arbitrators regards himself as a servant or as a mere agent of the appointing party is an arbitration that is not worth its name.

## 2.12 Test your understanding

1. **May an arbitrator be of the same nationality as one of the parties?**
2. **Should it be required that at least a sole arbitrator or the chairman of a collegiate arbitral tribunal be familiar with the legal systems involved or potentially involved in the dispute?**
3. **Some of the questions on neutrality/impartiality of the arbitrator call for careful balancing of interests:**
   - **How significant is group affiliation to the notion of independence/neutrality/and impartiality of the arbitrator?**
   - **What if the arbitrator is of the same religion, political party, or soccer team as one of the parties?**
   - **What if an arbitrator is from the same law school and law school class as a lawyer representing one of the parties? Should those arbitrators be screened out on account of their group affiliation?**
4. **Arbitrators (especially in specialized areas of the law) are likely to know counsel for the parties and one another, often having sat with together on previous occasions:**
   - **Should this connexion be disclosed?**
   - **Must social contacts with the co-arbitrators or counsel for the parties also be disclosed? - To whom, the parties or the other arbitrators?**

- **What other grounds may there be for doubting the arbitrator's independence?**

5. **While answering the foregoing questions, does it make a difference to answer those questions whether the nominated arbitrator is party-appointed or is the sole or third arbitrator?**
6. **Would you distinguish between the standards of impartiality to be expected from the party-appointed arbitrator and those applicable to the neutral (sole or third) arbitrator?**
7. **How realistic is to expect a party-appointed arbitrator not to be influenced by any form of prejudice?**
8. **What connexions to the parties (direct or indirect) should the arbitrators disclose?**
9. **Should the nominated arbitrator disclose that he/she once acted as counsel of the nominating party?**
10. **Suppose a dispute between Chrysler and its exclusive distributor in Puerto Rico is brought to arbitration:**
    - **Must the proposed third arbitrator disclose that he or she once acted as counsel for General Motors in Puerto Rico?**
    - **Would you change your answer if the nominated arbitrator is still a client of the law firm to which the nominated arbitrator belongs? Suppose General Motors is still a client of the proposed neutral arbitrator?**
11. **Canon VII (A)(1) of the AAA/ABA Code of Ethics provides that party-appointed arbitrators may be predisposed toward the party who appointed them but should in all other respects act with integrity and fairness. What do you understand the term predisposed to mean in this context?**
12. **In contrast to the AAA/ABA Code of Ethics, the IBA Guidelines do not refer to arbitrators, whether party appointed or not, as non-neutral or neutral (those terms are simply not used). Is the ABA/ABA Code of Ethics approach, tolerating a predisposition, better than the IBA Guidelines approach, calling for strict impartiality? Are arbitrators expected to act differently, depending on whether the arbitration is domestic or international? Assuming that there is such a difference, what are the different consequences of the two standards for international commercial arbitration?**
13. **Granting that a general predisposition on the part of the arbitrator towards the party that nominated him may be acceptable, at least under the ethical standards prevailing or formally acknowledged in the United States for domestic arbitration, how far can this predisposition go without manifesting an appearance of bias? Does predisposition towards one party inevitably mean that the arbitrator is partial?**
14. **Suppose an arbitrator travels in the same carriage of a train, or in the same bus or airplane with the parties and their lawyers and the arbitrator may choose where to sit. Should he sit in the seat**

**adjacent to the party or one of the lawyers? Should an arbitrator sit at the same breakfast table with a party or one of his lawyers, assuming they are staying in the same hotel? Is there any guidance as to any of these questions in the AAA/ABA Code of Ethics or IBA Guidelines?**

# 3. CHALLENGE OF ARBITRATORS

***Objectives***

**On completion of this section, the reader should be able to address the following questions:**

- **What happens if the agreement to arbitrate or the applicable arbitration rules or procedural law require arbitrators to meet certain qualifications (e.g., nationality, level of expertise in a certain field), and the nominating party nominates someone who either manifestly or arguably does not have any of those qualifications?**
- **What happens if a nominating party designates someone who is either manifestly or arguably disqualified on grounds of conflict of interest or for other ethical reasons?**
- **Should judicial intervention in the challenge procedure be allowed before the arbitral tribunal hands down an award or, should judicial scrutiny be postponed until after an award is rendered?**

## 3.1 Introduction

The choice of arbitrators may be the most important single task parties face, and the choice of party-appointed arbitrators is one of the most delicate issues in international commercial arbitration. Parties would want to have an arbitrator well predisposed to their cause, but such predisposition may turn into a bias vitiating the integrity of the arbitral process. Whereas some parties will use their right of nomination to appoint unscrupulous agents as arbitrators, others faithfully respect the principle of independence in making their nominations.

Arbitral institutions and national courts are aware of this danger and have the duty to remove arbitrators whose independence is in doubt. And if bias is revealed in the course of the arbitral proceedings, even though not apparent at the time of appointment, the opportunity to neutralize this problem may be found in the reaction of the co-arbitrators, who are likely to discount the views of a biased arbitrator upon noticing the bias.

Thus, the challenge of arbitrators is a significant correcting institution in favour of the integrity of the arbitral process. An arbitrator may be challenged in case of a conflict of interest arising before or during the arbitration proceedings, but the procedural mechanisms to bring the challenge, the authority vested with jurisdiction to decide it, and the grounds on which the challenge may result in the removal of an arbitrator, are matters that vary according to the applicable arbitration rules.

## 3.2 Avoidance of challenge

Any arbitrator should be impartial and independent, whether appointed by a party or a third party, and he or she should not act if there is any objective

doubt as to impartiality.

A nominee as arbitrator may avoid a challenge by declining the invitation if, when approached by a party or a third person with the invitation to act as arbitrator, the nominee believes that there will probably be objective doubts in the eyes of any of the parties about his independence or impartiality.

If the nominee does not decline the invitation and accepts the appointment, but there are circumstances that might give rise to doubt about his impartiality or independence, the appointee should disclose them to both parties and, if an arbitral centre is involved, to the institution as well. Finally, if upon the arbitrator's compliance with the duty to disclose, one of the parties objects to the appointment on serious grounds, he should resign forthwith, without a challenge procedure being necessary.

## 3.3 Tactical considerations

Within the bounds of discretion, the party-appointed arbitrator in a three-party arbitration is expected to be somewhat sympathetic to the case presented by the party that appointed him. If such sympathy exceeds the bound of discretion however, the other party must weigh the tactical advantages of exchanging one predisposed arbitrator for another, against the stress placed on the chairman of the panel and the doubt that is cast on the integrity of the arbitration. In some cases, the balance of considerations tips in favour of challenging a party-appointed arbitrator.

In other cases it may be better to ignore the opportunity to raise a challenge against a party-appointed arbitrator, because even assuming that the challenge is successful, the newly appointed arbitrator is likely to have the same predisposition towards the party who appointed him or her. However, if the suspicion of a defect in the neutrality or impartiality falls on the chairman of the tribunal, virtually in all cases, the party likely to be affected by the lack of impartiality will be prompted to lodge a challenge.

