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# Arbitrator Integrity: The Transient and the Permanent

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“Everything is in flux.”  
Heraclitus†

“Righteousness endures forever.”  
Psalm 111††

## I. LEVEL PLAYING FIELDS

### A. *Heraclitus Meets the Psalmist*

The somewhat excessive words attributed to Heraclitus find some application in the current search for ethical standards applicable to arbitrators sitting in international disputes. New patterns of misbehavior create new types of ethical challenges. Few criteria for evaluating

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† Transliterated *panta rhei* and attributed to Heraclitus of Ephesus (535–475 BCE) by Plato and Aristotle, the phrase likely derives from a statement that we never step twice into the same river because new waters flow on us. See HERACLITUS, THE COSMIC FRAGMENTS 370–80 (G.S. Kirk ed. & trans., 1978). In Greek thought the idea is an old one. By contrast, Hebrew and Christian scriptures often juxtapose human transience with divine permanence. According to the prophet Isaiah, “All flesh is grass. . . . The grass withers, the flower fades; but the word of our God will stand forever.” *Isaiah* 40:6–8, as quoted in shortened form in *1 Peter* 1:24–25.

†† The text of Psalm 111, verse 3 reads, “Full of honor and majesty is the Lord’s work, and His righteousness endures forever.”

arbitrator independence and impartiality will likely stay foolproof for long, given how ingenious fools often prove themselves to be.

Heraclitus notwithstanding, however, change does not occupy the entirety of human experience. Although tomorrow cannot be built on an assumption of yesterday's permanence, one must build on something. Yesterday's lessons remain better starting points than most. Thus the aspirational model of righteousness continues to manifest a stubborn stability, much as the Psalmist predicted.

No less than in other areas of the law, elaboration of standards for arbitrator ethics implicates a tension between the transient and the permanent.<sup>1</sup> Conflict-of-interest principles will remain useful only if implemented with sensitivity to new trouble spots.

Traditional ethical models serve as starting points for evaluating the fitness of those to whom business managers, investors, and nations entrust their treasure and their welfare. Any model, however, must be flexible enough to address novel professional temptations. In particular, vigilance commends itself when lawyers take on various professional roles, making arguments as advocates in one case about propositions that remain open in other cases where they sit as arbitrators. The constant movement in arbitrators' lives and activities requires regular adjustment in both formulation and application of contours for acceptable and unacceptable arbitrator behavior.<sup>2</sup>

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1. The phrase "Transient and Permanent" seems first to have appeared in a sermon by a New Englander named Theodore Parker, delivered at the ordination of Charles Shackford in the Hawes Place Church in Boston in May 1841. THEODORE PARKER, *The Transient and Permanent in Christianity*, in *THE TRANSIENT AND PERMANENT IN CHRISTIANITY* 447 (George Willis Cooke ed., 1908). The Unitarian preacher unsettled much of his community by suggesting that the message of Jesus was valuable solely because of the truth it revealed, not due to any divine credentials.

2. Important ethical questions related to legal counsel (how lawyers behave in international arbitration) remain beyond the scope of this Article. Such matters involve the propriety of interviewing witnesses (impermissible under deontological principles of many European bar association rules) and the duty to abide by the mandates of a lawyer's own jurisdiction when practicing in connection with a foreign arbitration. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 7 (2009) (providing that the choice of law provision applies to "lawyers engaged in transnational practice"). A lawyer admitted to practice in one jurisdiction may be subject to disciplinary authority there regardless of where the lawyer's conduct occurs. The choice of law provision makes reference to both the jurisdiction in which the relevant tribunal sits and the jurisdiction in which the lawyer's conduct occurred. See Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78 (2009), available at <http://www.gibsondunn.com/publications/Documents/Benson-CanProfessionalEthicsWait.pdf>; Janet Walker, *Ethics in Arbitration for Counsel and Arbitrators*, 14 ARB. COMMITTEE

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## B. Why Bias Matters

No one with a dog in the fight should judge the competition.<sup>3</sup> Nor should anyone serve as a referee in a game after having decided which team will win. At least as an aspirational model, legal claims should be decided on their merits, rather than according to a predisposition or interest in the outcome. Consequently, few tasks present the vital urgency of establishing standards for evaluating the independence and impartiality of arbitrators.<sup>4</sup>

Notwithstanding the elusiveness of perfect objectivity, a reasonable measure of arbitrator integrity remains both desirable and attainable.<sup>5</sup> Although few people are free of predispositions in an absolute sense, some will prove relatively more detached than others with respect to any given dispute. A relative measure of distance from troubling connections to litigants, along with a willingness to listen carefully to both sides of a dispute, constitutes essential elements of basic due process.<sup>6</sup>

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NEWSL. (Int'l Bar Ass'n, London, U.K.), Mar. 2009, at 10 (reporting on the IBA session on Ethics in Arbitration sponsored on October 13, 2008). *See generally* Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT'L L. 1035 (2009).

3. The more traditional formulation of this principle has been expressed in the maxim *nemo iudex in parte sua* ("no one may judge his own case"). *See, e.g.*, Matthew Gearing, "A Judge in His Own Cause?"—*Actual or Unconscious Bias of Arbitrators*, 3 INT'L ARB. L. REV. 46 (2000).

4. Just as "location, location, location" comprise the three key elements in sustainable real estate value, so it has been observed that "arbitrator, arbitrator, arbitrator" endure as the most critical factors in the integrity of any arbitration. In the same vein, another real estate maxim that might find application to arbitrators says that "price is what you pay, but value is what you get."

5. Somewhat ironically, while impartiality gains ground in arbitration, it has been questioned in some quarters with respect to judicial decisionmaking, most recently by supporters of Judge Sonia Sotomayor in connection with her nomination to the U.S. Supreme Court. *See* David Brooks, Op-Ed., *The Empathy Issue*, N.Y. TIMES, May 29, 2009, at A25; Ellen Goodman, Op-Ed., *What's So Bad About Empathy?*, BOSTON GLOBE, May 22, 2009, at A15. To some extent, albeit with considerably more intelligence and moderation, the call for empathy echoes many of the slogans in the Critical Legal Studies movement of American academia during the 1980s. For a short history of that movement, see Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991). For a contrasting view that emphasizes the deliberative nature of judicial decisionmaking, see Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007), and Michael Mustill, *What Do Judges Do?*, 1995–1996 JURIDISK TIDSKRIFT 611 (Swed.).

6. Although "due process" is used more within the United States, "natural justice" finds favor in the British tradition. In his famous defense of the Dartmouth College charter, Daniel Webster asked rhetorically whether the college trustees "lost their franchises by 'due course and process of law?'" He continued that the law "hears before it condemns" and "renders judgment only after trial." *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819). The French speak of "adversarial process" (*procédure contradictoire* or *principe de la contradiction*), and the Germans refer to "right to a hearing in accordance with law" (*Anspruch auf rechtliches Gehör*). In public international law, bias

In a cross-border context, the prohibition on bias justifies itself by reference to the very same goal underlying the decision to arbitrate: promoting a level playing field. A commitment to subject future disputes to arbitration usually aims to enhance a relative measure of adjudicatory neutrality, at least when compared with the prospect of the other side's hometown courts. Indeed, the notion that promises are meant to be kept depends in large measure on private arbitration for continuing vigor. Even if speed and economy prove illusory, arbitration can still serve to enhance the perception as well as the reality of procedural fairness, thus promoting respect for the parties' shared ex ante expectations at the time of the contract or investment.

In a world of stubbornly heterogeneous legal cultures, each with its own divergent view of proper conduct, elaborating one common ethical plumb line for international arbitration poses special challenges.<sup>7</sup> In contrast to national legal communities, which tend to adopt relatively formalized paths for appointing judges, the fragmented framework of international arbitration relies on more fluid processes for selecting decisionmakers and vetting their integrity. For instance, direct party-nomination of arbitrators coexists with arbitrator selection by institutional appointing authorities,<sup>8</sup> national court decisions on arbitrator impartiality intersect with analogous rules and decisions of arbitral institutions; and guidelines issued by professional associations are interpreted by scholars and practitioners from disparate procedural traditions.

This hodgepodge of influences serves as a backdrop for both honest and spurious challenges to arbitrators. Some objections will be advanced in good faith, based on genuine concerns about an arbitrator's exercise of independent judgments. In other instances, however, requests to remove arbitrators or to vacate awards represent no more than attempts to derail proceedings or to reverse unwanted decisions.

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against foreign investors unable to vindicate rights in a host state's legal system will give rise to claims for "[d]enial of justice." See JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 4 (2005).

7. A weighted cord used to determine verticality, the plumb line has served as a metaphor for ethical standards since Biblical times, when the prophet Amos spoke of God setting a "plumbline in the midst of . . . Israel" to judge the rectitude of a people found morally warped and in need of correction. *Amos* 7:8.

8. There are several of these institutions, such as the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), and the International Centre for the Settlement of Investment Disputes (ICSID).

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Cynics sometimes suggest that litigants want fairness much less than they want victory. The two goals need not be incompatible. In many contexts they intersect. What limited empirical research does exist seems to indicate that parties to arbitration place “fair and just results” high in their pantheon of virtues, regardless of whether, in the heat of battle, they focus more on victory.<sup>9</sup>

Common sense and general experience reinforce this conclusion. In appointing arbitrators, it would be rare indeed for counsel to seek candidates known to be dull or dishonest, admitting their client’s case to be so weak that success can come only through trickery or bribes. Rather, fair-mindedness and intelligence remain the most sought after qualities in arbitrators.

### C. Two Ways to Sabotage Arbitration

Seeking to bring arbitration into disrepute, an evil gremlin might contemplate two starkly different routes. One route would tolerate appointment of pernicious arbitrators, biased and unable to judge independently. An alternate route to shipwreck, also reducing confidence in the integrity of the arbitral process, would establish unrealistic ethical standards that render the arbitrator’s position precarious and susceptible to destabilization by litigants engaged in dilatory tactics or seeking to annul unfavorable awards.<sup>10</sup>

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9. A study by the Global Center for Dispute Resolution (an affiliate of the American Arbitration Association) found that attorneys and parties to arbitrations rated a “fair and just result” as the most important element in arbitration, above all other considerations including cost, finality, speed, and privacy. See Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT’L BUS. LAW. 203 (2002); see also Richard W. Naimark & Stephanie E. Keer, *What Do Parties Really Want from International Commercial Arbitration?*, 57 DISP. RESOL. J. 78 (2002–2003) (publishing same results). Both prior to the first hearing and after the award, parties to international commercial arbitrations were asked to rank the importance of eight variables: (i) speed; (ii) privacy; (iii) receipt of monetary award; (iv) fair and just result; (v) cost-efficiency; (vi) finality of decision; (vii) arbitrator expertise; and (viii) continuing relationship with opposing party. Claimants and respondents alike ranked “fair and just result” higher (90% for respondents and 75% for claimants) than any other variable.

10. In at least one instance, an arbitral award rendered in Zürich was challenged because the presiding arbitrator’s law firm had turned down a potential client to avoid possible conflicts. The losing party argued that the loss of potential business caused the arbitrator to become biased. The highest court in Switzerland (*Tribunal fédéral* or *Bundesgericht*) dismissed the challenge in *Rhône-Poulenc Rorer Pharmaceuticals Inc. v. Roche Diagnostic Corp.*, Feb. 17, 2000, 172 Die Praxis des Bundesgerichts (Basel) [Pra.] 4, 1999 (Switz.). The challenge was based inter alia on Articles 190(2)(e) of the Swiss Conflicts of Law Code (LDIP/IPRG), which permits award annulment for violation of “public policy” (*ordre public* in both the French and the German texts). For better or for worse, in Swiss arbitration law notions of bias and partiality are subsumed under the broader category of public policy violations.

To reduce the risk of having cases decided by either pernicious or precarious arbitrators, those who establish and apply ethical guidelines walk a tightrope between the rival poles of (i) keeping arbitrators free from taint, and (ii) avoiding maneuvers that interrupt proceedings unduly. From the command post of bland generalities, the job of evaluating independence or impartiality may seem simple. In light of specific challenges, however, the task becomes one of nuance and complexity, often implicating subtle wrinkles to the comportment of otherwise honorable and experienced individuals.

The quest for balance in ethical standards entails a spectrum of situations in which mere perceptions of bias may be given weight equal to real bias. To promote the litigants' trust in the arbitral process, an arbitrator might sometimes step down just to alleviate one side's discomfort. Not always, however. In some instances it would be wrong to permit proceedings to be disrupted by unreasonable fears, whether real or feigned.

If arbitrators must be completely sanitized from all possible external influences on their decisions, only the most naïve or incompetent would be available. Consequently, notions such as "proximity" and "intensity" will be invoked to evaluate allegedly disqualifying links or prejudgment. As we shall see, the search for balance in ethical standards compels a constant reevaluation of the type of relationships and predispositions likely to trouble international arbitration.

## II. PROBLEMATIC RELATIONSHIPS AND ATTITUDES

### *A. The Basics: Independence and Impartiality*

Arbitrator conflicts of interest usually fall into one of two categories: lack of independence and lack of impartiality. In common usage, independence refers to the absence of improper connections,<sup>11</sup> while impartiality addresses matters related to prejudgment.<sup>12</sup> The common

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11. The taxonomy is not entirely satisfactory, however. An arbitrator might be "independent" in the sense of not having any financial or personal links, yet still be "partial" to one side because of a friendship (or animosity) with respect to one of the lawyers. The chairman of a three-member arbitral tribunal might sometimes be referred to as "the neutral" even though all three arbitrators, in line with increasingly common practice, would be required to be independent.

12. See generally the excellent survey by Loretta Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 789, 807 (Peter Muchlinski et al. eds., 2008).

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assumption is that an arbitrator in international disputes must be *both* impartial and independent.<sup>13</sup>

Lack of independence derives from what might be called problematic relationships between the arbitrator and one party or its lawyer. Often these result from financial dealings (such as business transactions and investments), ties of a sentimental quality (including friendships and family), or links of group identification (for example, shared nationality and professional or social affiliations). Individuals should decline appointment if they have doubts about their ability to be impartial or independent, or if facts exist such as to raise reasonable concerns on either score.