At times, tactical considerations may lead the arbitral tribunal (or the authority vested with jurisdiction to decide on the challenge) to forego the opportunity to rule on the challenge. It is reasonable to assume that the authority would be reluctant to rule on a challenge based on a party's subjective allegation of bias whenever such allegation is denied by the arbitrator. One possible outcome is for the decision-maker to attempt to settle the challenge informally. If the challenge is brought in good faith (even if somewhat subjectively), as opposed to an abusive challenge or, one brought for the purpose of causing delay, it may be convenient to formulate a courteous request to the arbitrator, asking whether he or she wishes to continue with the arbitration in view of the opposition and possible effect thereof on the proceedings.

## 3.4 Challenge procedures

What are the procedures to bring a challenge? Methods of challenge vary under the different arbitration laws and rules. First it is necessary to examine the law applicable to the arbitration, because any provision of a mandatory nature regarding the challenge of arbitrators will prevail over provisions on the same subject in arbitration rules.

Noticeable differences among the different arbitration laws lay in the authority vested with jurisdiction to decide on the challenge (e.g., an arbitral institution as opposed to a national court), the grounds for challenge, and the impact that the challenge has on the arbitral proceedings. A vast majority of municipal procedural laws, international conventions, and case-law authorize the courts to decide on the challenge of an arbitrator. Yet the same jurisdictions are the ones that accept the parties' freedom to refer to rules of an arbitration institution for settling their disputes. Thus in most cases it is the will of the parties that determines the procedure to be followed in regard to the challenge.

## 3.5 Exclusive and concurrent authority to decide on a challenge

The answer to the question of who decides the challenge depends on whether the arbitration is conducted under the auspices of an arbitral institution and, if so, which institution, as well as on the venue of the arbitration, which may trigger the application of the procedural law of the situs.

### *3.5.1 The challenge to be decided by an arbitral institution with a possibility of recourse to a court against the institutional decision on the challenge*

Most arbitration acts provide a system by which the parties may agree on a challenge procedure calling for a third party (usually an arbitral institution) to decide on the challenge. Under Article 11 of the ICC Rules, the ICC Court is in charge of deciding the challenge. Similarly, under Article 9 of the AAA Rules the administrator decides the challenge in its sole discretion. The LCIA also entertains a petition for removal of an arbitrator and makes the final decision (LCIA Rules Art. 10.4). Also the UNCITRAL Rules refer challenges to the party-designated appointing authority or, by any appointing authority to be designated by the Secretary-General of the Permanent Court of Arbitration (UNCITRAL Rules, Art. 12).

This approach, which is the one followed by the UNCITRAL Model Law,[13] has the advantage of internalizing the challenge procedure, allowing an arbitral institution to rule initially on the challenge, and preventing it from moving directly into national courts. However, the challenge may be subsequently brought before a court, for the parties are not free to agree on the exclusion of the courts. The disadvantage is that the proceedings may be unduly delayed, because two different instances, the arbitral institution and the court, may be called upon to decide on the challenge**.**

One of the questions posed by the exercise of judicial review over the choice of arbitrators made by the arbitral institution, is whether the court should examine the question of impartiality and independence of the arbitrator *de novo*, i.e., engaging in its own examination of the circumstances giving rise to the doubts as to the arbitrator's impartiality or independence or, whether this review should be limited to a marginal, perfunctory, and deferential review of the institution's decision on the challenge, just for the purpose of confirming whether a reasonable person could have come to that decision. It appears that examination *de novo* is more consistent with the authority assumed by the courts of supervising this crucial aspect of the arbitral process.

### 3.5.2 Challenge to be decided by the arbitral tribunal

In contrast with the foregoing approach, in which the arbitral tribunal is not required to be involved in the challenge, under Article 58 of the ICSID Convention a challenge to a particular arbitrator must be lodged with the other members of the arbitral tribunal, who decide whether or not to disqualify the challenged arbitrator. If the two remaining arbitrators of a three member tribunal do not agree, the final decision rests with the Chairman of the Administrative Council of the ICSID, who is the exclusive authority to decide on a challenge lodged against a sole arbitrator.

It will be noted that the UNCITRAL ML, Art. 13(2) envisages that a challenge will be decided by the arbitral tribunal, including the challenged arbitrator, if the parties have not agreed on a different procedure. That is because the Model Law anticipates the situation where the parties to an ad hoc arbitration have not agreed upon any rules in regard to the challenge of an arbitrator. The rules of the German Institution of Arbitration (DIS) in Section 18.2 also provide that a challenge will be decided by the arbitral tribunal, including the challenged arbitrator.

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[13] *(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.*

*(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or, after becoming aware of any circumstance referred to in Art. 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*

*(3). If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Art. 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.*

There are distinct disadvantages in leaving the decision on the challenge to the full tribunal or to the members of the tribunal other than the challenged arbitrator. Firstly, it allows the party-appointed arbitrator of the opposing and challenging side to play a significant role in effecting the disqualification of the other party-appointed arbitrator. Secondly, the challenge puts into question the integrity of the arbitral tribunal as a whole and, if the challenge is ultimately rejected, this incident is likely to influence the outcome of the arbitration. It seems preferable to avoid such direct confrontation between a party and the arbitral tribunal by entrusting to a third party (court or arbitral institution) the judging of the question of whether an arbitrator lacks impartiality or independence.

### 3.5.3 Challenge to be decided exclusively by the courts

In some jurisdictions the courts have exclusive jurisdiction to decide on the challenge of an arbitrator. The advantage of this system, in the case of institutional arbitration, is that arbitral proceedings are unlikely to be delayed by proceeding in two instances, i.e., first with the arbitral institution and then a re-examination by the court. The disadvantage for international commercial arbitration of providing a national court with exclusive jurisdiction is that the court's view on impartiality and independence of arbitrators may differ from the views of the courts in other countries and, in particular, from those of the arbitral institution that the parties had chosen to administer the arbitration.

## 3.6 Grounds of the challenge

Because the impartiality and independence of the arbitrators are fundamental to the integrity of the arbitral process, courts and arbitration centres are likely to be rather strict in applying the grounds on which an arbitrator may be challenged.

The grounds of challenge are either generally defined or not defined at all in most arbitration rules. Those grounds have been traditionally likened to those that apply to the disqualification of a judge in a civil matter. Under the AAA Rules a party may challenge an arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. Other arbitration rules adopt similar broad language, referring to circumstances giving rise to doubts about the impartiality or independence of the arbitrator (e.g., LCIA Rules, Art. 10.3). The ICC Rules, after providing specifically for the independence of all arbitrators (ICC Rules Art.7(1)), provide that "a challenge of an arbitrator, whether for an alleged lack of independence or otherwise," shall be commenced by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. (Art. 11(1)). With such unspecified grounds for a challenge, wide discretion is left in the ICC Court.

## 3.7 Timing for the challenge

Generally there is a time limit for bringing a challenge against an arbitrator. Some arbitration laws and rules call for lodging the challenge "within a reasonable time", from the time the grounds for disqualification became known to the party filing the motion or, from the notification of the appointment of the arbitrator or, from the establishment of the arbitration tribunal. In most cases, the challenge is expected to be raised not long after the appointment of the arbitrator in question or the challenge will be time barred.[14] Most arbitration acts provide that a party may not challenge an arbitrator whom he has appointed, except on a ground which came to that party's attention after the appointment.

Under the ICC Rules the challenge must be brought within thirty days of the notification of the appointment of the arbitrator by the ICC Court, or within thirty days from the date when the party making the challenge was informed of the facts or circumstances on which the challenge is based. If the grounds for challenge arise during the course of the arbitration, the ICC Court may assess the difficulties resulting from the application of those time limits. The challenge must be sent in writing to the Secretary General of the ICC Court, specifying the facts and circumstances on which it is based. The final decision is made by the Plenary of the ICC Court after giving the other arbitrators and the parties the opportunity to comment on the challenge. The Court's decision is final and the arbitrator is replaced if the challenge is upheld (ICC Rules Art. 12(1)).

Under Article 10.4 of the LCIA Rules, the protesting party must lodge his challenge within fifteen days of the establishment of the arbitral tribunal or of notice of the circumstances warranting a challenge. Some arbitration rules draw a distinction between the timing for lodging a challenge against the arbitrator who it appointed itself, and the timing for challenging the arbitrator appointed by the other side. Thus, under the LCIA Rules a challenge against the arbitrator that a party itself appointed holds only if the doubts about his or her impartiality or independence arise or become apparent after the appointment was made (LCIA Rules, Art. 10.3).

## 3.8 Effects of the challenge on the continuation of the arbitral proceedings

The challenged arbitrator may voluntarily withdraw upon the lodging of the challenge, and the arbitrator will most likely be withdrawn if the other parties agree with the challenge. If the challenged arbitrator does not withdraw and the other party or parties fail to agree to the challenge, arbitration rules differ as to the procedure to follow. Some arbitration statutes and rules are rather succinct while others are more detailed.

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[14] *Switzerland's Federal Code on Private International Law, Art. 180(2): The ground for challenge must be notified to the arbitral tribunal and the other party without delay.*

Neither the ICC Rules nor the UNCITRAL Rules contain any rule on the suspension of proceedings pending a challenge. In contrast, the UNCITRAL Model Law[15] contains an express provision to the effect that the arbitral tribunal may decide to continue the arbitral proceedings notwithstanding that a decision on the challenge is pending before the courts.[16] This discretionary power is more likely to be exercised if the arbitral tribunal considers that the challenge is prima facie unjustified.

If an arbitrator withdraws following the lodging of a challenge, the arbitrator who will take his or her place is likely to be appointed pursuant to the same procedure as for the original appointment, which allows some participation by the parties (AAA Rules Art. 10). Under the LCIA Rules, however, once the LCIA determines that a nominee is not suitable due to lack of independence or impartiality, the Court in its discretion may follow the original nominating process or reappoint the new arbitrator directly.

## 3.9 Court intervention in the challenge procedure

Compliance with the requirement that the arbitral tribunal meet minimum standards of independence and impartiality is generally subject to court supervision. Court intervention is not the best alternative to follow in an arbitration where the parties seek a prompt solution to the dispute. In fact, local court intervention in international commercial arbitration seems to defeat the purpose of choosing a more neutral alternative means of dispute resolution. Experience shows that it is the unnecessary and untimely referral to municipal courts that has resulted in many frustrated arbitrations. Moreover, submission of the challenge of an arbitrator to a national court by a party who has agreed to an institutional arbitration may result in rewarding the conduct of a party who is ultimately seeking to sabotage the arbitral proceedings.

It must be acknowledged that the question whether an arbitrator has been impartial or not, or whether he or she was properly disqualified, will finally be decided by the courts. It is also fair to acknowledge that exceptional circumstances, suggested by considerations of international public policy, or compelled by the reality of the world of business, make the assistance and intervention of the local courts convenient if not unavoidable. The timing of such intervention, however, varies among legal systems and arbitration rules.

## 3.10 Timing of court control

At what time can or should court control be exercised? The supervision exercised by the local courts when seized of a challenge to the final award is restricted to limited grounds and occurs only at the end of the arbitral

[15] *UNCITRAL ML Art. 13(3) While such a request [for a challenge] is pending [before a court], the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.*

[16] *See also Netherlands Arbitration Act Art. 1035(1) The arbitral tribunal may suspend the arbitral proceedings as of the day of receipt of the notification [of the challenge].*

proceeding. Nevertheless, in light of the contentious attitude of the parties, unavoidable encounters between municipal courts and the rulings of the arbitral tribunal or those of the arbitral institution are likely to take place much earlier during the course of the arbitration.

Under some legal systems and procedural rules challenges may be brought during the arbitration. This procedural avenue is problematic, for it may be used as a delaying tactic to the extent that the arbitration proceedings are stayed until the matter is decided by a court. A challenge procedure may take one to six months or longer, especially if the court's decision is subject to appeal before an intermediate or the highest court in the jurisdiction. This is why modern arbitration laws provide that the decision on the challenge is final, i.e., not subject to appeal.[17]

In other jurisdictions the arbitral proceedings need not be suspended, and it is only after the rendering of the award that the courts exercise any control over the challenge. According to this approach, the intervention of the national courts in the arbitration proceedings can take place only after the final award has been rendered, either in enforcement proceedings or in proceedings relating to the nullity or the setting aside of the award on the grounds that the tribunal was not properly constituted. This approach also introduces problems, because of the waste of time and money if the challenge to the arbitrator is upheld at that late stage.

A compromise has been reached in the UNCITRAL ML, Art. 13(3). If the challenge is not successful, the challenging party may within thirty days request the court to decide on the challenge. While the request is pending before the court, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. Therefore, the arbitral tribunal may decide whether it considers the challenge to be serious, in which case it may suspend its proceedings, or whether it considers the challenge to completely without merit.

## 3.11 Test your understanding

1. **Answer the following questions, assuming that UNCITRAL ML applies in an ad hoc arbitration:**
   - **Who decides on the challenge?**
   - **Does the challenged arbitrator participate in the decision?**
2. **Now answer the same questions but on the assumption that the parties choose the UNCITRAL Rules.**
3. **Is it possible to raise the issue of the challenge in New York Convention countries at the time the award is sought to be enforced?**
4. **At what point should the courts enter to examine and decide a challenge to an arbitrator in an ad hoc arbitration?**

[17] *See, e.g., UNCITRAL ML Art. 13(3).*

5. **Should courts be authorized to decide on challenges before or during arbitral proceedings?**
6. **If a challenge has previously been decided by the arbitrators themselves or by an arbitral institution, how much deference to that decision should a court give in enforcement proceedings?**

# 4. REPLACEMENT OF ARBITRATORS

***Objectives***

**On completion of this section, the reader should be able to explain the methods for replacing an arbitrator who has died, resigned, unable to perform his functions or who has been removed for cause or otherwise.**

## 4.1 Introduction

If an arbitrator withdraws, dies, or resigns, a substitute arbitrator must be appointed. Under some arbitration rules the substitute arbitrator is appointed pursuant to the same procedure that was followed for the initial appointment of the arbitrators (e.g., ICSID Art. 56(1)). Moreover, under ICC Rules the ICC Court may replace an arbitrator upon its own initiative if the arbitrator is not fulfilling his functions or at the request of all of the parties (ICC Rules, Arts. 12.1 and 12.2). Also, if the ICC Court accepts the challenge brought against an arbitrator, a substitute arbitrator is appointed in accordance with the procedure laid down in Article 12.1 of the ICC Rules.