Even if no special relationship or financial link exists with either side, a second category of concerns will arise if an arbitrator appears to have prejudged some matter. An arbitrator might be independent but still be a bigot, with low opinions about people of a particular race, nationality, or religion. This second category (often called “actual bias”) was illustrated by the English decision arising from a maritime accident off the coast of France, between a Portuguese and a Norwegian vessel, submitted to arbitration in London by the two respective shipowners.<sup>14</sup> During hearings, counsel for one side mentioned a case involving Italians. To which, the arbitrator responded as follows:

Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese. But the other side here are Norwegians and in my experience the Norwegians generally are a truthful people. In this case I entirely accept the evidence of the master of the [the Norwegian vessel].

In connection with the application to remove the offending arbitrator, it was argued that a formal award not having yet been rendered, there was no evidence that an ultimate decision against the Portuguese would in fact rest on the biased perspective. Rejecting what might be called an argument too clever by half, the court confirmed that justice must not only be done, but must be seen to be done. The arbitrator was removed.

More subtle examples of prejudice might include a procedural order that presumes contested facts on which evidence has not been heard. In other instances, an arbitrator might have written an article or delivered a speech taking a firm position on otherwise open questions that remain central and controversial in the dispute.

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13. See IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION Gen. Standard 1, 2 (2004), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918> [hereinafter IBA GUIDELINES].

14. *In re* The Owners of the Steamship Catalina & The Owners of the Motor Vessel Norma, [1938] 61 Lloyd’s Rep. 360 (Eng.). Thanks to my friend Professor Loukas Mistelis for correcting the misimpression that it was the Greeks, rather than the Portuguese, who were the liars.



No magic attaches to this conceptual framework. Independence and impartiality serve merely as intellectual hooks on which to hang analysis with respect to two basic principles expected of arbitrators.<sup>15</sup> No arbitrator should have links with either side that provide an economic or emotional stake in the outcome of the case. And no arbitrator should decide a controverted matter prior to hearing evidence and argument.

A third notion, sometimes called “neutrality,” generally encompasses both independence and impartiality. This term takes on a special connotation for domestic arbitration within the United States, which traditionally distinguished between “neutral” and “nonneutral” arbitrators.<sup>16</sup>

One useful formulation of the type of the independence required of arbitrators might be found in the notion of “relative reversibility” as between the two sides.<sup>17</sup> Under this approach, an arbitrator would be independent as between an Israeli seller and an Egyptian buyer if his predisposition toward one side or the other would not change on reversal of the parties’ nationalities. In that particular context, a French or Swiss arbitrator might be characterized as more neutral than an Israeli or an Egyptian. This does not mean that an Israeli or an Egyptian arbitrator would lack integrity. Rather, a perception might exist that it would be asking too much of either one to judge the dispute.

Of course, an arbitrator may deviate from duty through avenues other than prejudgment and inappropriate relationships. The contours of integrity touch on matters as diverse as delegation of tasks,<sup>18</sup> participation in

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15. Much of the pioneering work in this field has been done by Catherine Rogers. See e.g., CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* (forthcoming 2009); Catherine A. Rogers, *The Ethics of International Arbitrators*, in *THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* 621 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008); Catherine A. Rogers, *The Vocation of the International Arbitrator*, *AM. U. INT’L L. REV.* 957 (2005). For an Australian perspective on the matter, see Samuel Luttrell, *BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION* (forthcoming 2009). For a survey of analogous principles applicable to judges who sit on international tribunals, see generally *THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY* (Int’l Law Ass’n 2004), available at [http://www.ucl.ac.uk/laws/cict/docs/burgh\\_final\\_21204.pdf](http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf).

16. See *CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* note on neutrality (2004), available at [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf) [hereinafter *AAA/ABA CODE OF ETHICS*]. The 2004 version establishes a presumption of neutrality unless the parties agree otherwise, in which event the nonneutral individuals will be governed by the tenth set of principles in the Code of Ethics. *Id.* Canon X.

17. See generally William W. Park, *Neutrality, Predictability and Economic Cooperation*, 12 *J. INT’L ARB.* 99 (1995).

18. Normally, arbitral duties should not be delegated. See *AAA/ABA CODE OF ETHICS*, *supra* note 16, Canon V(C). See also *Note from the Secretariat of the ICC Court*

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settlement negotiations,<sup>19</sup> and inappropriate interviews with party representatives.<sup>20</sup> Nevertheless, independence and impartiality constitute the core of arbitrator integrity, and continue to be emphasized at professional symposia<sup>21</sup> and in the literature.<sup>22</sup>

### B. Can Integrity Be Waived?

One intriguing question relates to the extent that either independence or impartiality may be waived by fully informed litigants. In some circles the answer seems to be a conditional “yes” at least with respect to independence, even if not necessarily so for impartiality. The *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* (IBA Guidelines) contain a “Red List” of prohibited relationships that bifurcates into waivable and nonwaivable relationships. The former include, inter alia, an arbitrator who acts for a litigant in the case, or is a member of the same firm as counsel to one side. The latter encompass

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*Concerning Appointment of Administrative Secretaries by Arbitral Tribunals*, ICC INT’L CT. ARB. BULL., Nov. 1995, at 77, 78, which provides that the work of any secretary (somewhat analogous to the clerk of an American judge) “must be strictly limited to administrative tasks” and that the secretary “must not influence in any manner whatsoever the decisions of the Arbitral Tribunal.”

19. Section 4(d) of the IBA Guidelines on Conflicts of Interest provides inter alia that before attempting to assist the parties in reaching a settlement, the arbitrator should “receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator.” IBA GUIDELINES, *supra* note 13, § 4(d). The Guidelines continue, “Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation in such process or from information that the arbitrator may learn in the process.” *Id.*; see generally Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT’L 187 (2009), adapted from Gabrielle Kaufmann-Kohler, Clayton Utz Lecture at the University of Sydney (Oct. 9, 2007).

20. For example, the Chartered Institute of Arbitrators Practice Guidelines No. 16 (“The Interviewing of Prospective Arbitrators”) provides in section 13(4) that a sole arbitrator should not normally be interviewed except by the parties jointly. PRACTICE GUIDELINES guideline 16 (Chartered Inst. of Arbitrators 2008), available at <http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols>.

21. See, for example, ICC INT’L CT. ARB. BULL. (2007 SPECIAL SUPP.), Feb. 2008, a special supplement entitled *Independence of Arbitrators*, with contributions by Louis Epstein (*Arbitrator Independence and Bias: The View of a Corporate In-House Counsel*); Dominique Hascher (*A Comparison Between the Independence of State Justice and the Independence of Arbitration*); Ahmed S. El-Kosheiri and Karim Y. Youssef (*The Independence of International Arbitrators: An Arbitrator’s Perspective*); Lord Steyn (*England: The Independence and/or Impartiality of Arbitrators in International Commercial Arbitration*); François Terré (*Independence and Arbitrators*); Anne Marie Whitesell (*Independence in ICC Arbitration*); and Otto L.O. de Witt Wijnen (*The IBA Guidelines on Conflicts of Interest in International Arbitration Three Years On*).

22. See essays collected in a special issue on arbitrator bias in TRANSNAT’L DISP. MGMT., July 2008, <http://www.transnational-dispute-management.com/> (subscription required).

an arbitrator's service as director in a corporation that is party to the case or as adviser to his or her appointing party.<sup>23</sup>

Independence thus seems to lend itself to waiver up to the point where the litigant actually becomes judge of its own cause. At that moment the decisionmaking process may no longer bear the attributes permitting its enforcement as an "award" under relevant statutes and treaties. Although a mother might well referee games among her children, deciding a quarrel between her son and his schoolmate would be a different matter. Likewise, it would be impermissible for an arbitrator to own a majority interest in one of the parties, no matter how much he or she might try to be fair.

A recent case tested the extent to which arbitrator integrity can be waived in an international context.<sup>24</sup> A dispute arose over distribution of a Biblical citrus fruit called the *esrog* (or *etrog*), used in connection with the Jewish Harvest festival of Succoth.<sup>25</sup> An American distributor refused to pay the balance due for imported fruit, complaining that the Israeli grower had circumvented the exclusive distributorship by selling to third parties. The controversy was submitted to arbitration before an Israeli clergyman who found in favor of the grower.

The award was presented for enforcement in the United States under the New York Convention.<sup>26</sup> The distributor resisted confirmation, arguing that the arbitrator was not independent, due to services rendered to the grower by certifying the orchard's kosher status, which was essential to maintaining the fruit's marketability.

The court rejected the challenge, finding that the distributor knew of the arrangement and thus waived a right to complain. The assumption seems to have been that the right to a fair hearing could be waived, or at the least that objections must be raised in a timely fashion. From a

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23. See IBA GUIDELINES, *supra* note 13, pt. II, §§ 1–2. See also discussion *infra* Part IV.F.

24. Schwartzman v. Harlap, No. 08 Civ. 4990(BMC), 2009 WL 1009856 (E.D.N.Y. Apr. 13, 2009).

25. The fourth book of Moses (*Leviticus* 23:40) mentions the fruit of the "godly" or "beautiful" tree, which Jewish tradition interprets to be the *esrog*. The week-long festival of Succoth falls in autumn for the Northern Hemisphere, and memorializes the booths or "tabernacles" used during the forty years of Hebrew wandering from Egypt after the Exodus.

26. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. This convention is also called the 1958 United Nations Arbitration Convention.

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practical perspective this seems reasonable. Otherwise, a litigant might simply hope for a successful outcome, raising the conflict only if things do not end with a happy result.

How far this result can be pushed remains open to question. The case concerned lack of independence, not positive prejudgment. Although interrelated, independence and impartiality are not the same thing. Prejudgment would seem to impede the very heart of the arbitral process, which presumes a quasi-judicial function of deciding legal claims after weighing evidence and argument. The lack of independence may create an imperfect arbitration, but prejudgment renders the process a sham formality, an unnecessary social cost. Although the New York Convention contains no definition of *arbitration*, prejudgment seems entirely foreign to the process whose recognition the treaty contemplates.

Nothing prevents enforcement of an arbitrator's decision simply as a matter of contract. However, actors in cross-border commerce seek something more than just a contractual framework for arbitration. The New York Convention and its antecedents (the Geneva Convention and Geneva Protocol of 1927 and 1923, respectively) grew from dissatisfaction with contract law alone as a remedy for failure to respect arbitration commitments. The commercial community sought to facilitate enforcement of arbitrators' decisions as *awards*, not simple contracts.<sup>27</sup>

The legal matrix for such enforcement presumes a minimum level of impartiality in the arbitrator's respect for the parties' right to be heard.<sup>28</sup> Likewise, for investor-state arbitration the ICSID Convention requires arbitrators to be persons "who may be relied upon to exercise independent judgment" and permits challenge of an award for "departure from a fundamental rule of procedure."<sup>29</sup> Although litigants might waive impartiality as a matter of contract, in so doing they may well remove their dispute from the legal framework applicable to the creature we call arbitration.

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27. At least one respectable current in French legal thinking posits the existence of an independent juridical status for arbitration (*l'ordre juridique arbitral*) that seems to hover somewhere above and beyond what might be called the normal framework for national arbitration law. See EMMANUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL (2008), originally published in 329 RECUIL DES COURS (Hague Acad. of Int'l Law 2007).

28. Convention Article V(1)(b) provides for nonrecognition when the losing party was "unable to present his case." New York Convention, *supra* note 26, art. V(1)(b). The French text talks about the impossibility of a party "de faire valoir ses moyens." Likewise, the Federal Arbitration Act permits vacatur in the event of "evident partiality" by the arbitrator. 9 U.S.C. § 10(a)(2) (2006).

29. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, arts. 14(1), 52(1)(d), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

Not all agree, however, with such a balance between freedom of contract and arbitral integrity. One of the most thoughtful scholarly commentators argues that ethical questions should resolve themselves into issues of contract interpretation.<sup>30</sup> Even if this perspective might prevail in certain jurisdictions, it does not necessarily commend itself as the better view as a policy matter. One remembers words attributed to Talleyrand to the effect that the excessive becomes meaningless: *Tout ce qui est excessif devient insignifiant*.

### C. *The Devil in the Detail*

#### 1. *Clear Conflicts*

Most analysis starts with relatively clear models on which most reasonable people agree, and then proceeds from black and white to shades of gray. An arbitrator who says French people exaggerate should not judge a case with a respondent from Paris. And an arbitrator should not become romantically entangled with a lawyer representing one side in the case.<sup>31</sup> Equally settled is the proposition that an arbitrator will not be disqualified merely because once, during a midmorning coffee break at a professional lecture, he chatted with a lawyer appearing before him in a case.

Nuances appear at some point between extremes. The somewhat ambiguous notion of friendship might encompass business associates who occasionally share a meal, as well as confidants who exchange regular calls and visits. In some cases, the shared cup of coffee can become a deeper relationship that results in arbitrator disqualification.

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30. Alan Scott Rau, *On Integrity in Private Judging*, 14 ARB. INT'L 115 (1998), adapted from Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485 (1997). See also *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994), in which Judge Posner suggests that "short of authorizing trial by battle or ordeal, or more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes."

31. For a tale of room sharing by an arbitrator and a lawyer appearing before him in a case, see Richard B. Schmitt, *Suite Sharing*, WALL ST. J., Feb. 14, 1990, at A1. On two different nights, a video camera caught an arbitrator entering and leaving the hotel suite for one of the lawyers in his case. The attorney claimed that the arbitrator initially stayed with her because she had felt ill and he was concerned for her health. On the second night, said the attorney, the arbitrator was waiting for a lost briefcase that was not found until late evening, by which time he no longer had a room. The concerned attorney thus offered to share her room with him again. *Id.*

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## 2. Variations on a Theme

Although some behavior patterns provide per se evidence of impropriety, other types of conduct take on radically different ethical overtones depending on the circumstances. For example, arbitrators concerned about committing time for distant hearings might build into their terms of appointment provisions to cover days reserved but ultimately not used due to the parties' decision to cancel without adequate notice. In some instances, a retainer might be requested to cover such an eventuality. If properly disclosed to all parties and requested prior to accepting the time commitment, such an arrangement might not pose any problem.<sup>32</sup> However, a retainer paid by only one party, and not revealed to the other side, might well be seen as a bribe, and understandably so.<sup>33</sup>

More subtle factors can also color perceptions and evaluations on conflicts of interest. Was a gap in the curriculum vitae intentional or inadvertent?<sup>34</sup> Was the arbitrator's previous consulting work for one of the parties significant?<sup>35</sup> Does a former law firm affiliation create a perception of continuing links? The appreciation of a conflict might vary depending on whether it is expressed in a positive or a negative fashion. Is an "independent" arbitrator the same as one who is "not biased" toward either side?