## 4.2 Dismissal and replacement with the consent of all parties concerned

In order to safeguard the independence and authority of the arbitrator, he or she may not be dismissed unilaterally by the party who nominated him. Yet, if all the parties agree to terminate the arbitration, there is nothing the arbitrator can do to oppose their decision. Therefore, under most legal systems, the arbitrator may be dismissed upon a successful challenge or with the unanimous agreement of the parties[18]. Thus, Article 12(1) of the ICC Rules states:

***ICC Rules, Article 12(1)***

> *An arbitrator shall be replaced upon his death, upon the acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge or upon the request of all the parties.*

Canon II(E) of the AAA/ABA Code of Ethics mandates the withdrawal of the arbitrator if both parties wish, whereas the IBA Guidelines does not contain a corresponding rule. Thus, under the IBA Guidelines, if the arbitrator believes that he or she is a victim of false rumours, the arbitrator may theoretically insist on challenge procedures rather than withdrawing. Yet, it is difficult to conceive of a situation in which the arbitrator would refuse to withdraw if both parties request him or her to do so.

## 4.3 Replacement of an arbitrator who has resigned

What happens if one of the party-appointed arbitrators submits his resignation during the course of the proceedings without apparent justifiable cause, thus

[18] *New French Code of Civil Procedure, Art. 1463.2*

frustrating or slowing down the arbitral proceedings? Are the other members of the Arbitral Tribunal required to consent to the resignation and should the party who appointed the arbitrator be entitled to appoint its successor?

In a case dealing with the consequences of the attempted resignation of an arbitrator who sought to condition his resignation to the fact that the Claimant, who appointed him in the first place, be allowed to appoint his successor, in what came to be known as *The Incident of Sir John Foster,*[19] the two other members of the Arbitral Tribunal decided to disregard the condition attached to the resignation, the vacancy having been filled pursuant to Article 56(3) of the ICSID Convention by the Administrative Council of the ICSID.

## 4.4 Replacement of an arbitrator who has been challenged

If a withdrawal of an arbitrator is effected following the lodging of a challenge, the arbitrator who will take his or her place is likely to be appointed pursuant to the same procedure as for the original appointment, which allows some participation by the parties (AAA Rules, Art. 11). Under the LCIA Rules however, once the LCIA determines that a nominee is not suitable due to lack of independence or impartiality, the Court in its discretion may follow the original nominating process or reappoint the new arbitrator directly (LCIA Rules, Art. 11.1).

## 4.5 Non-replacement of an arbitrator

If the arbitrator dies or has been removed by the ICC Court subsequent to the closing of the proceedings but prior to the rendering of an award, the ICC Court may decide that the remaining arbitrators should continue the arbitration without the appointment of a substitute arbitrator (ICC Rules, Art. 12.5). Similarly, under AAA Rules, Art. 11 and the LCIA Rules, Art. 12, if an arbitrator refuses or persistently fails to participate in the deliberations of the arbitral tribunal, rather than replacing him, the two remaining arbitrators have the power to continue the arbitration, including the making of an award.

## 4.6 Test your understanding

1. **How should the two remaining members of an arbitral tribunal rule on the consequences of an untimely and unjustified resignation by an arbitrator?**
2. **Contrast the method adopted by the ICC Rules for dealing with an abusive or unjustifiable resignation of an arbitrator during the course of the arbitral proceedings, with the method adopted under the ICSIDR.**

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[19] *Holiday Inns S.A. and others v. Morocco (Case No. ARB/72/1), 11 ICSID Ann.Rep. (W. Bank) 32 (1977).*

**3. Suppose a party-appointed arbitrator resigns without justification. Should that party be deprived of his right to nominate a replacement arbitrator because the first arbitrator nominated by him resigned without justification?**

# 5. RIGHTS AND RESPONSIBILITIES OF THE ARBITRATORS

***Objectives***

**On completion of this section, the reader should be able to appreciate the standards of behaviour of arbitrators, the procedures and range of remedies available to the parties if an arbitrator fails to fulfil his or her duties, and the tactical considerations the parties may bring to bear in deciding whether to pursue any remedy.**

## 5.1 Introduction

The arbitrator is a decision-maker only by virtue of a contract whereby he promises the parties (and eventually the arbitral institution) that he will carry out a clearly defined and usually remunerated task. By accepting this task, the arbitrator undertakes to fulfil it with due diligence and within a reasonable time, even though the obligation is seldom articulated in those terms.

The rights and powers of arbitrators are exercised in the course of the arbitral proceedings; from the time the arbitral tribunal affirms its jurisdiction to settle the dispute to the moment they settle the dispute by rendering the final award. Once selected, arbitrators enjoy wide powers that are not limited by appellate level scrutiny. Proof of this assertion is that under most international conventions and national laws an arbitral award can only rarely be vacated on the ground of improper behaviour or the lack of professional competence of the arbitrators. The only safeguards given to the parties to protect themselves against unskilled or corrupt conduct by arbitrators are scrutiny before the appointment, broad grounds for challenging the arbitrators once they are appointed, and a limited number of grounds for setting aside, vacating, nullifying, or refusing to enforce the award. Thus the importance of nominating and appointing the right arbitrators.

This section, however, will focus on the duties and obligations of the arbitrators *vis-a-vis* the parties, the co-arbitrators, and the institution administering the arbitration. The parties themselves in the arbitration agreement or, in the case of ad hoc arbitration, in the terms of appointment of the arbitral tribunal, may outline many of those powers. Other rights and duties may arise from arbitration rules, governing laws, and ethical standards embodied in codes of conduct.

## 5.2 Duty to fulfil his task until its completion

An arbitrator who is a member of an arbitral tribunal fails in his duty of due diligence if he refrains from taking part in the hearings or deliberations. That task must be carried out until its completion, that is, until the final award is rendered. That means that from the moment he or she accepts the appointment, the arbitrator cannot resign without good reason. Many arbitration statutes

have adopted the rule expressly[20] and in other legal systems it is the prevailing doctrinal view.[21] Some arbitration rules also prohibit the arbitrator's untimely resignation.[22] Exceptionally, Section 25 of the 1996 English Arbitration Act introduces a possible recourse in the face of the unjustified resignation of an arbitrator.[23]

If the arbitrator were to resign as a means of paralysing the arbitral proceeding, particularly if this was in the interest of the party who nominated him, it would constitute a deliberate wrongful act. Resignation is always possible, however, in the presence of legitimate reasons (e.g., when circumstances threatening his independence *vis-a-vis* the parties arise without fault of his own, or if he is unable to continue with his task due to illness).