Often it will be important whether a lawyer serving as an arbitrator practices in partnership with a firm whose other members represent affiliates of the litigants. On occasion, however, an arbitrator may be tainted even without the status of employee or partner. One Paris Court of Appeal judgment addressed a situation in which a lawyer with the Paris office of a large multinational law firm had failed, apparently by simple inadvertence, to disclose all links between his firm and one of the

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32. See, e.g., *K/S Norjarl A/S v. Hyundai Heavy Indus. Co.*, [1991] 1 Lloyd's Rep. 524 (C.A.) (Eng.) (holding the arbitrators did not misconduct themselves in seeking security for remuneration with respect to twelve weeks of hearings scheduled for two years in the future).

33. See, e.g., Lawrence F. Ebb, *A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangements*, 3 AM. REV. INT'L ARB. 177, 181-90 (1992) (discussing *State of Israel v. Desert Exploration*), as reprinted in W. MICHAEL REISMAN, W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION 603 (1997).

34. See *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 Lloyd's Rep. 127, 137 (C.A.) (Eng.), available at 2000 WL 571190.

35. See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968). Compare the competing approaches of Justices Black (requiring disclosure of any relationship), White (calling for scrutiny only of nontrivial links), and Fortas (focusing on actual bias).

parties.<sup>36</sup> Although neither a partner nor associate (but simply “of counsel”) to the law firm, the lawyer was found to be constitutionally connected (*structurellement lié*) with the Paris office to an extent requiring attribution of the firm’s conflicts.<sup>37</sup>

A general standard of independence usually takes meaning only as applied to specific cases, some of which resist facile analysis. Should an arbitrator be disqualified if he or she sits on the board of a financial institution that manages pension funds holding shares of affiliates of one of the parties? If so, does it matter how large the institution, or how sizeable the ownership of interest might be in proportion to the entire portfolio?

If it seems obvious that an arbitrator should not sit when he or she represents one of the parties, does the same rule apply when his firm represented an affiliate in an unconnected matter five years ago? What about one year ago? Or ten? If it seems obvious that an arbitrator should not be having a romance with a lawyer for one of the parties, the same conclusion will not necessarily be self-evident with respect to a witness with whom a good friendship existed during university days. In determining when a professional acquaintance becomes a disqualifying relationship, the devil will be very much in the detail of how regularly the two might dine together.

Should national origin matter? Should it matter that an arbitrator is an American of Korean ancestry presiding in a dispute between a Korean claimant and a Japanese respondent?<sup>38</sup> And what about religion? In a domestic commercial arbitration, one would not normally expect an arbitrator being challenged for being Muslim or Hindu.<sup>39</sup> Would the

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36. See *La S.A. J&P Avax S.A. v. Société Tecnimont SPA*, Cour d’appel Paris, 1e ch., sec. C, Feb. 12, 2009, Rev. Arb. 186, note Clay.

37. The award was vacated under Article 1502(2) of the French *Code de procédure civile*, providing for annulment when an arbitral tribunal was not properly constituted (*tribunal irrégulièrement composé*). The International Chamber of Commerce Rules of Arbitration (ICC Rules) applicable to the particular case require independence of all arbitrators.

38. See generally Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator*, 31 *FORDHAM INT’L L.J.* 603 (2008).

39. The obverse might be less certain, however. The High Court of London has sustained a challenge to an arbitrator because he was not Muslim. An arbitration clause in a joint venture between two Muslim businessmen provided for a tribunal drawn exclusively from the Ismaili community, a branch of Shi’a Islam led by Aga Khan. One side resisted the other’s attempt to appoint a retired English judge who was not Ismaili. The party seeking to confirm the appointment argued that to bar non-Muslims would constitute religious discrimination in violation of English law. The court rejected that argument

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same calm insouciance toward religious affiliation obtain with respect to arbitration of a border dispute between Pakistan and India?

Likewise, the very existence of professional expertise can present an ethical conundrum. If a scholar has expressed a firm opinion on a narrow and controverted point on which the case hangs, she may not inspire confidence in the party that received the rough side of the academic analysis. However, learned professionals do (and should) write treatises sharing their knowledge. A professor of contract law at an American law school would not normally be disqualified for having written about “offer and acceptance.” It would be a shame to exclude from service those who really know something, leaving arbitration only to the ignorant.

#### *D. The Parties’ Role in Arbitrator Selection*

To promote confidence in the international arbitral process, party input into the selection of arbitrators has long been common practice. Even limited interview of candidates by counsel has been allowed, at least with safeguards to avoid discussion of the merits of the case.<sup>40</sup> Rightly or wrongly, litigants often perceive a benefit in direct selection of a tribunal, rather than leaving the choice entirely to an institution. By vetting a proposed arbitrator, the party may feel more comfortable that the case will be decided by someone who is skilled, fair, and perhaps even smart.

Those unfamiliar with international arbitration sometimes express surprise at the degree of party involvement in the selection process, suggesting that it may inject a corrupting influence on the independence of arbitrators. Yet the justification for a heightened party participation will be evident after a moment of mature reflection on the difference between national and international proceedings.

In a relatively homogeneous and integrated juridical environment, the individuals selected as judges (or at an earlier stage, the principal

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and upheld the constitution of an all-Ismaili tribunal. *See* Nurdin Jivraj v. Sadruddin Hashwani, [2009] EWHC (Comm) 1364 (Eng.). This result accords with the way many courts treat proceedings before a *Beth Din* (court of Jewish law) when all parties have accepted its jurisdiction. *See, e.g.*, Zeiler v. Deitsch, 500 F.3d 157 (2d Cir. 2007) (business partnership); Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343 (D.C. 2005) (bylaws of Jewish congregation); Avitzur v. Avitzur, 108 N.E.2d 136 (N.Y. 1983) (prenuptial agreement). *See generally* Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review and Due Process*, 107 COLUM. L. REV. 169 (2007); Ginnie Fried, *The Collision of Church and State: Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004).

40. *See generally* PRACTICE GUIDELINES guideline 16 (Chartered Inst. of Arbitrators 2006), available at <http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols>.



candidates for judgeships) will be well known to the other members of the legal profession (as in England and the United States), or will have been selected by nationally administered examination, as in countries following the French model.<sup>41</sup> They will likely know each other, directly or indirectly, through university, court appearances, or professional associations. Shifting from selection of judges to choice of arbitrators, within a single-country framework, a national institution may well inspire some measure of analogous confidence as an appointing authority, as for example the American Arbitration Association generally commands in the United States.

By contrast, if an American company has a dispute with the Chinese government, the two sides may not be equally comfortable with any single appointing authority framework. The party from the United States may like the American Arbitration Association, while the Chinese may favor the China International Economic and Trade Arbitration Commission (CIETAC). Even venerable institutions of longstanding, such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA), may be suspect to some observers as dominated by interests and traditions of industrialized nations.<sup>42</sup>

In such circumstances, the job of constructing a mutually acceptable arbitral tribunal would normally be facilitated by allowing each side to appoint an arbitrator, and having the two party-nominated arbitrators choose the third member of the tribunal. Such party participation democratizes the process, serving to foster trust that at least one person on the tribunal (the party's nominee) will monitor the procedural integrity of the arbitration.<sup>43</sup>

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41. French *magistrats* pursue civil service careers following a competitive examination and study at the *Ecole Nationale de la Magistrature*. See generally John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757 (1988).

42. The perception of such institutions as too "pro-Western" explains much of the impetus behind the United Nations Conference on International Trade Law (UNCITRAL) Arbitration Rules. Some organizations are non-national in name only. For example, the International Centre for Dispute Resolution is based in New York and affiliated with the American Arbitration Association.

43. For some institutions, such as the International Chamber of Commerce Court of Arbitration, parties technically are permitted only to "nominate" an arbitrator, with the actual appointment authority falling to the ICC Court, which in essence can exercise a veto over a clearly unqualified nominee. INTERNATIONAL CHAMBER OF COMMERCE COURT OF ARBITRATION RULES arts. 7(4), available at [http://iccwbo.org/uploadedfiles/court/arbitration/other/rules\\_arb\\_english.pdf](http://iccwbo.org/uploadedfiles/court/arbitration/other/rules_arb_english.pdf) [hereinafter ICC RULES].

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Party participation in the constitution of a tribunal means that each side will want to be sure that its nominee (and the presiding arbitrator if possible) will be free of doctrinal predispositions that would adversely affect its case. A company whose assets have just been expropriated will not be keen on a tribunal dominated by a professor who has written a book supporting uncompensated nationalization. Likewise, the host state will not want someone who has taken the position that national welfare must take a back seat to profit maximization for the foreign investor.

In practice, the process of evaluating ideological conflicts may shift from avoiding the “wrong” arbitrator to jockeying for the “best” arbitrator. Even if a litigant knows that an arbitrator cannot be in its pocket, the litigant may, understandably, still hope to appoint someone who falls into its corner doctrinally.<sup>44</sup> Thus rejection of the left-wing professor as tribunal chairman may become an effort to nominate a strong capitalist, with traditional views on “prompt, adequate and effective” compensation.<sup>45</sup> The risk in such excessive wrangling, of course, is that the selection process becomes unworkable, a bit like what happens when a schoolchild tries to sharpen a pencil to an excessively fine point.

The game can become even more complex with respect to procedural matters. For instance, a party hoping to avoid extensive document production may prefer a French professor over an American litigator, given that American style “discovery” (including requests to produce extensive documentation that may be adverse to one’s own arguments) has traditionally been foreign to the Continental legal system.<sup>46</sup>

Party input into the arbitrator selection process need not impinge on arbitrator integrity. Current arbitration rules and canons of ethics point to a consensus that now presumes independence and impartiality as the norm for all arbitrators (not just the chair) on a three-member tribunal, notwithstanding an assumption that each side will nominate an arbitrator.

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44. The late Sir Michael Kerr, a leading light of the English bar during the latter half of the twentieth century, once playfully recounted to the Author advice he had received from a senior colleague who learned of his nomination as a party-appointed arbitrator. “My boy,” said the older man, “steer a middle course between too much and too little independence.”

45. The doctrine of “prompt, adequate, and effective” compensation was first introduced by Secretary of State Cordell Hull in his letter to the Ambassador of Mexico requesting compensation for expropriation of property of American nationals. For a reprint of the letter, see 3 GREEN HAYWOOD HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 659 (1942).

46. For a European comparison of English and Swiss document production, see ARIELLE ELAN VISSON, *DROIT À LA PRODUCTION DE PIÈCES ET DISCOVERY: DROIT FEDERAL, DROIS CANTONAUX DE VAUD, GENÈVE, ZÜRICH ET DROIT ANGLAIS* (1997) (Switz.).

This does not mean, however, that tension never exists between the value of independence and the parties' desire for an advocate on the tribunal. In the United States, it was the case until recently that party-appointed arbitrators were presumed *not* to be neutral.<sup>47</sup> Moreover, skepticism about the merits of neutrality for party-appointed arbitrators has made a revival in some scholarly writing,<sup>48</sup> as well as in the emerging protocols for arbitration pursuant to income tax treaties.<sup>49</sup>

Ambivalence about arbitrator independence and impartiality seems to have been particularly marked in public international arbitration. More than a century ago, the U.S. Secretary of State lamented that arbitrators in state-to-state disputes tended to see themselves as diplomats rather than as judicial decisionmakers looking to the law and the facts. In a speech given in April 1907, Secretary of State Elihu Root opined as follows:

It has seemed to me that the great obstacle to the universal adoption of arbitration is not the unwillingness of civilized nations to submit their disputes to the decision of an impartial tribunal; it is rather an apprehension that the tribunal selected will not be impartial.<sup>50</sup>

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47. See AAA/ABA CODE OF ETHICS, *supra* note 16, preamble; see also Stephen G. Yusem, Comparing the Original with the Revised American Bar Association-American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes, METROPOLITAN CORP. COUNS., July 2004, at 38, 38–39, 64 (“[T]he judiciary has generally supported the concept of nonneutrality both before and after the adoption of the original Code. The original Code assumed that the business community desired and expected nonneutrality; however, the modern rules of the major institutional ADR providers require neutrality for party-appointed arbitrators.” (citations omitted)).

48. See Tony Cole, *Authority and Contemporary International Arbitration* (forthcoming 2009) (draft at 55, on file with author), arguing that party-appointed arbitrators should “see themselves as the party’s representative on the panel.” Professor Cole suggests that such partisan behavior will enhance understanding of the nominating party’s views, but will not prevent the arbitrator from being independent and impartial. *Id.*

49. MODEL TAX CONVENTION ON INCOME AND CAPITAL art. 25(5) (Org. for Econ. Cooperation & Dev. 2008). Still in its infancy, tax treaty arbitration has not yet evolved into a system in which all arbitrators are genuinely independent. Although the new treaties contain a general prohibition on presiding arbitrators of the same nationality of either country, governments have not been willing to provide specific guidelines for independence of the arbitrators appointed by the two disputing nations, each of which may appoint government officials. See recent protocols for tax treaty arbitration concluded by the United States with Belgium, Canada, and Germany. IRS.gov, Mandatory Tax Treaty Arbitration, <http://www.irs.gov/businesses/international/article/0,,id=201209,00.html> (last visited Aug. 30, 2009).