## 5.3 Duty to conduct the arbitration with impartiality as well as the appearance of impartiality

The grey zone surrounding the duty of the arbitrator to be impartial and independent was examined in connexion with the qualifications to be met by arbitrators. In the numerous rulings that the arbitrators must issue in a long arbitration, their duty to remain impartial and independent is likely to come into play. It is imperative that the arbitral tribunal grant each party equal treatment, a duty that may be perceived as a corollary of the attribute of impartiality.

## 5.4 Give equal treatment to the parties

The arbitrator has an obligation to treat the parties on an equal footing throughout the whole duration of the procedure. He must ensure that the parties are given every opportunity to assert their pleas. This is not only a contractual obligation assumed as of the moment he or she accepts the

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*[20] French New Code of Civil Procedure Art. 1462; Italian Code of Civil Procedure Art. 813; Belgian Judicial Code Art. 1689; Dutch Code of Civil Procedure Art. 1029.2.*

*[21] See, e.g., P. Lalive, J.F. Poudret, C. Raymond, Le droit suisse de l'arbitrage interne et international en Suisse 333 (1989) (...[a]n arbitrator who has accepted his task must in principle conduct it until it is completed...he can only divest himself of it for legitimate reasons...); E. Gaillard, Les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international, Revue de l'arbitrage 759 (1990).*

*[22] ICSID Rules, Art. 8(2) (entrusting the arbitral tribunal with the task of accepting or rejecting the resignation submitted by a party-appointed arbitrator); ICC Art. 12(1) (providing that the arbitrator's resignation must be accepted by the ICC Court).*

*[23] English Arbitration Act 1996, Sec. 25*

*(1) The parties are free to agree with an arbitrator as to the consequences of his resignation as regards: (a) his entitlement (if any) to fees and expenses, and (b) any liability thereby incurred by him.*

*(2) If or to the extent that there is no such agreement, the following provisions apply.*

*(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court (a) to grant him relief from any liability thereby incurred by him, and (b) to make such order as it thinks fit with respect to his entitlement (if any) to fees and expenses, or the repayment of any fees or expenses already paid.*

*(4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3) (a) on such terms as it thinks fit. (5) The leave of the court is required for any appeal from a decision of the court under this section.*

appointment, but it is also a duty arising under or underlying most of the arbitration laws and rules. Thus, Article 18 of the UNCITRAL Model Law formulates the principle that the parties shall be treated with equality and each party shall be given a full opportunity to present his case. What does equal treatment mean in this context? It may mean different things at different stages of the proceedings, including not only fairness in making procedural rulings, but also impartiality of expression and personal contacts with the parties.

At times it may be difficult for the arbitrator to strike a balance between respect for equal treatment and giving due regard to the parties' right of defence or due process. This situation is likely to arise in connexion with the postponement of existing deadlines unilaterally requested by one party, the admission of evidence sought by one party and opposed by the other, the limitations on the number of witnesses or, the reduction in the frequency or time allocated to hearings requested by one party and opposed by the other, etc.. A prudent sense of fairness may counsel the arbitrator to act with a sense of procedural leniency, with a view to avoiding motions to set aside an award on the ground that the right of due process of one party has not been appropriately heeded.

## 5.5 Communications and contacts between the arbitrators and the parties

An arbitrator communicating with a party in writing should not fail to address a copy of that communication to the other party, the other arbitrators, and the case administrator of the arbitral institution. If the communication is oral, an arbitrator may arrange procedural dates or even procedural rules with one of the parties, but the contents of the communication should immediately be made known to the other party and arbitrators.

If one of the parties addresses one of the arbitrators, the arbitrator should not discuss the merits of the case, the evidence, or hear any legal argument in the absence of the other party and his fellow arbitrators. This standard should also extend to the relationship among the co-arbitrators: An arbitrator should not discuss the merits of the arbitration with another arbitrator in the absence of the third arbitrator, unless the latter has agreed and is informed of the subject of the discussion.

Even informal contacts between the arbitrators and the parties should be carefully considered, because the absence of rigid procedural rules in arbitration invite informality that is not present in a more formal litigation setting. A friendly and informal way of conducting the arbitration however, may lead one of the parties to the mistaken conclusion that the arbitrator is biased in favour of the other, hence the advantage for the arbitrator to keep social contacts with one party only in the presence of the other party.

## 5.6 Unilateral communications between a party-appointed arbitrator and the party who appointed her/him

The AAA/ABA Code of Ethics for domestic arbitration seems to condone a party-appointed arbitrator communicating unilaterally with the party that appointed him. This is in contrast with the ABA Code of Judicial Conduct, which does not approve of such unilateral communications[24]. This is why the IBA Guidelines frown on unilateral communications between an arbitrator and a party who appointed him.[25] The prevailing view, to the extent that one may be identified, seems to be that all arbitrators, including party-appointed arbitrators, are expected to be, and should be, genuinely neutral and independent.

There are circumstances under which an arbitrator or potential arbitrator needs to communicate unilaterally with the nominating party for the purpose of discussing the issue in dispute. Such a case is presented before the constitution of the arbitral tribunal, when a party first contacts a potential arbitrator to ask him if he is willing to serve.[26] Another opportunity in which the issue in dispute may need to be superficially touched upon is presented when the nominating party discusses with the nominee potential candidates for chairmanship, for it is difficult to avoid disclosing the nature of the dispute when what is at stake is the fitness of a particular arbitrator for a particular case. Thus, if the arbitration agreement provides that the two arbitrators nominated by the parties shall choose the presiding arbitrator, it is expected, although not without controversy, that the candidates being considered as chairman be cleared with counsel by the nominated arbitrators.[27]

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*[24] ABA Code of Judicial Conduct, Canon 3(B)(7): a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.. The accompanying commentary states that the proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding.*

*[25] IBA Guidelines Rule 5.3: Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance.*

*[26] IBA Guidelines Rule 5.1: Communication with Parties. When approached with a view to appointment, a prospective arbitrator should make sufficient enquiries in order to inform himself whether there may be any justifiable doubts regarding his impartiality or independence, whether he is competent to determine the issues in dispute; and whether he is able to give the arbitration the time and attention required. He may also respond to enquiries from those approaching him, provided that such enquiries are designed to determine his suitability and availability for the appointment and provided that the merits of the case are not discussed..*

*[27] Contra Code of Ethics for Vancouver Maritime Arbitrators Ass'n Rule 10, reprinted in William O. Forbes, Rules of Ethics for Arbitrators and Their Application, J. Int'l. Arb. Sept. 1992, at 25-26: No arbitrator shall confer with the party or counsel appointing him regarding the selection of a third arbitrator. But see IBA Guidelines, Art. 5.2: If a party-nominated arbitrator is required to participate in the selection of a third or presiding arbitrator, it is acceptable for him (although he is not so required) to obtain the views of the party who nominated him as to the acceptability of the candidates being considered.*

## 5.7 Duty to deliberate before issuing an award

Deliberation appears as an essential element of the decision, so that failure of the arbitrators to deliberate may constitute a aground for annulment. However, there is little authority on what constitutes sufficient deliberation. Should all deliberations take place in the presence of all of the arbitrators, or may one arbitrator contact another for the purpose of developing a joint position *vis-a-vis* the third arbitrator? Should deliberations take place necessarily in a face-to-face meeting, or should telephone or teleconference communication suffice?