50. PROCEEDINGS OF THE NATIONAL ARBITRATION AND PEACE CONGRESS 43 (Robert Erskine Ely ed., 1907). Secretary of State Root then quotes Lord Salisbury and goes on to say:

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Similar sentiments were included the following month in his instructions to the American delegates to the Second Hague Conference that revised the status for the Permanent Court of Arbitration.<sup>51</sup>

### III. NEW FRONTIERS

#### A. *Issue Conflict and Role Confusion*

Among the new categories for possible conflicts that continue to suggest themselves, increasing concern has been expressed with respect to “issue conflict” and its sibling, “role confusion.” Each represents a special form of prejudgment.

On occasion, an arbitrator must address, in the context of an arbitration, the very same issue presented to him or his law firm as advocate in another case, or to himself as scholar in academic writings. It is not difficult to see why such situations might compromise the integrity of the arbitral process.

The arbitrator might be tempted, even subconsciously, to add a sentence to an award that could later be cited in another case. Such an *arrière pensée* might lead to disparaging or approving some legal authority or argument regularly presented in similar disputes,<sup>52</sup> and thus intended to persuade in a different matter where the arbitrator’s firm acts as counsel.

The flip side of the coin might also present itself, with an arbitrator influenced by his or her position while acting as counsel in another case. This difficulty was encountered in a treaty-based investment proceeding heard in the Netherlands, where a Dutch court gave an individual ten

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The essential fact which supports that feeling, is that arbitrators too often act diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments and the sense of honorable obligation which have grown up in the centuries of diplomatic intercourse, rather than by the traditions, the sentiments and the sense of honorable obligation which characterize the judicial departments of civilized nations.

*Id.* at 44.

51. COMMENTS BY ELIHU ROOT, S. DOC. NO. 444 10-11, at 1128, 1135 (60th Sess. 1907), reprinted in JOHN HAY & ELIHU ROOT, INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE CONFERENCES, 1899 AND 1907, at 20, 22–23 (World Peace Foundation Pamphlet Series, vol. 3, no. 4, 1913). The Permanent Court of Arbitration had been established eight years earlier, in 1899, by the First Hague Peace Conference. See also Elihu Root, *Instructions to the American Delegates to the Hague Conference, 1907*, in 2 JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 181, 191 (1909).

52. For example, investor-state cases routinely implicate the shareholders’ right to bring derivative claims on behalf of corporations in which they own stock. See *Barcelona Traction, Light & Power Co. (Belg. v. Spain, Second Phase)*, 1970 I.C.J. 3 (Feb. 5), available at 1970 WL 1 (I.C.J.).

days to decide whether to resign as arbitrator or as counsel.<sup>53</sup> The judicial reasoning rested on the specific facts of the case at bar, and created no automatic presumption of bias simply because the same individual might serve as arbitrator in one case and counsel in another.

Other wrinkles on this theme come from the world of sports. In one recent case, the cyclist Floyd Landis challenged an arbitral award upholding a doping disqualification for use of synthetic testosterone in the 2006 Tour de France. The Lausanne-based Court of Arbitration for Sport/Tribunal Arbitral du Sport (CAS/TAS) had convened the arbitral tribunal to review a ban imposed by the U.S. Anti-Doping Agency.<sup>54</sup>

In September 2008, Landis moved to challenge the decision in a United States federal court in California, contending that the arbitral tribunal had been tainted by conflicts of interest.<sup>55</sup> The gist of the argument seems to be that the arbitrators came from a limited pool that often filled rotating functions between arbitrator and advocate, allegedly prone to rule favorably for each other.<sup>56</sup>

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53. See A. Marriott, *The Arbitrator is Counsel*, TRANSNAT'L DISP. MGMT., Dec. 2006, <http://www.transnational-dispute-management.com/> (subscription required). The well-known French jurist Emmanuel Gaillard, sitting as arbitrator in a case pitting Telekom Malaysia against Ghana, had been advising an Italian construction consortium (RFCC) that sought to annul an earlier ICSID award rejecting claims against Morocco. On October 18, 2004, the Hague District Court reasoned that Emmanuel Gaillard, in his role as counsel in RFCC/Morocco, would advocate the invalidity of that award, on which Ghana relied for its defense in the *Telekom Malaysia* matter. As arbitrator, Gaillard would be required to remain open-minded towards the validity of the earlier award. Gaillard chose to resign as counsel rather than as arbitrator. *Id.*

54. The CAS/TAS panel was comprised of a multinational tribunal including David Williams, Jan Paulsson, and David Rivkin. *Landis v. U.S. Anti-Doping Agency*, CAS 2007/A/1394 (Ct. Arb. Sport 2008), available at [http://www.tas-cas.org/d2wfiles/document/1418/5048/0/Award%20Final%20Landis%20\(2008.06.30\).pdf](http://www.tas-cas.org/d2wfiles/document/1418/5048/0/Award%20Final%20Landis%20(2008.06.30).pdf).

55. Mr. Landis filed a Motion to Vacate Arbitration Award in the United States District Court for the Central District of California. The case was ultimately settled with prejudice on December 4, 2008. Landis moved to vacate on the basis of the Federal Arbitration Act section 10(a)(2) (evidential partiality or corruption) and New York Convention Articles V(1)(a) (invalid arbitration agreement), V(1)(d) (improper composition of the tribunal), and V(2)(b) (violation of public policy). *Motion to Vacate Arbitration Award and Demand for Jury Trial, Landis v. U.S. Anti-Doping Agency*, No. CV 08-06330 (C.D. Cal. Sept. 25, 2008).

56. The motion alleges, "[T]hese arbitrators constantly find themselves changing hats, arbitrator one day, litigant the next." *Id.* at 27. As illustration, the motion recites that David Rivkin presided over a CAS/TAS panel considering an action against Austrian skiers in which Mr. Paulsson represented the IOC, with the result (according to the motion) that the arbitrator appointed by the Anti-Doping Agency (David Rivkin) was sitting in judgment of the arbitrator appointed by Mr. Landis (Jan Paulsson). *Id.* at 24. The motion also recites that David Rivkin represented an affiliate of Occidental Petroleum in an arbitration in which the same David Williams served as arbitrator. *Id.* at 27.

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The independence of the CAS/TAS itself has not always been free from doubt. In its early days, the CAS/TAS was challenged following a 1992 incident implicating a German equestrian whose horse had ingested a prohibited substance. A challenge to the ban was brought before Switzerland's highest court, the *Tribunal fédéral* in Lausanne, which was asked to determine whether the decision was in fact an arbitral award in the sense of the Swiss federal and cantonal statutory legal framework for arbitration.<sup>57</sup> Although not denying the validity of the decision in the instant case, the *Tribunal fédéral* drew attention to the numerous then-existing links between the CAS/TAS and the International Olympic Committee (IOC), which could cause apprehension that the independence of the CAS/TAS would be weakened in the event the IOC stood before it as a party to proceedings.<sup>58</sup>

In response to the hesitation expressed in this decision, a new supervisory body was created to insulate the CAS/TAS from the influence of the IOC.<sup>59</sup> This new structure seems to have passed muster, at least in the eyes of the *Tribunal fédéral*.<sup>60</sup>

### *B. Institutional Bias and Professional Affiliation*

To some extent, concerns over issue conflict and role confusion intersect with what is sometimes called “institutional bias.” A particular arbitral institution might be perceived as tending to appoint arbitrators likely to favor one category of litigants over others. For example, in a consumer debt action, arbitrators with long affiliations to banks and lending institutions might not inspire confidence in borrowers. Or, in a dispute over mismanagement of an investment account, an arbitrator

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57. Elmar Gundel v. Fédération internationale d'équitation, Recueil Officiel Tribunal fédéral Suisse Mar. 15, 1993, 119 Recueil Officiel des Arrêts du Tribunal fédéral [ATF] II 271 (Switz.), *extract reprinted in* RECUEIL DES SENTENCES DU TAS DIGEST OF CAS AWARDS 1986–1998, at 561 (Matthieu Reeb ed., 1998); *see* Jan Paulsson, *The Swiss Federal Tribunal Recognises the Finality of Arbitral Awards Relating to Sports Disciplinary Sanctions Rendered by the IOC's Court of Arbitration for Sports*, INT'L ARB. REP., Oct. 1993, at 12.

58. One scholar described this decision as “oui, mais” (“yes, but”). ANTONIO RIGOZZI, L'ARBITRAGE INTERNATIONAL EN MATIERE DE SPORT § 523, at 274 (2005).

59. The entity is called “International Council of Arbitration for Sport” (ICAS) in English and *Conseil international pour l'arbitrage en matière de sport* (CIAS) in French. For the operation of the ICAS/CIAS, *see* generally GABRIELLE KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS (2001).

60. *See, e.g.,* Lazutina and Danilova v. IOC, FIS & CAS, Tribunal fédéral Suisse May 27, 2003, 129 ATF III 445 (Switz.) (concerning members of the Russian women's ski team). *See* also commentary in RIGOZZI, *supra* note 58, §§ 537–551, at 279–87.

who worked for a large financial institution might create an understandable apprehension of being predisposed to favor the brokerage house.<sup>61</sup>

A somewhat related charge is made that arbitrators may have incentives to decide in favor of claimants in order to increase their prospects of reappointment. For example, one author suggests that “as merchants of adjudicative services, arbitrators have a financial stake in furthering [arbitration’s] appeal to claimants,” which results in an “apprehension of bias in favour of allowing claims and awarding damages against governments.”<sup>62</sup>

Of course, individuals who supplement their incomes as arbitrators are not immune from temptations to greed and bias to which humanity has always been heir. Each arbitrator should be conscious of the risk that he or she may fall prey to astigmatic perspectives. The beginning of wisdom often lies in a healthy fear of latent bias.

Nevertheless, no evidence supports the proposition that the arbitral system as it now exists provides incentives to produce inaccurate decisions that favor either claimants or respondents, or even that such incentives actually exist. Common sense tells us that the big losers would be none other than professional arbitrators themselves if the process did not inspire general confidence. Although concern may be justified against certain types of arbitration, broad theories of “arbitrator incentives” remain difficult to support in logic or in practice, particularly for cross-border transactions where the principal motivation to arbitrate lies in apprehension about potential antforeign prejudice in national courts.<sup>63</sup>

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61. Ironically, the rise of consumer and employment arbitration within the United States derives in some measure from a mirror image concern over civil juries being predisposed toward the “little guy” as represented by the customer or the worker. For expressions of concern from someone who questions the tradition of “mandatory” arbitration in the United States, see Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996), and Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV L.J. 82 (2007).

62. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 152–53 (2007). Van Harten then goes on to state his view that arbitrators do not satisfy the requisite standard of “independence.” *Id.*

63. One study found evidence that in federal civil actions in the United States, foreigners actually fare better than domestic parties. The explanation for this counterintuitive finding may well lie in the fear of litigation bias that causes foreigners to continue to final judgment only if they have particularly strong cases. See Kevin Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996).

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Where necessary, dispute resolution systems can implement mechanisms to promote the balanced composition of a tribunal.<sup>64</sup> For example, American securities arbitration has understandably been concerned that the majority of a three-member tribunal should not be drawn from the ranks of lawyers who make their living representing financial advisers. Consequently, it has long been the practice to identify “public” as opposed to “industry” arbitrators, and to make sure that the latter do not predominate in any arbitral tribunal.<sup>65</sup> Analogous issues arise in employment arbitration, although the ways to assuage the concern are not yet that clearly identified.<sup>66</sup>

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64. In response to a lawsuit brought by the Minnesota Attorney General, at least one provider of arbitration services recently decided not to supervise consumer arbitration. See Press Release, Minn. Att’y Gen., National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson (July 20, 2009), <http://www.ag.state.mn.us/Consumer/PressRelease/090720NationalArbitrationAgremnt.asp> (last visited Aug. 30, 2009). The complaint asserted that the arbitral institution had impermissible links with debt collection services. *Id.*

65. In the United States, many of these cases fall to be decided under the auspices of the Financial Industry Regulatory Authority (FINRA), a self-regulatory body that in 2007 consolidated the dispute resolution for both the National Association of Securities Dealers (NASD) and the New York Stock Exchange. FINRA (NASD) Rule 12402 provides in pertinent part:

If the panel consists of one arbitrator, the arbitrator will be a public arbitrator selected from the public chairperson roster, unless the parties agree in writing otherwise. If the panel consists of three arbitrators, one will be a non-public arbitrator and two will be public arbitrators, one of whom will be selected from the public chairperson roster, unless the parties agree in writing otherwise.

FINRA RULES R. 12402 (Fin. Indus. Regulatory Auth. 2008), available at <http://finra.complanet.com/finra/> (search for rule number in search box). On June 9, 2008, FINRA amended the definition of a “public” arbitrator under NASD Rules 12100(u) and 13100(u), as set forth in the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes. The amendment adds an annual revenue limitation to the definition of “public” arbitrator in order to exclude from that category individuals with a direct or indirect connection to the securities industry. For example, lawyers or accountants seeking to preside over FINRA arbitration disputes may not derive 10% or more of their annual revenue from financial institutions, or devote 20% or more of their work to clients who are brokers or dealers. *Id.* R. 12100(u), 13100(u).

66. See, for example, *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), in which Chief Judge Harry Edwards understandably held that an employee alleging discrimination cannot be subject to a de facto bar in the vindication of statutory rights by virtue of inability to pay the arbitrator’s fee. However, the employer’s payment of arbitrators’ fees may itself raise other concerns. Mindful of the proverb that “he who pays the piper calls the tune,” some observers wonder whether an arbitral process does not become distorted if one industry group covers all of the costs. See also the discussion of arbitrator neutrality in *Armendariz v. Foundation Health Psychare Services*, 6 P.3d 669, 693 (Cal. 2000), another case concerning arbitration with respect to contracts of employment.



### C. Repeat Players

Another critique of arbitration that dovetails into those mentioned above arises with respect to so-called “repeat players” who might be appointed several times by the same party or law firm. Although some professional guidelines address the matter,<sup>67</sup> greater clarity might well be in order.<sup>68</sup>

The notion of “repeat player” has a somewhat chameleon-like character that may lead to confusion. One concern relates to individuals who change functions in the arbitral process, serving one day as advocate and another as arbitrator, thus arguably sitting in judgment of each other’s clients.<sup>69</sup> Another relates to individuals appointed on several occasions by the same company or industry group. For example, in disputes between insurance companies and policyholders, a barrister with a long history of acting on behalf of insurers might regularly be named by insurers. These special situations remain quite distinct from the understandable practice by which experienced individuals serve regularly in commercial and investment disputes, sometimes nominated by claimant, sometimes by respondent, and sometimes as chair.

Much can be said on behalf of the “professional arbitrator” who serves repeatedly, albeit in different types of cases. There may be some truth to the oft-repeated assertion that arbitrators want to see cases decided in favor of the parties which appointed them.

Usually, however, an even stronger incentive exists to safeguard professional status, particularly with peers. Individuals who serve as arbitrators care deeply about the respect of their colleagues, for reasons both personal and professional. Doing a good job builds a positive reputation. Few enticements to good behavior are stronger for those who sit regularly as arbitrators than a colleague’s appreciation of one’s ability and integrity.<sup>70</sup>

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67. The IBA Guidelines include the “Orange List” of situations that may, depending on the facts of the case, give rise to “justifiable doubts” about an arbitrator’s independence or impartiality. IBA GUIDELINES, *supra* note 13, pt. II, § 3.13. That provision describes an arbitrator who “has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.” *Id.*

68. See generally Fatima-Zahra Slaoui, *The Rising Issue of ‘Repeat Arbitrators’: A Call for Clarification*, 25 ARB. INT’L 103 (2009).

69. See discussion *supra* of Landis v. United States Anti-Doping, Part III.A.

70. On the general comportment of who might be sometimes called elite arbitrators, see Jan Paulsson, *Ethics, Elitism, Eligibility*, J. INT’L ARB., Dec. 1997, at 13. On the profiles of those chosen to serve as arbitrators in international disputes, see YVES DEZALAY & BRYANT G.

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#### D. Duty to Investigate

Among the new frontiers being addressed by judicial decisions, few are more intellectually challenging than the matter of an arbitrator's duty to investigate. It has long been common coin of conflicts analysis that arbitrators must disclose significant relationships that might call into question their independence.

What happens, however, when the arbitrator knows of no relevant relationships? Must he or she go one step further and investigate possible conflicts? Must arbitrators actively look for trouble?

The answer, perhaps unsatisfying to those who seek hard and fast rules, must be "sometimes." In a recent United States case, an appellate court stopped short of imposing a general duty to investigate, limiting its holding to situations in which the arbitrator had reason to believe that some conflict might exist.<sup>71</sup> The case confirmed vacatur of a commercial award for "evident partiality" (the relevant standard under the Federal Arbitration Act) because the challenged arbitrator had failed to investigate possible business transactions that might have affected his independence.<sup>72</sup>

The facts of the case merit close scrutiny. A dispute between a Turkish company and an American corporation led to arbitration in which the presiding arbitrator learned of a potential conflict that was disclosed by email, with no objection by either side.<sup>73</sup>

After the arbitral tribunal determined liability in favor of the American party, the proceedings continued into the damages phase. It was then discovered that the challenged arbitrator's company had been involved in a relatively small transaction (approximately \$275,000) with the entity that acquired the American party. On the arbitrator's refusal to recuse himself, the Turkish side brought an action to vacate the award on liability. The tribunal chairman was President and CEO of what the reviewing court described as "a multi-billion dollar company with 50 offices in 30 countries."<sup>74</sup> An affiliate of that group apparently had a relatively small business transaction with a company related to the American side. The chairman had earlier informed the parties of the negotiations with that entity, but did not reveal that at a later time a contract had been actually concluded. The court was not impressed by

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GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

71. See *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007).

72. *Id.* at 136, 139.

73. *Id.* at 134–35.

74. *Id.* at 135.

the arbitrator's explanation that a "Chinese Wall" had been erected between himself and the potential conflict.<sup>75</sup>

The appellate decision noted that the lower court had cited both the American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA Code of Ethics) and the IBA Guidelines.<sup>76</sup> To the thoughtful observer, this provides an illustration of the trend towards cross-pollination of ethical standards in international arbitration, with national courts looking to professional guidelines just as arbitral institutions look to judicial decisions.

Analogies are not perfect, of course, which is why they are simply analogies. Judges might look to professional guidelines as a way to measure arbitrators with their own ruler. And arbitral institutions might look to judicially created rules as benchmarks that will be applied by reviewing courts. In either instance, however, the result will be a convergence of standards.

#### IV. CHALLENGES IN INVESTOR STATE ARBITRATION

##### A. *The Paradigm Shift*

Students of history remember that claims related to mistreatment of a foreign investor traditionally were subject either to the home court jurisdiction of the expropriating country or to the "gunboat diplomacy" of the investor state's political and military influence.<sup>77</sup> In some instances, arbitration triggered by diplomatic pressure led to significant and controversial debates on legal theories about state responsibility.<sup>78</sup>

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75. *Id.* at 138–39.

76. *Id.* at 136.

77. Although the legal use of force is now more circumscribed as a tool of foreign policy, *see* U.N. Charter art. 51, the reality of military influence on international economic relations has not disappeared.

78. For example, the *Tinoco Case* (named for General Federico Tinoco, a Costa Rican dictator who ruled between 1917 and 1919 after overthrowing that country's legitimate government) led to the elaboration of the "odious debt" doctrine, which was revived in the context of Iraqi commitments contracted during the regime of Saddam Hussein. An award by William Howard Taft (who served as both President of the United States and Chief Justice of the U.S. Supreme Court) upheld state succession with respect to governmental commitments (loans to the Royal Bank of Canada) but suggested that illegitimate obligations of an illegitimate government may nevertheless fail to bind following the downfall of the illegitimate ruler. *Tinoco Case* (Gr. Brit. v. Costa Rica), 1 R. Int'l Arb. Awards 369 (1923), *reprinted in* 18 AM. J. INT'L L. 147 (1924); *see also* Lee C. Buchheit et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1261 (2007) (suggesting that as a putative doctrine of international law, had it flown at all, "odious

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In its early days, investor-state arbitration was largely a matter of contract,<sup>79</sup> with concession agreements serving as the foundation for arbitrators' power to hear investor claims for de jure or de facto expropriation.<sup>80</sup> During the past several decades, however, bilateral and multilateral treaties have given foreign investors an opportunity to arbitrate disputes even in the absence of any direct concession with the host state.<sup>81</sup>

The paradigm shift from contract to treaty, as the foundation for redress for expropriation and discrimination, means that arbitrator integrity has become even more vital to host state acceptance of investor claims that affect vital national interests such as the environment, taxation, and administration of justice. Although consent remains the foundation of arbitral jurisdiction, government acceptance takes a blanket form through free trade and investment agreements, or even an investment statute.

A treaty-based standing offer to arbitrate gives foreign investors a direct right of action against the host state, exercisable as the occasion arises,<sup>82</sup> subject always to the conditions provided in the treaty or statute

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debts" would have flown very low, "far beneath the level of near-universal consensus required to make it a binding norm of international law"); Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. 7 (2007); David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 LAW & CONTEMP. PROBS. 137 (2007); Bradley N. Lewis, *Restructuring the Odious Debt Exception*, 25 B.U. INT'L L.J. 297 (2007); Odette Lienau, *Who Is the "Sovereign" in Sovereign Debt?*, 33 YALE J. INT'L L. 63 (2008). The doctrine of odious debts (*dettes odieuses*) was formalized in 1927 by a former minister of Tsarist Russia then teaching law in Paris. See ALEXANDER N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* (1927) (Fr.).

79. Not all investment arbitration was contractual, however. In 1794, the so-called Jay Treaty (named for its American negotiator John Jay) gave British creditors the right to arbitrate claims of alleged despoliation by American citizens and residents. Treaty of Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116. Under Article 6, damages for British creditors were to be determined by five commissioners, two appointed by the British and two by the United States. The fifth was to be chosen unanimously by the others, in default of which selection would be by lot from between candidates proposed by each side. See generally Barton Legum, *Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794*, 18 NEWS FROM ICSID 11 (2001).

80. Often investor-state arbitration would take place pursuant to an investment concession between host country and foreign investor. See e.g., *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980), *vacated*, 684 F.2d 1032 (D.C. Cir. 1981) (unpublished table decision); *Texaco Overseas Petrol. Co./Cal. Asiatic Oil Co. v. Libyan Arab Republic*, 53 I.L.R. 389 (Int'l Arb. Trib. 1978). Such investment arbitration pursuant to concessions is different, of course, from so-called mixed commissions of the colonial era.

81. See generally CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007).

82. Jan Paulsson has suggested the catchphrase "arbitration without privity." Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.: FOREIGN INVESTMENT L.J. 232

itself.<sup>83</sup> In some instances, there may also be an opportunity for government-to-government arbitration following reimbursement to investors under political risk insurance.

### *B. Critiques of Arbitrator Integrity in Investor-State Cases*

Investor-state arbitration has been a fertile ground for criticism related to arbitrator integrity. Some authors have written of “The Businessman’s Court” with the implication that arbitrators tend to favor claimant-investors in order to increase prospects of reappointment.<sup>84</sup>

A large part of the critique aims at the current “party-selection” system, suggesting that arbitrators’ desire for business leads to a systemic bias in favor of investors. Such pessimistic appraisals of arbitrators usually find themselves linked to a more diffusely negative commentary on investor-state relations, asserting a perceived malaise with respect to the fairness of arbitration itself.<sup>85</sup> Each of these two concerns will be addressed below.

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(1995). See generally Alain Prujiner, *L’arbitrage unilatéral: Un coucou dans le nid de l’arbitrage conventionnel?*, 2005 REVUE DE L’ARBITRAGE 63.

83. In one recently decided ICSID case, the tribunal rightly reminded us of the need for caution with respect to notions such as “arbitration without privity.” *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14 (2008) (Award). Fali S. Nariman presided, with Dr. Santiago Torres Bernárdez and Professor Piero Bernardini as co-arbitrators. Finding that the facts of that case did not permit the investor to invoke a “Most-Favored Nation” clause (allowing an investor invoking one treaty to benefit from more favorable provisions of another), the tribunal stressed that consent in writing remains the cornerstone of ICSID arbitration. *Id.* ¶ 160. The treaty’s standing offer to arbitrate must be accepted on a case-by-case basis. Lack of privity at the beginning does not dispense with the requirement to perfect the agreement to arbitrate. Perfection occurs when a particular investor accepts that standing offer by filing a claim, and at that time must comply with the requirements of the treaty.

84. See, e.g., VAN HARTEN, *supra* note 62, at 175–84 (advocating a public law model with tenured judges for investor-state dispute resolution).

85. See LOUIS T. WELLS & RAFIQ AHMED, *MAKING FOREIGN INVESTMENT SAFE* 283–98 (2007). The authors criticize investor-state arbitration for, inter alia, what they see as its rigidity and lack of sensitivity to changed circumstances and public policy, as well as the effect of moral hazard in the form of arbitration awards that discourage investor analysis of the stability of their contracts. They then suggest reforms including *amiable composition* (disregard of law and contract in favor of what is “fair and just”), more transparency in arbitration, a common law that relies on precedent, and an appeals body to review awards. *Id.* at 294. They then suggest that serious reforms will be resisted by “the small group of lawyers who now dominate investment arbitration” in part because they resist “making decisions based on criteria beyond the language of a contract” and fear smaller awards as “a threat to their income.” *Id.* at 298. Some of the conclusions will startle the thoughtful observer, particularly the suggestion that “predictability of

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### 1. Systemic Bias in Favor of Investors

One common argument posits that systemic “incentives” push arbitrators to decide for investors. The argument seems to run as follows: arbitrators seek to promote growth of investor-state proceedings in order to get future appointments; efforts to promote arbitration translate into decisions that favor claimant-investors, particularly when the appointing authority is ICSID, a World Bank affiliate.<sup>86</sup> For reasons discussed below, neither evidence nor logic supports the existence of such incentives or their operation in practice.

As a preliminary matter, inducements to pro-investor bias remain counterintuitive. Reputations tarnished by deviation from duty do not bring reappointment, at least when both host state and investor have a role in the process. Assuming rational arbitrators seek to enhance income, biased decisionmaking would be an odd way to do so, given that awards would be subject to review by either national courts (for lack of due process or violation of public policy) or before an ad hoc committee convened in connection with an ICSID proceeding.<sup>87</sup> Thus if arbitrator incentives operate at all in large international cases, they work to promote accuracy and honesty.

Although teenage boys may hope to attract adolescent girls by showing themselves dangerous and daring, no similar rule works for judges or arbitrators. Rumors of prejudice and partiality do little to enhance the credibility of professional decisionmakers, who normally benefit from reputations for reliability and accuracy. Bad arbitrators exist, but their lack of integrity does them no favors.

Arbitral institutions will also want to obtain a reputation for even-handedness. In a world where treaties and contracts are freely negotiated, and multiple institutions compete for arbitration business, it would be self-destructive if any organization gained a reputation for systematically turning out awards on behalf of either claimant or respondent. The disfavored side would simply insist on using another forum.

As a secondary matter, one might readily admit that a system of tenured international judges should be explored as a theoretically better system, as suggested in the “public law” model advocated by Professor

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outcome” will follow the practice of looking “beyond the language of a contract” and greater recourse to *amiable composition*.

86. See VAN HARTEN, *supra* note 62, at 152–53, 167–75.

87. ICSID Convention Article 52 provides for award annulment when there was, *inter alia*, “corruption on the part of a member of the Tribunal” or “a serious departure from a fundamental rule of procedure.” ICSID Convention, *supra* note 29, art. 52(c). Challenge to an arbitrator will be allowed as to individuals who do not meet the standards for Article 14, which requires that an arbitrator “may be relied upon to exercise independent judgment.” *Id.* art. 14.

Van Harten.<sup>88</sup> The difficulty, however, lies in finding a commercial appointing authority that would command worldwide confidence. The most realistic baseline against which to measure the present system is not a “World Arbitrators Corps” appointed by a single universally admired institution, but rather a diffuse set of national courts staffed by judges perceived as even more partial (toward their appointing governments) than arbitrators constituted by a joint decision of the parties.