It is plausible to assume that an award rendered by a three-member tribunal had been preceded by a genuine and searching examination of the positions espoused by each party. Moreover, nowadays deliberations may take place by telephone or teleconference, without a need for a face-to-face meeting.

## 5.8 Duty of secrecy and confidentiality

One of the main features of arbitration is that, unlike court proceedings, arbitration is conducted in private. And this is the reason why arbitration is chosen in a majority of cases. So it is reasonable for every arbitrator to assume that it is his or her duty not to disclose information obtained during the course of the proceedings, an obligation that is expressly acknowledged by the AAA Rules. Art. 34 reads:

***AAA Rules, Art. 34***

> *Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.*

The ICC Rules also provide for the confidential nature of the arbitration, although only in relation to the work of the ICC Court[28] while the LCIA Rules focus on the parties' duty of confidentiality (LCIA Rules, Art. 30).

Thus stems from a general duty of confidentiality, which may be regarded as one element of the duty of diligence arising from the agency nature of the arbitration agreement. This restriction should preclude, at the very least, undue disclosure of the arbitration process to third parties. More specifically, the duty of confidentiality covers the award and the deliberations that preceded it as well as, according to the IBA Guidelines, any record or statement produced for the purpose of the arbitration.

[28] *Internal Rules of the Court of Arbitration, Art. 1.*

## 5.9 Dissenting opinions

An arbitral tribunal may be unable to reach a unanimous decision, in which case an arbitrator whose views did not prevail may wish to let them be known, either as a separate opinion disagreeing with a decision (dissenting opinion) or approving the decision but not its reasoning (concurring opinion). In some civil law jurisdictions, however, maintaining secrecy with regard to a court or tribunal's deliberations is very important, to the extent of prohibiting an arbitrator from making his dissenting views known. This approach appears to be abandoned, at least in modern arbitration laws and some arbitration rules, that tend to encourage the expression of a minority view by an arbitrator desirous of expressing his concerns about an award.

The UNCITRAL Rules neither foresee dissenting opinions nor rule them out. When the UNCITRAL Rules were adapted for use by the Iran-United States Claims Tribunal, Article 32(3) was modified to provide that "[a]ny arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefore be recorded" and many dissenting opinions have been made public. Similarly, ICSID expressly permits dissenting opinions.

ICSID Rule 47(3): Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

It may be noted that both the Iran-United States Claim Tribunal and ICSID deal with high profile disputes in which there is a significant public interest as well as the interest of the private parties.

The admissibility of dissenting opinions is more ambiguous under the ICC Rules which, while not expressly forbidding dissenting opinions, do not encourage them either. Nothing in the ICC Rules prevents annexing a dissenting opinion to the award. Article 25(1) of the ICC Rules speaks in terms of a majority decision in the absence of unanimity, which is not required. In the absence of a majority, the award may be issued on the basis of a decision by the presiding arbitrator alone. Therefore, the goal is to allow the arbitral tribunal to reach a decision that disposes of the case, and even if a dissenting opinion were to be filed, the opinion would not be considered part of the award.

Moreover, Article 35 of the ICC Rules provides that both the arbitral tribunal and the ICC Court shall make every effort that the award be enforceable. The Court carries out its obligation under Article 27 of the Rules by reviewing the award as to its form. It may also draw the attention of the tribunal to points of substance, without affecting the tribunal's liberty of decision. According to Article 6 of the Internal Rules of the Court:

> *'When the Court scrutinizes draft awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.'*

This means that the award should conform as much as possible to the requirements of the jurisdictions in which arbitrations take place, but also those places where awards may need to be enforced. Since a number of parties to ICC arbitrations come from civil-law jurisdictions where dissenting opinions are looked down upon for revealing the inner workings of the tribunal, there is always the possibility that an award sought to be enforced in any of those jurisdictions might be turned down because it attaches a dissenting opinion. However, a survey conducted in 1988 by a working party of the ICC Commission on International Arbitration found no State in which it was certain that the transmission of a dissenting opinion to the parties would imperil the award.[29]

## 5.10 Rights and obligations of the arbitrator *vis a vis* the arbitral institution

The arbitral institution is bound to carry out its functions of organization, administration and supervision of the arbitration, as defined by the arbitration rules laid down by the arbitration centre. In this regard, the arbitrator is entitled to expect that he or she will receive all the administrative and technical assistance that is needed to facilitate the completion of the arbitration. The arbitral institution is also bound to reimburse the arbitrator's expenses and pay him fees, in respect of which it has collected advances from the parties pursuant to the arbitration rules. On the other hand, the arbitrator has agreed that the reimbursement of his expenses, the amount of his fees and the modalities relating to their payment will be decided and fixed by the arbitration centre, also pursuant to the arbitration rules.

## 5.11 Immunity of the arbitrators

The issue of responsibility of the arbitrators is seldom dealt with specifically even in modern arbitration statutes. By way of exception, Section 29 of the 1996 English Arbitration Act, entitled *Immunity of arbitrator* is one of the few arbitration statutes dealing explicitly with this issue, in the sense of exempting the arbitrator and subordinates for any liability incurred in connexion with the discharge of his or her functions.[30] Also by way of exception, the ICC Rules Art. 34 have introduced a new provision, according to which:

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[29] *Fourth Report on Dissenting and Separate Opinions, Working Party on Partial and Interim Awards and Dissenting Opinions, Commission on International Arbitration, Doc. No. 420/293 Rev. 2, 23 February 1988, cited in Craig, Park & Paulson, International Commercial Arbitration, 2d ed., 1998 (Dobbs Ferry).*

[30] *English Arbitration Act 1996, Sec. 29*

*(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith*

*(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself. Subsection (3) of Section 29 states explicitly that the rules of subsections (1) and (2) do not affect any liability that may have been incurred by an arbitrator by reason of his resigning and refers to Section 25 which, among other things, authorizes the arbitrator to petition the court to grant him relief from any such liability.*