A third and even more compelling reason exists to doubt the plausibility of a theory hypothesizing pro-investor incentives. Without host state participation in bilateral (or multilateral) investment treaties (BITs) and free trade agreements (FTAs), investment arbitration would have little future. Just as it takes two to tango, so it takes two countries to conclude a treaty. Investor-state arbitration succeeds only if the process appears fair to host-state as well as investor interests. Host states appoint as many arbitrators as investors, and a presiding arbitrator must be acceptable to both sides.

No “Global Arbitral Authority” today commands general acceptance in the eyes of any sizeable number of economic players. In an international context, party input into the arbitrator selection process remains a condition for the litigants to feel comfortable with the legitimacy of the tribunal, and perhaps for acceptance of the treaty commitments in the first place.

The present base line against which to evaluate alleged arbitrator bias remains decisionmaking by judges beholden to national governments. It seems unrealistic to expect litigants to relinquish their traditional role in selecting arbitrators without a realistic alternative. Whilst ideals can be worth pursuing even if not fully realizable, the best would become the enemy of the good if pursuit of theoretical neutrality led to dismantling or dismissing the current system, which for all its faults suffers far less bias than its alternatives.

Debates on the propriety of the current arbitrator selection system often touch on what is referred to as “transparency,” a notion that includes public pleadings and open hearings. On occasion, the more titillating term *secrecy* is used to imply an aura of something untoward about arbitration, perhaps evoking the *omertà* or code of silence operating

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88. See VAN HARTEN, *supra* note 62, at 175–84. Although the work of Professor Van Harten criticizes ICSID as an appointing authority, it does not seem to suggest any realistic replacement.

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among criminal organizations in southern Italy. The assumption of such loaded language seems to be that secrecy is suspect, perhaps, because it breeds lack of accountability.<sup>89</sup> In any event, it is not clear who benefits from lack of publicity.<sup>90</sup> Host states themselves may resist the glare of publicity when an expropriation risks exposing political corruption or victimization of ethnic groups through unfair spoliation.

Assertions of systemic bias can detract attention from consideration of more concrete measures to promote arbitrator integrity. Thoughtful dialogue should focus on how to articulate and implement ethical principles that avoid the two principal paths by which arbitration may come into disrepute: (i) lax ethical canons that tolerate arbitrator prejudgment and hidden links to parties, and (ii) unrealistic rules that facilitate abusive arbitrator challenges designed to disrupt the arbitral process.

Dialogue on arbitrator integrity becomes more plausible if linked to the way arbitrators consider facts and legal arguments. Do cases suggest that arbitrators invent treaty requirements not apparent on the face of the convention, in a way analogous to the way some American judges find “penumbra” rights in the United States Constitution? Does bias show in weighing evidence or granting requests for document production? Have arbitrators shut their eyes to discriminatory rhetoric from host state legislators in parliamentary exchanges?<sup>91</sup>

As mentioned earlier, institutional incentives to arbitrator bias can and do exist when arbitrators are taken from one particular industry.<sup>92</sup> Analogies from domestic arbitration do not always transplant well, however.

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89. See generally *Behind Closed Doors*, THE ECONOMIST, Apr. 25, 2009, at 63 (reporting on the “struggle” of an Indian lawyer named Ashok Sancheti who wished to receive publicity for his claim against the United Kingdom). For earlier debate on the subject, see also Anthony De Palma, *NAFTA’s Powerful Little Secret*, N.Y. TIMES, Mar. 11, 2001, § 3-1 (late ed.). In December 2001, an advertisement in the *Washington Post* attacked investment arbitration under the headline “Secret Courts for Corporations.” Sponsored by Ralph Nader’s “Public Citizen’s Global Trade Watch,” the publication referred to arbitrators as judges whose “identity[ies] can be kept secret indefinitely.” WASH. POST, Dec. 5, 2001, at A-5.

90. See Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, For Whose Benefit?*, in 2009 AUSTRIAN ARBITRATION YEARBOOK 483 (Christian Klausegger et al. eds., 2009).

91. Of course, smart people sometimes know how to mask their bias. This remains a fact of life no matter what the guiding principles on impartiality. Unless we establish a way to cut open an arbitrator’s head to see what is really going on (and then put things back together again), the best clues to partiality lie in the things that actually have been said or written.

92. Thus the Securities and Exchange Commission in the United States has issued directives to limit the role of arbitrators with substantial connections to financial advisers. See *supra* note 65 and accompanying text. The directives mandate that arbitrators who decide consumer disputes involving brokerage houses should not be drawn unduly from the ranks of stock brokers or their lawyers.



When disputes address a specific sector of the economy, arbitrators should not be closely identified with the relevant industry. By contrast, when the distinction lies between the two broad categories of host state and investors, few potential arbitrators of any experience or ability will be able to avoid association with one group or the other. Most will have links with both.

Moreover, when the alleged enticements to bad behavior relate to the simple dichotomy between investor and host state, the domestic paradigm loses much of its force. As illustrated by the role of sovereign wealth funds, countries such as China (traditionally considered a host state) often invest in countries such as the United States (the investor state par excellence). Needless to say, incentives to “repeat player” status can operate just as well for individuals known in the arbitration community to be regularly appointed by host states.

## 2. *Disillusionment with Arbitration*

The suggestion that arbitrator bias is driven by systematic incentives will dovetail into the current debate about whether investor-state arbitration continues to inspire general confidence.<sup>93</sup> The argument that public appreciation for investment arbitration has been dissipated rests on several factors, including increased political sensitivity and inconsistent results. Concern about arbitrator integrity constitutes one element in the mix of alleged malaise.

As a preliminary matter, it is far from clear that fear of bias derives from governments and investors as opposed to pundits and academics. Even if international arbitration does not inspire universal confidence, it seems to command greater legitimacy than any reasonable alternative. The number of countries that have recently opted out of the system, such as Bolivia and Ecuador,<sup>94</sup> remains small enough to count on the fingers of one hand. Albeit not without some hesitation, nations as well as

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93. See, e.g., M. Sornarajah, *The Retreat of Neo-Liberalism in Investment Treaty Arbitration*, in *THE FUTURE OF INVESTMENT ARBITRATION* 273 (Catherine A. Rogers & Roger P. Alford eds., 2009).

94. See *infra* notes 102–03. The situation remains somewhat more nuanced in Venezuela, where a recent judicial decision seems to have acknowledged the validity of binding international arbitration under certain circumstances. See Ivor D. Mogolión-Rojas, *Venezuelan Supreme Tribunal Restates ICSID Jurisdiction*, 10 INT’L ARB. Q.L. REV. 103 (2009) (discussing an interpretative decision of October 17, 2008, given by the Venezuelan Constitutional Chamber of the Supreme Tribunal).

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investors seem to be sticking with arbitration as a way of leveling the playing field. Even in the realm of taxation, a most public domain, arbitration has gained ground.<sup>95</sup>

In addition, no evidence supports the proposition that the arbitration system operates as an assembly line of decisions that favors the investor. Host states seem to win their share of cases,<sup>96</sup> however a win might be

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95. Many income tax treaties now incorporate OECD proposals to integrate arbitration mechanisms into the so-called Mutual Agreement Procedure, which hitherto relied exclusively on negotiations among government officials with a stake in the outcome of the case. See MODEL TAX CONVENTION ON INCOME AND CAPITAL (Org. for Econ. Cooperation & Dev. 2008), Article 25(5). Such provisions have been incorporated in recent protocols of treaties that the United States has concluded with Belgium, Canada, and Germany. See generally WILLIAM W. PARK & DAVID R. TILLINGHAST, INCOME TAX TREATY ARBITRATION (2004); Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, 23 ARB. INT'L 405 (2007).

96. For a sample of decisions favoring host states, see *Aguaytia Energy LLC v. Peru*, ICSID Case No. ARB/06/13 (2008) (involving claim for alleged violation of a stabilization agreement); *Metalpar S.A. v. Argentina*, ICSID Case No. ARB/03/5 (2008) (turning on failure to establish breach of BIT protections); *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14 (2008) (finding of no jurisdiction by reason of inapplicability of BIT's "most favored nation" clause to import procedural shortcut); *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24 (2008) (concluding that claimant was not entitled to protections under Energy Charter Treaty); *M.C.I. Power Group L.C. v. Ecuador*, ICSID Case No. ARB/03/6 (2007) (finding of no breach by Ecuador of obligations under power purchase arrangement, annulment decision is pending); *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9 (2006) (dismissing most claims for asset "pesification" on basis of US/Argentina BIT; upholding duty to maintain public order; and surviving claim for U.S. \$112 million reduced to U.S. \$2.8 million plus interest); *Consortio Groupement L.E.S.I.-DIPENTA v. Algeria*, ICSID Case No. ARB/03/8 (2005) (finding of no jurisdiction because claimant consortium possessed separate legal personality from constituent companies). The United States, as host country, prevailed against Canadian investors in the high-profile decisions of *Mondev International, Ltd., v. United States*, ICSID Case No. ARB(AF)/99/2 (2002); *Loewen Group, Inc., v. United States*, ICSID Case No. ARB(AF)/98/3 (2003), reprinted in 42 I.L.M. 811 (2003); and *Methanex Corp. v. United States* (Aug. 3, 2005), available at <http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>. In comparing interests of industrialized and nonindustrialized countries, a fair-minded observer would also note awards in favor of investors from developing countries, as in *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17 (2008), in which "moral damages" were awarded when an Omani company charged with building roads was expelled from worksites at gun point by government-sponsored gangs. See also *Glamis Gold Ltd. v. United States* (NAFTA claim under UNCITRAL Rules and administered by ICSID, June 2009), available at <http://www.state.gov/s/l/c10986.htm> (dismissing Canadian mining company's claim arising from proposal to mine in California and finding federal and state regulations did not violate NAFTA); *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Ecuador*, ICSID Case No. ARB/05/9 (2009) (dismissing a \$1.7 billion claim for lack of jurisdiction); *TSA Spectrum de Arg., S.A. v. Argentina*, ICSID Case No. ARB/05/5 (2008) (a split tribunal rejecting a claim brought under the Netherlands-Argentina BIT after determining that claimant's ultimate owner was an Argentine citizen); *Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines*, ICSID Case No. ARB/03/25 (2007) (dismissing German company's claim on jurisdictional grounds).

measured.<sup>97</sup> No reason exists to think that arbitrators decided these matters other than according to their particular substantive or jurisdictional merits. The cases show no propensity of arbitrators to rubber stamp investors' claims. Host states can be expected to win when the claimant's legal position is weak, and to lose when the evidence and law run the other way. Arbitrators are in fact capable of getting it right on the facts and the law.

It bears noting that a rational investor would normally be expected to prefer national courts, given that arbitration implicates transaction costs in convening and funding a private tribunal whose decisions must be enforced through a complex network of treaties transcending multiple jurisdictions. These transaction costs seem to be outweighed by apprehension with respect to domestic courts of the country that allegedly has been discriminating against foreigners or expropriating their assets.<sup>98</sup>

To some extent, both investment and commercial arbitration have become victims of their own success. Their general acceptance often makes them objects of criticism by observers who forget what led to arbitration in the first place: a genuine concern about politicized justice in national courts. Even if accepted for want of anything better, as a

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97. Winning and losing implicate the amount of awards as well as findings of liability. If a \$100 million claim results in a \$1 million award, the claimant may not really feel that it prevailed. In this connection, see Susan Franck's study of more than 100 investment awards, finding that investors brought treaty claims for \$343 million on the average, but collected only \$10 million on the average. Susan D. Franck, *An Empirical Analysis of Investment Treaty Awards*, 101 AM. SOC'Y INT'L L. PROC. 459 (2007); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 49–50, 64 (2007); Susan D. Franck, *Empiricism & International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767 (2008); Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, 7 COLUM. FDI PERSP. 1 (2009), <http://vcc.columbia.edu/pubs/documents/SusanFranckPerspective-Final.pdf>. In at least one case the claimant established liability but not damages. *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 ¶ 814 (2008).

98. In evaluating the value of arbitration, much depends on the observer's perspective. Few Americans have trouble understanding why Ugandans of Indian origin, dispossessed by Idi Amin, might not have relished the prospect of seeking redress before courts in Kampala during the 1970s. Yet these same Americans might bridle at the offense to sovereignty when a Canadian asks for arbitration to repair loss occasioned by a xenophobic state jury. See e.g., *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (2003), reprinted in 42 I.L.M. 811 (2003) (involving a \$500 million Mississippi verdict (later coupled with a \$625 million security requirement) against a Canadian funeral company for breach of agreements related to burial insurance, where the transactions giving rise to the lawsuit were valued at 1% of the amount awarded).

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“second best” solution, arbitration continues to provide what some have called “enclaves of justice” for resolution of international economic controversies,<sup>99</sup> serving as the best means to enhance rule of law in a global marketplace lacking any omni-national courts or sheriffs.

Although no one should belittle the need for vigilance with respect to bias in arbitration, a dialogue on the topic must be placed in context. Nations that are unhappy can revise existing models, as witnessed by the new paradigm that shows increased understanding of host states’ positions, such as government veto of arbitration in tax matters<sup>100</sup> and limits on arbitration claims based on general welfare legislation.<sup>101</sup>

Moreover, host states can also walk away from the process entirely, as some have recently done. Bolivia denounced its adherence to the ICSID Convention,<sup>102</sup> and Ecuador’s new constitution generally prohibits treaties or other international instruments that require arbitration in commercial disputes with private parties.<sup>103</sup> Most host states, however, have remained with the investor-state arbitration system.

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99. See Jan Paulsson, *Enclaves of Justice*, TRANSNAT’L DISP. MGMT., Sept. 2007, <http://www.transnational-dispute-management.com/> (subscription required). A wholly separate debate, of course, surrounds whether investment treaties do in fact benefit developing nations. Many of the arguments in this connection have been summarized in the recent work of Professor Susan Franck, evaluating both the arguments in favor of foreign investment and the skepticism expressed by scholars such as Professors Susan Rose-Ackerman and Jennifer Tobin. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337 (2007). See generally THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT (Karl P. Sauvant & Lisa Sachs eds., 2009).

100. See William W. Park, *Arbitration & the Fisc: NAFTA’s “Tax Veto,”* 2 CHI. J. INT’L L. 231 (2001); William W. Park, *Arbitrability and Tax*, in ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES 179 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2008), adapted from William W. Park, *Tax, Arbitration & Investment Treaties*, in THE FUTURE OF INVESTMENT ARBITRATION (Catherine A. Rogers & Roger P. Alford eds., 2009).

101. The new United States model for treaty-based investment arbitration clarifies the contours of substantive investor protection with respect to “indirect” expropriation through regulatory actions that decrease the value of an investor’s property, providing that governmental regulations will not normally constitute expropriation if nondiscriminatory and designed to protect legitimate welfare objectives. American implementation of the new patterns began with its free trade agreements with Singapore, Chile, and Uruguay, as well as the Central American Free Trade Agreement. On the 2004 State Department model bilateral investment treaty, see, for example, David A. Gantz, *The Evolution of FTA Investment Provisions*, 19 AM. U. INT’L L. REV. 679 (2004); Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. INT’L ARB. 383 (2004); Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REV. FOREIGN INVESTMENT L.J. 344 (2004).

102. See generally Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L.J., June 26, 2007, at 1; Marco Tulio Montañes, Note, *Bolivia Denounces ICSID Convention*, 46 I.L.M. 969 (2007).

103. See Juan Manuel Marchán, *The Treatment of Arbitration in the New Constitution of Ecuador*, NEWS & NOTES FROM INST. FOR TRANSNAT’L ARB., Autumn 2008/Winter 2009, at 1, 6–8 (discussing Article 422 of the Ecuadorian Constitution approved by referendum

Critiques of arbitration tend toward a cyclical character, given that fashion invades the realm of ideas no less than the length for hemlines on ladies' dresses or the angle at which students tilt their caps. The recent actions of Bolivia and Ecuador echo the ideology of the "New International Economic Order" of three decades earlier, which in turn took its cue from the "Calvo Doctrine" of the late nineteenth century.<sup>104</sup> The doctrines of both attempted unsuccessfully to limit investor-state arbitration, which at the time was a creature of contractual investment concessions.<sup>105</sup>

The 1974 Charter of Economic Rights and Duties of States provided that any "controversy [about expropriation of foreign property] shall be settled under the domestic law of the nationalizing State and by its tribunals."<sup>106</sup> This approach was ultimately rejected in arbitration awards<sup>107</sup> as well as by developing countries themselves when they came to see that the absence of an option for arbitration risked putting a chill on welfare-enhancing economic cooperation. The fact that such discredited ideologies again become trendy in certain academic and political circles does not mean they have merit.<sup>108</sup>

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on September 28, 2008). In May 2009, President Correa of Ecuador announced again that his government is considering withdrawing from the ICSID system.

104. The esteemed Argentine jurist Carlos Calvo argued that foreign investors in Latin America should submit expropriation disputes to local courts. Announced in 1868, the doctrine received fuller expression in his treatise on public international law, stating that foreign nations should not intervene in South America to protect private property and debts. 1 *LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE* §§ 185–205, at 322–51 (5th ed. 1896); 3 *id.* §§ 1280–1296, at 142–55. The corollary was that claims for improper takings of property were to be brought by the foreign investors, and were subject to the exclusive jurisdiction of host state law and courts. See K. Lipstein, *The Place of the Calvo Clause in International Law*, 22 *BRIT. Y.B. INT'L L.* 130 (1945); William W. Park, *Legal Issues in the Third World's Economic Development*, 61 *B.U.L. REV.* 1321 (1981).

105. See generally Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 12, 1974); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974).

106. G.A. Res. 3281, *supra* note 105, art. 2(2)(c). The Charter was adopted by a vote of 120 to 6, with 10 abstentions. The six negative votes were cast by Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom, and the United States. Those abstaining were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain.

107. See Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, 17 *I.L.M.* 1 (1978) [hereinafter *TOPCO Award*].

108. See generally Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration*, 28 *YALE J. INT'L L.* 365 (2003).

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Central to sound analysis is the fact that investor-state arbitration is a dynamic process based on informed negotiation. Unlike American credit card companies that impose arbitration clauses through fine print in a monthly statement, investment and free trade agreements are concluded under the glare of public scrutiny by governments that represent both capital-exporting and capital-importing concerns.

*C. Mechanics of Challenge: Basic Texts*

Challenges to arbitrators in investor-state disputes would normally be brought under either the ICSID Convention or the UNCITRAL Arbitration Rules (UNCITRAL Rules),<sup>109</sup> each of which provides the framework for private claims under BITs and FTAs.<sup>110</sup> Although these systems share some common elements, their treatment of challenges will diverge with respect to two key elements: the person who decides whether the challenge is justified, and the possibility of judicial review. On both matters, UNCITRAL arbitration falls toward the commercial arbitration model.<sup>111</sup>

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109. Under some investment treaties, investors and host states may have the option to choose other arbitration regimes. In addition, arbitration might arise under the terms of a concession agreement containing its own arbitration clause. In some instances, arbitration claims have been filed on the same set of facts under both ICSID and ICC Rules. *See* S. Pac. Prop., Ltd. v. Egypt, Jurisdiction, ICSID Case No. ARB/84/3 (1988). The ICC award was subject to extensive discussion in the French judicial actions that led to its vacatur. *See* Cour d'appel de Paris, July 12, 1984, *translated in* 23 I.L.M. 1048 (1984); Cour de Cassation, Jan. 6, 1987, *translated in* 26 I.L.M. 1004 (1987). For the ICSID award of May 20, 1992, see 3 ICSID REP. 189, 241 (1995). *See also* W. Laurence Craig, *The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk*, 8 ICSID REV. FOREIGN INVESTMENT L.J. 264 (1993).

110. In theory at least, challenges might also arise under other institutional or ad hoc rules. For example, Article 24(3) of the 2004 United States Model BIT provides that a claimant may submit a request for arbitration under the rules of ICSID, the ICSID Additional Facility, UNCITRAL, or "if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules." U.S. State Dep't, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 24(3) (2004), *available at* <http://www.state.gov/documents/organization/38710.pdf>. The same language appears in Free Trade Agreements, for example Article 11.16 of the South Korea-United States FTA (pending ratification as of the moment this Article goes to print). Free Trade Agreement Between the United States and the Republic of Korea art. 11.16, U.S.-S. Korea, June 30, 2007, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>. By contrast, Article 1120 of NAFTA limits itself to the ICSID, the ICSID Additional Facility, and UNCITRAL. North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, art. 1120, Dec. 17, 1992, 32 I.L.M. 289 (1993).

111. The UNCITRAL Arbitration Rules are not to be confused with the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). Although the former entails procedural rules for handling an arbitration arising from a governing instrument that warrants application of the UNCITRAL Rules, the latter constitutes a matrix of what UNCITRAL deems to be a "model" national arbitration statute. Both the

In ICSID arbitration, the touchstone will be the words in Article 14 of the ICSID Convention, which speak of the individual's ability to "exercise independent judgment."<sup>112</sup> This requirement is supplemented by a certification of independence made by the arbitrator at the beginning of the proceedings.<sup>113</sup> A party to the arbitration may propose disqualification of an arbitrator on account of any fact indicating a "manifest" inability to meet that standard.<sup>114</sup>

When a dissatisfied litigant contests an arbitrator's fitness in an ICSID proceeding, the remaining arbitrators normally determine whether the individual lacks the capacity to exercise independent judgment.<sup>115</sup> Any

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UNCITRAL Rules and Model Law address arbitrator challenge, and unsurprisingly, display vast similarities.

112. The full text of Convention Article 14(1) contains both ethical and professional components. The full text reads:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

ICSID Convention, *supra* note 29, art. 14(1). *See generally* Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 131, 147–48 (Christina Binder et al. eds., 2009). Reforms proposed by Mr. Sheppard include inter alia (i) a change in the grounds for challenge from "manifest" lack independence to "justifiable doubts" as to independence and impartiality"; and (ii) decisions on challenge are to be made by an independent ad hoc committee rather than the challenged arbitrator's colleagues on the tribunal.

113. Rule 6(2) of the ICSID Arbitration Rules requires each arbitrator, prior or during the Tribunal's first session, to sign a declaration affirming, inter alia, that the individual will "judge fairly as between the parties, according to the applicable law" and attach a statement of past and present professional, business, and other relationships with the parties as well as any other circumstance that might cause the arbitrator's reliability for independent judgment to be questioned by a party. In signing the declaration, the arbitrator assumes a continuing obligation to promptly notify ICSID of any such relationship that subsequently arises during the proceedings. ICSID R. ARB. PROC. 6(2), *available at* [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

114. Article 57 of the ICSID Convention provides as follows:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

ICSID Convention, *supra* note 29, art. 57.

115. *See id.* art. 58. The challenged arbitrator would first be given the opportunity to "furnish explanations." If the challenge relates to a majority of the arbitral tribunal, or if the remaining two members are equally divided, the disqualification decision will be made by the Chairman of the ICSID Administrative Council, a post filled ex officio by

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review of the resulting award would be made by an ICSID-appointed panel rather than national judges who might conduct their own review of independence and impartiality.<sup>116</sup> By contrast, outside ICSID, challenges to arbitrators in commercial arbitrations would initially be heard by the relevant supervisory institution and then again come before whatever national court is charged with considering motions to review awards.

Challenge under the UNCITRAL Rules differs in procedural mechanics, notwithstanding a basic similarity in the standards themselves. Article 10 provides for challenge if circumstances give rise to “justifiable doubts” about the arbitrator’s impartiality or independence.<sup>117</sup> Unless the other side agrees or the arbitrator withdraws voluntarily, the challenge decision will be made by the appropriate “appointing authority” that constituted (or would otherwise have constituted) the tribunal itself.<sup>118</sup>

In UNCITRAL arbitration, as in ordinary commercial cases, the ultimate validity of any appointing authority decision will be subject to

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the President of the World Bank pursuant to Article 5 of the ICSID Convention. See generally CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1202–06 (2001). Also see the procedure amplified in Rule 9 of the Arbitration Rules adopted by the ICSID Administrative Council pursuant to Article 6 of the Convention itself. ICSID R. ARB. PROC. 9, available at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

116. ICSID Convention, *supra* note 29, art. 52. The limited grounds for challenge do not include an arbitrator’s lack of independent thinking. An award may be set aside for the following reasons: (1) improper constitution of the tribunal; (2) tribunal excess of authority; (3) corruption of a tribunal member; (4) serious departure from a fundamental rule of procedure; or (5) failure of the award to state reasons. *Id.* art. 52(1). This challenge is made not to national courts, but pursuant to an internal ICSID process triggered by a letter to the ICSID Secretary General. Review is conducted by an ad hoc committee of three persons with authority to annul the award in part or in total. If an award is annulled, either party may require that it be submitted to a new tribunal.

117. United Nations Commission on International Trade Law Arbitration Rules, G.A. Res 31/98, art. 10(1), U.N. Doc. A/31/17 (Dec. 15, 1976), available at <http://www.adr.org/sp.asp?id=22091> [hereinafter UNCITRAL Arbitration Rules]. A similar formulation exists in Article 12 of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, art. 12, U.N. Doc. A/40/17/Annex I & A/61/17/Annex I (June 21, 1985) [hereinafter UNCITRAL Model Law].

118. The wording in Article 12 contains an unfortunate (albeit perhaps unavoidable) complexity with respect to who gets to decide arbitrator challenges, distinguishing between situations (i) “when the initial appointment was made by an appointing authority” (situations in which *kompetenz* to hear the challenge lies with the same appointing authority); (ii) “when the initial appointment was not made by an appointing authority” (in which case the challenge will be heard by a previously designated authority); and (iii) “all other cases,” whereby “the decision on the challenge will be made . . . [by the] appointing authority as provided for in article 6” of the Rules, under which the Permanent Court of Arbitration serves by default as the entity to designate an appointing authority if the parties cannot agree. UNCITRAL Model Law, *supra* note 117, art. 11.



review by national courts under the appropriate arbitration statute or within the framework of the New York Convention.<sup>119</sup>

In some cases an arbitrator's challenge will take place under what might be seen as a hybrid process under the ICSID Additional Facility. In such instances, the arbitration will be supervised by ICSID, under procedures similar to those of conventional ICSID cases, but *outside* the framework of the Washington Convention. The rule for challenge remains the ability to "exercise independent judgment,"<sup>120</sup> and the decision will normally be made by the challenged arbitrator's remaining colleagues.<sup>121</sup> However, national courts might also have their say on the matter when asked to vacate an award pursuant to their own standards of arbitrator fitness.<sup>122</sup>

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119. New York Convention, *supra* note 26. In some instances, the relevant treaty framework would be found in the Inter-American Convention on International Commercial Arbitration, commonly known as the 1975 Panama Convention. See 9 U.S.C. ch. 3 (2006). Although similar in their basic structure, the two conventions differ in significant respects. For example, the Panama Convention does not require judges to refer parties to arbitration, or set forth conditions that must be satisfied by the party seeking award enforcement. Moreover, only the Panama Convention contains reference to arbitration rules (those of the Inter-American Commercial Arbitration Commission) that apply in default of party choice. See generally Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 *ARB. INT'L* 214 (1989); John Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 *AM. REV. INT'L ARB.* 1 (2000).

120. Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, ICSID/11, sched. C, art. 8 (Apr. 10, 2006), available at [http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf) [hereinafter ICSID Additional Facility Rules].

121. *Id.* art. 15(5) ("Disqualification of Arbitrators").

122. The Additional Facility Rules might apply in disputes where ICSID jurisdiction would not otherwise exist because either the host state or the investor's state is not party to the Washington Convention. For example, in the *Metalclad* case an American company filed an Additional Facility Claim related to a hazardous waste disposal facility in Mexico. The arbitrators found that Mexican regulatory action denied "fair and equitable treatment" and constituted expropriation without adequate compensation. Mexico petitioned to have the award set aside by the British Columbia Supreme Court, which had jurisdiction by virtue of the arbitration's official situs fixed in Vancouver notwithstanding that for convenience hearings had been held in Washington. The court found that some but not all of the arbitrators' conclusions exceeded their jurisdiction. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (2000) (Award), reprinted in 16 *INT'L ARB. REP.* 62 (2001).