**ICC Rules, Art. 34**

*Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.*

## 5.12 Test your understanding

1. **What is the responsibility of an arbitrator who abandons his or her function without justification? Suppose he does, what are (or should be) the consequences of an arbitrator's failure to comply with his duties? Will (should) this affect the regularity of the arbitral proceedings?**
   - **Assume that one of the arbitrators withdraws without justification, the remaining two members refuse to accept his resignation (or the arbitration center refuses to accept the resignation), and this arbitrator nevertheless refuses to perform his functions.**
   - **Should the other arbitrators continue with the proceedings?**
   - **Would it make a difference whether the resigning arbitrator is the chairman of the tribunal or a sole arbitrator, as opposed to a party-appointed arbitrator?**
   - **Assuming the two remaining arbitrators continue with the arbitration but are unable to agree on an award. What may be the result?**
2. **Can the validity of an arbitral award become contingent on whether one of the arbitrators had a sound, or at least plausible, reason to resign? Assuming this is relevant, who decides on the appropriateness of the resignation?**
   - **Assuming one of the arbitrators resigns without cause, should the two remaining arbitrators continue with the arbitral proceedings after such an unjustified resignation?**
3. **Do the rules of the arbitral institutions prohibit disclosure of dissenting opinions?**
4. **May an arbitrator who is a partner in a law firm be allowed to disclose information to one of his partners? How can the obligation of confidentiality be enforced? Can an arbitrator be enjoined from disclosing information relating to an arbitration?**
5. **Is the exclusion of liability provided for in Section 29 of the 1996 English Arbitration Act and Article 12(2) of the 1998 ICC Rules conclusive? Does this exemption from liability preclude liability of the arbitrators who abandon their functions without justification?**

# 6. ADMINISTRATIVE AND FINANCIAL ASPECTS

***Objectives***

**On completion of this section, the reader will be able to explain how arbitrators get paid, the different methods for advancing costs, and how to allocate the cost of expenses, arbitrators and attorneys' fees between the parties to the arbitration.**

## 6.1 Introduction

Arbitration is not free of charge, and arbitrators are entitled to ask for remuneration from the parties who request them to settle their dispute. Modalities on the reimbursement of expenses, advances on costs, and determination and payment of fees are more a matter of practice, but some arbitration laws have opted for regulating them in more detail than others. Thus, Article 814 of the Italian Code of Civil Procedure provides that the arbitrators are entitled to the reimbursement of their costs and to fees for the work carried out, unless they have waived them. If the parties fail to agree on the calculation of the costs and fees, the sum will be fixed by the court. The parties to the arbitration are jointly bound to pay for those costs and fees, without prejudice to their rights of recourse one against the other.

## 6.2 Reimbursement of expenses

In order to carry out their services, the arbitrators will incur a variety of expenses, which they can obviously ask to have reimbursed. It is common for the arbitral tribunal or the arbitration institution to ask for an advance of costs in the form of a deposit. It is from this fund that the arbitrators are reimbursed for their expenses.

## 6.3 Advances on costs and refusal by the respondent

In cases in which the arbitrators or the arbitral institution require a deposit of costs, it is not uncommon for the respondent to refuse to pay its share. As a matter of practice, in such a case it is common for the arbitral tribunal or institution to ask the claimant to deposit the whole amount, on the understanding that the final award would decide on the allocation of costs. The arbitral tribunal or the arbitral institution will normally suspend the proceedings until the deposit is paid in full.[31]

## 6.4 Determination of costs and arbitrators fees

Setting costs and fees is less complex in institutional than in *ad hoc* arbitration. Most institutional rules of arbitration lay down a scale of fees, which takes

[31] *For example, ICC Rules, Appendix III, Art. I.3: In general, ... the Arbitral Tribunal shall, in accordance with Article 30(4) of the Rules, proceed only with respect to those claims or counterclaims in regard to which the whole of the advance on costs has been paid.*

into account the commercial amount in dispute and, in some cases, the difficulty of the case and the time spent by the arbitrators in deciding it[32]. The scale of fees is allegedly set up for the purpose of safeguarding the independence of the arbitrators. Any unilateral financial arrangement between an arbitrator and the party who nominated him is strictly prohibited.

Quite frequently, *ad hoc* arbitrators tend to assess (and justify) their fees relying on the scale of fees of well-known arbitration centres. In most cases the fees are set by the arbitrators and are almost automatically accepted by the disputants rather than negotiated, thus the scarcity of controversy as to the contractual relationship between the arbitrator and the parties.

The fixing of the amount of fees owed to the arbitrators is included in the award, even if the arbitral institution has determined the amount. The arbitral tribunal in its award decides the allocation of the costs and fees between the parties. Thus, an order to pay all or part of the costs and fees is one of the usual heads of the award, which the arbitrators decide on the basis of the respective success and conduct of the parties to the arbitration (UNCITRAL Rules Art. 40; ICC Rules Art. 31(3)).

## 6.5 Judicial review of the determination of fees

It is not uncommon for a legal system to provide some kind of judicial control over the fees or remuneration fixed unilaterally by agents, contractors, or professionals of the most varied kind. However, it is not certain whether national courts could check or reduce the amount of the arbitrator's fees, stemming from the application of a scale, on the ground that the court deems such fee to be excessive. Unless it can be proved that the provisions of the standard fees fixed pursuant to the scale were somewhat unfairly imposed, courts are unlikely to revise the determination of fees issued by the arbitral tribunal.

## 6.6 Allocation of payment of fees

The arbitral tribunal decides in its award on the allocation of the fees and costs between the parties. The usual procedure is that "unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate".[33]

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[32] *ICC Rules, Appendix III, Art. 4: The Scales of Administrative Expenses and Arbitrators fees, set forth below shall be effective as of January 1, 1998 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitration. UNCITRAL Rules Art. 39 (in the absence of a scale, it provides that the amount of the fees must be reasonable); AAA Rules Art. 31.*

[33] *LCIA Rules, Art. 28.(4).*

## 6.7 Test your understanding

1. **In an ad hoc arbitration, would you allow a separate fee arrangement between a party and that party's appointed arbitrator?**
2. **It is said that the relationship between the arbitral institution and the arbitrator is based on contract. If the arbitrator is not paid, could he or she sue the arbitral institution, or the parties, or both?**

# 7. CASE STUDIES

## 7.1 Challenge of the arbitrators (1)

X and Y enter into a contract incorporating an ICC clause providing for the appointment of a three-member arbitral tribunal with Moldova, capital of Ruritania, as the place of arbitration. After a dispute over the performance of the contract develops, X commences arbitration and designates its arbitrator. Counsel for Y interviews possible arbitrators, including Mr. Hefisch, a prominent attorney and well-known arbitrator from Moldova. Subsequently X and Y are unable to agree on the appointment of a chairman. The National Committee of Ruritania appoints Mr. Heifisch as chairman of the arbitral tribunal. Heifisch has disclosed the interview and the National Committee feels that it is no impediment to his appointment. Discuss the possible implications of this appointment from the perspectives of X and Y and consider which option the ICC Rules gives each party. Weigh and discuss the pros and cons of the options of each party.

## 7.2 Challenge of the arbitrators (2)

Assume you are the counsel for Government X in a case before the ICSID. Early in the arbitration it comes to your knowledge that the arbitrator appointed by Corporation Y gave tax advice to Corporation Y for several years but did not state this connection when she accepted the appointment. Discuss your legal options and weigh their strategic utilities.

## 7.3 Qualifications

There are many delicate questions in which the appearance of impartiality/ neutrality of the party-appointed arbitrator is at stake yet are not specifically contemplated by the law or the arbitration rules:

**(a)** Assume you are a candidate for appointment in arbitration and the attorney who wishes to nominate you asks you to submit to an interview. Would you agree to be interviewed? Would you agree to go to the attorney's office to be interviewed?

**(b)** How would you respond to the following questions that may be asked (and also consider whether, as an attorney seeming to nominate a party appointed arbitrator, you would be willing to appoint an arbitrator who refused to answer some of these questions):

- What other arbitrations have you been involved in and who were the counsel and other arbitrators?
- In the process of interpreting a contract or a statute, would you lean towards a more literal or analogical interpretation of the words?

- Do you believe, as a matter of fairness, that a contract may be tampered with in case events that were unforeseeable at the time the contract was concluded turned extraordinarily burdensome to the obligations of one of the parties? If so, would you consider that the parties ought to renegotiate the terms of the contract, or would you simply declare it terminated?
- Have you ever decided a case against the party who appointed you?

**(c)** Suppose after the award is rendered, an attorney for one of the parties asks an arbitrator what was really decisive in the panel's deliberations. The attorney wants to know whether any evidence or arguments were particularly persuasive and whether any missed the mark entirely:

- Should the arbitrator answer?
- Would your opinion be affected by whether the arbitrator was party-appointed?

# 8. FURTHER READING

## 8.1 Books

- **Rene David**, *Arbitration in International Trade* 255 (1985) [independence and impartiality of arbitrators]
- **Martin Domke**, *Domke on Commercial Arbitration* 326-27 (rev. ed. 1984) [independence and impartiality of arbitrators]
- **Michael J. Mustill & Stewart C. Boyd**, *The Law and Practice of Commercial Arbitration in England* 253-54 (2d ed. 1989) [impartiality and appearance of impartiality as one of the main duties of arbitrators]
- **A. Redfern and M. Hunter**, *Law and Practice of International Commercial Arbitration* 205 (1991) [tactical considerations in challenging arbitrators]
- **J. Willis Wetter**, *The International Arbitral Process* 368 (1979)

## 8.2 Essays

- **Guillermo Alvarez**, *The Challenge of Arbitrators*, J. Arb. Int'l. 203 (Jan.1990).
- **Mohammed Bedjaoui**, *The Arbitrator: One Man-Three Roles*, J. Int'l. Arb. 7 (Mar. 1988) [independence of the arbitrators].
- **Giorgio Bernini**, *Report on Neutrality, Impartiality, and Independence*, in *The Arbitral Process and the Independence of Arbitrators* 31-37 (ICC ed. 1991).
- **Stephen R. Bond**, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 Arb. Int'l. 300 (1988).
- **Robert Coulson**, *An American Critique of the IBA's Ethics For International Arbitrators*, 4 J. Int'l. Arb'n. 103 (June 1987).
- **Lawerence F. Ebb**, *A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangement*, in The American Review of International Arbitration: Essays in Honor of Hans Smit 3 (1992).
- **Andreas F. Lowenfeld**, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Tex. Int'l. L. J. 59 (1995).
- **Claude Raymond**, *Note sur l'avance des frais de l'arbitrage et sa répartition*, in *Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret* 495 (Lausanne 1999)
- **Stephen M. Schwebel**, *The Validity of an Arbitral Award Rendered by a Truncated Tribunal*, ICC Int'l. Ct. Arb'n. Bull. (November 1995).
- **Tibor Varady**, *On Appointing Authorities in International Commercial Arbitration*, 2 Emory J. Int'l. Dispute Res. 311 (1988).

## 8.3 Case law

- *Commonwealth Coatings Co. v Continental Casualty Co.*, 393 U.S. 145 (1968) [scope of the arbitrator's obligation to disclose prior relationships with either party to the arbitration agreement].
- *Holiday Inns S.A. and others v. Morocco (Case No. ARB/72/1),* 11 ICSID Ann.Rep. (W. Bank) 32 (1977) [on the ruling by an ICSID two-member arbitral tribunal on the consequences of an attempted resignation by the remaining member of the tribunal].
- *In re Certain Softwood Lumber Products from Canada (U.S. v. Can.),* No. ECC-94-1904B01USA (Extraordinary Challenge Comm., U.S.-Can.Free Trade Agreement, Aug. 3, 1994) at 74-80. [duty to disclose and grounds for challenging an arbitrator]
- *K/S Norjarl A/S v. Hyndai Heavy Industries Co., Ltd.,* Queen's Bench Division (Commercial Court), 1990, 1 Lloyd's Law Rep. 260 (1991), affirmed by the Court of Appeals, Civil Division, 21 Feb. 1991, [1992] 1 QB 863, [1991] 3 All ER211, [1991] 1 Lloyd's Law Rep. 524 [validity of contract between the parties and the arbitrators providing for a commitment fee]
- *Ivan Milutinovic PIM v. Deutsche Babock AG*, International Chamber of Commerce (ICC), No. 5017, Partial Award of 8 Nov. 1987 [validity of an arbitral award rendered by a truncated tribunal after one of the arbitrators resigned for what the other members of the arbitral tribunal considered no apparent good reason]
- *Philips Hong Kong Ltd. (Hong Kong) v. Huyndai Electronics Industries Co. Ltd. (Hong Kong),* Supreme Court of Hong Kong, 1993, 1 Hong Kong Law Reports 263 (1993) [appointment of arbitrators by the court is premature unless claimant has exhausted the contractual mechanism for appointment].
- *Andros Compania Maritima v. Marc Rich & Co., AG.,* U.S. Courts of Appeals, Second Circuit, 1978, 579 F.2d 691 [validity of a challenge of arbitrators]

# 9. ABBREVIATIONS

- **AAA Rules** – International Center for Dispute Resolution: American Arbitration Association, International Arbitration Rules (2001)
- **FNCCP** - French New Code of Civil Procedure
- **ICC Rules** - International Chamber of Commerce Arbitration Rules (1998), International Chamber of Commerce, ICC Pub. No. 447
- **ICC Court** – International Court of Arbitration of the International Chamber of Commerce
- **ICSID** - Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.
- **ICSID Rules** – ICSID Rules of Procedure for Arbitration Proceedings (2003)
- **LCIA** - Rules of the London Court of International Arbitration (1998)
- **UNCITRAL Rules** - Rules of Arbitration of the United Nations Commission on International Trade Law (1976), U.N. GAOR, 31st Sess., Supp. No. 17, at 34-50, U.N. Doc A/31/17, U.N. Sales No. E77.V.6 (1976)
- **UNCITRAL ML** - UNCITRAL Model Law on International Commercial Arbitration (1985), adopted by UNCITRAL on June 21, 1985, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17.