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## D. Filling the Gaps

### 1. The Effect of Institutional Rules and Case Law

Implementation of ICSID and UNCITRAL challenge standards would be a very difficult job indeed if investor-state cases were isolated from lessons learned in other varieties of arbitration. Notions such as ability “to exercise independent judgment”<sup>123</sup> or “justifiable doubts” as to impartiality or independence<sup>124</sup> touch on notions of proper behavior shared with other arbitral systems.

In examining a motion to disqualify an arbitrator in an investor-state case, the decisions in analogous commercial arbitrations will inevitably have some influence. Consideration will be given to how things have been done pursuant to institutional rules, national statutes, other multilateral treaties (such as the New York Convention), and the “soft-law” of professional guidelines. These different arbitration standards often follow roughly similar paths, albeit with different emphasis or minor variation.

For example, the ICC Rules speak of arbitrator independence, but not impartiality.<sup>125</sup> By contrast, impartiality as well as independence has been explicitly addressed in the UNCITRAL Rules,<sup>126</sup> the UNCITRAL Model Law,<sup>127</sup> the AAA/ABA Code of Ethics,<sup>128</sup> the IBA Guidelines,<sup>129</sup> and the LCIA Rules.<sup>130</sup> Under the UNCITRAL Model Law and other statutes that follow its paradigm, arbitrator bias as a ground for award vacatur seems to be subsumed under the general rubric of “public policy” violation.<sup>131</sup> The IBA Guidelines mention “actual bias” as a ground for declining appointment.<sup>132</sup>

Most standards require an arbitrator’s disclosure of circumstances that may cause doubts as to his or her ability to serve impartially and

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123. ICSID Convention, *supra* note 29, art. 14(1); ICSID Additional Facility Rules, *supra* note 120, sched. C, art. 8.

124. UNCITRAL Arbitration Rules, *supra* note 117, art. 10(1); *see also* UNCITRAL Model Law, *supra* note 117, art. 12(2) (“An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.”).

125. ICC RULES, *supra* note 43, art. 9(2).

126. UNCITRAL Arbitration Rules, *supra* note 117, art. 10.

127. UNCITRAL Model Law, *supra* note 117, art. 12.

128. AAA/ABA CODE OF ETHICS, *supra* note 16, Canon II.

129. IBA GUIDELINES, *supra* note 13, Gen. Standard (1).

130. London Court of International Arbitration Rules, arts. 5.2, 10.3 (1998) [hereinafter LCIA Arbitration Rules].

131. UNCITRAL Model Law, *supra* note 117, art. 34(2)(b)(ii).

132. IBA GUIDELINES, *supra* note 13, Explanation to Gen. Standard 2.

independently during a proceeding.<sup>133</sup> Some make reference to “justifiable” doubts,<sup>134</sup> while others direct the arbitrator to ask whether the questionable circumstances would cause doubt “in the eyes of the parties.”<sup>135</sup> The IBA Guidelines include both “justifiable doubts” and doubts “in the eyes of the parties” as factors for an arbitrator to consider.<sup>136</sup>

Some rules address arbitrator nationality. When litigants are of different nationalities, the LCIA Rules<sup>137</sup> and the ICSID Convention<sup>138</sup> generally provide that an arbitrator may not have the same nationality as either party. Conversely, the UNCITRAL Model Law provides that “no person shall be precluded by reason of his nationality from acting as an arbitrator,” unless the parties agree otherwise.<sup>139</sup> The ICC Rules direct the ICC Court to consider an arbitrator’s nationality in some circumstances.<sup>140</sup>

In arbitration outside the treaty-based investor-state context, a decision on challenge for alleged conflict will often need to be made on the basis of both arbitration rules and applicable statute. Imagine, for example, arbitration conducted in England under the rules of the LCIA. One side complains that the arbitrator has prejudged some vital question by statements made in a procedural order. The challenging party would begin by citing Article 10.3 of the LCIA Arbitration Rules permitting challenge on the basis of circumstances “that give rise to justifiable doubts as to [the arbitrator’s] impartiality or independence.”<sup>141</sup> There might also be a citation to Article 10.2 of the LCIA Rules, which makes

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133. See AAA/ABA CODE OF ETHICS, *supra* note 16, Canon II(A)(2); IBA GUIDELINES, *supra* note 13, Gen. Standard 2; ICC RULES, *supra* note 43, art. 7; ICSID R. ARB. PROC., available at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf); LCIA Arbitration Rules, *supra* note 130, art. 5.3; UNCITRAL Arbitration Rules, *supra* note 117, art. 9. For discussion of a particularly problematic set of standards, see M. Scott Donahey, *California and Arbitrator Failure to Disclose*, 24 J. INT’L ARB. 389 (2007).

134. See UNCITRAL Arbitration Rules, *supra* note 117, art. 9; LCIA Arbitration Rules, *supra* note 130, art. 10.3.

135. See ICC RULES, *supra* note 43, art. 7(2).

136. IBA GUIDELINES, *supra* note 13, General Standards 2 and 3, in particular General Standards 2(c), 2(d) and Explanation to General Standard 3(a).

137. LCIA Arbitration Rules, *supra* note 130, art. 6.1.

138. ICSID Convention, *supra* note 29, art. 39.

139. UNCITRAL Model Law, *supra* note 117, art. 11(1).

140. ICC RULES, *supra* note 43, art. 9(1).

141. LCIA Arbitration Rules, *supra* note 130, art. 10.3.

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reference to an arbitrator who “does not act fairly and impartially as between the parties.”<sup>142</sup>

If the institutional challenge before the LCIA fails,<sup>143</sup> the unhappy litigant might also bring a court challenge under English statute for “justifiable doubts”<sup>144</sup> as to the arbitrator’s impartiality, or an application to annul the award itself for “serious irregularity,”<sup>145</sup> including failure to “[a]ct fairly and impartially” as between the parties.<sup>146</sup>

## 2. *The Specificity of Investment Cases*

Assertions about the uniqueness of investor-state cases often overstate the proposition.<sup>147</sup> A clear cross-pollination of national and professional ethical standards exists as between commercial and investor-state cases. In reality, investor-state arbitration holds no monopoly on the “private judging” that affects societal and economic well-being.<sup>148</sup> Ethical standards in commercial cases fertilize decisions in investment cases and vice versa.

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142. *Id.* art. 10.2.

143. Under LCIA Rules, challenges are heard by a Division of the LCIA Court itself, usually pursuant to written memorials and on occasion (albeit rarely) with oral argument. Unlike many other arbitral institutions, the LCIA publishes a sanitized version of challenge decisions to guide future litigants with respect to nominations or challenges. See Geoff Nicholas & Constantine Partasides, *LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish*, 23 ARB. INT’L 1, Annex: Survey of Exiting LCIA Challenge Decisions, 21–41 (2007).

144. Arbitration Act, 1996, c. 23, § 24(1) (Eng.).

145. *Id.* § 68.

146. *Id.* § 33. For an illustration under the ICC Rules, see discussion of challenge in *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 Lloyd’s Rep. 127 (C.A.) (Eng.), available at 2000 WL 571190. In light of the fact that the arbitration began in 1995, the application to set aside partial awards invoked Section 23 of the 1950 Arbitration Act (not the 1996 Act) that speaks of arbitrator “misconduct.” *Id.* at 136–37.

147. One recent essay suggested that commercial arbitration was conducted “entirely by and for professionals.” Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well Are Investment Awards Reasoned?*, in *THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES* 1, 2 (Guillermo Aguilar Alvarez & W. Michael Reisman eds., 2008). If this were true, of course, professors who teach about policy aspects of business disputes should be exposed as charlatans, and large portions of their scholarly work eliminated as meaningless. Decisions like *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), which address safeguards involving antitrust claims, could be removed from national arbitration law, along with cases interpreting the language of New York Arbitration Convention Article V(2)(b) on public policy violations. Surprisingly, the authors also suggest that international commercial awards are “rarely published,” notwithstanding the extensive collections of awards published in places such as the *ICC Recueil des Sentences*, *Mealey’s International Arbitration Reports*, *Journal de droit international*, *ASA Bulletin*, and *Revue de l’arbitrage*.

148. For an exploration of the arguments on both sides, see Stephan Wilske et al., *International Investment Treaty Arbitration and International Commercial Arbitration—Conceptual Difference or Only a “Status Thing”?*, 1 CONTEMP. ASIA ARB. J. 213 (2008).

Nor are the public effects of commercial arbitration any less real than those of treaty-based investor-state cases.<sup>149</sup> If the financial crisis of 2008 demonstrates anything, it teaches that private choices have public consequences. Contract disputes affect the world's aggregate social and economic welfare no less than treaty controversies,<sup>150</sup> and breaches of international law end up being decided in commercial arbitration just as in treaty-based proceedings.<sup>151</sup>

### *E. Transnational Standards and "Soft Law"*

Increasingly, conflicts of interest implicate nongovernmental instruments such as the professional standards issued by the International Bar Association or the American Arbitration Association. To some extent such guidelines will be supplemented by the writings of scholars and practitioners setting forth what might be termed the "lore" of international arbitral procedure.<sup>152</sup>

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149. One unfortunate effect of BIT-arbitration puffery lies in its tendency to reinforce stereotypes of investor-state arbitration as so extraordinary as to be somehow illegitimate. A better course might be to acknowledge that all international arbitration is designed to enhance procedural and political neutrality by granting decisionmaking power to persons other than the national bodies with a stake in the outcome.

150. For example, insurance arbitrators play a vital role in maintaining respect for the sanctity of contract, which in turn permits manufacturers to meet otherwise disruptive risks. Gas price revision arbitration affects how much people pay for heat in the winter. And arbitration of pharmaceutical license disputes can have an impact on the price of drugs.

151. See, for example, the LIAMCO arbitration with respect to the Libyan expropriation of American assets, discussed in *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980), *vacated*, 684 F.2d 1032 (D.C. Cir. 1981) (unpublished table decision). See also TOPCO Award, *supra* note 107.

152. See, e.g., Karl-Heinz Böckstiegel, *Major Criteria for International Arbitrators in Shaping an Efficient Procedure*, in *ARBITRATION IN THE NEXT DECADE* 49 (ICC Int'l Ct. Arb. Bull. Spec. Supp. 1999); Jack J. Coe, Jr., *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness—Some Thoughts Concerning Arbitral Process Design*, 2 *PEPP. DISP. RESOL. L.J.* 53 (2002); Paul Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration*, *INT'L ARB. REP.*, Sept. 1997, at 25; Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedure*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY* 3 (Richard B. Lillich & Charles N. Brower eds., 1993); Mark Huleatt-James & Robert Hunter, *The Laws and Rules Applicable to Evidence in International Arbitration Procedure and Some Issues Relating to Their Determination and Application*, in *THE COMMERCIAL WAY TO JUSTICE* 45 (Geoffrey M. Beresford Hartwell ed., 1997); Martin Hunter, *Modern Trends in the Presentation of Evidence in International Commercial Arbitration*, in 3 *AMERICAN REVIEW OF INTERNATIONAL ARBITRATION* 204 (1992); Julian D.M. Lew & Laurence Shore, *Harmonizing Cultural Differences in International Commercial Arbitration*, *DISP. RESOL. J.*, Aug. 1999, at 32;

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The use of the term “soft law” to designate such guidelines has led to unfortunate misinterpretation and misapprehension. Some observers express concern that nongovernmental instruments will undermine the reasonable measure of certainty sought by merchants and investors to guide decisionmaking. The right critique has been aimed at the wrong target.<sup>153</sup>

When properly applied, such standards can enhance certainty by providing an alternative to ad hoc rulemaking by jurists whose facile eloquence may articulate “general legal principles” that constitute little more than a fig leaf covering personal preferences.<sup>154</sup> If crafted with intelligence, professional guidelines present a better guess about the parties’ shared ex ante expectations than the unbridled discretion of overly clever arbitrators who pursue their own agendas.<sup>155</sup>

Soft law instruments thus represent one check on the imperial decisionmaker, and perhaps the only standard that can permit elaboration of procedural law through what John Rawls called the “veil of ignorance” about the contingencies of a rule’s application.<sup>156</sup> Arbitrators who interpret preexisting norms have less leeway to pick rules that will lead to the outcome favoured by their subjective predispositions.<sup>157</sup>

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Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. Y.B. INT’L LEGAL STUD. 163 (1985); James J. Myers, *Ten Techniques for Managing Arbitration Hearings*, DISP. RESOL. J., Jan.–Mar. 1996, at 28; Lucy Reed & Jonathan Sutcliffe, *The ‘Americanization’ of International Arbitration?*, INT’L ARB. REP., Apr. 2001, at 37; John Uff, *The Bill Tompkins Memorial Lecture 1994*, 61 ARBITRATION 18 (1995).

153. See W. Michael Reisman, *Soft Law Instruments Should Have No Place in International Arbitration at the Inst. for Transnational Arbitration Acad. Council & Am. Soc’y of Int’l Law: Soft Law Symposium* (Apr. 9, 2008).

154. William W. Park, *National Law and Commercial Justice*, 63 TUL. L. REV. 647 (1989); William W. Park, *Neutrality, Predictability and Economic Cooperation*, 12 J. INT’L ARB. 99 (1995); William W. Park, *Why Courts Review Arbitral Awards*, in RECHT DER INTERNATIONALEN WIRTSCHAFT UND STREITERLEDIGUNG IM 21. JAHRHUNDERT: LIBER AMICORUM KARL-HEINZ BÖCKSTIEGEL 595 (Robert Briner et al. eds., 2001).

155. William W. Park, *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT’L 279 (2003); William W. Park, *Private Disputes and the Public Good*, 20 AM. U. INT’L L. REV. 903 (2005); William W. Park, *Procedural Default Rules Revisited*, in ARBITRATION INSIGHTS 360 (Julian D.M. Lew & Loukas A. Mistelis eds., 2007); William W. Park, *The Procedural Soft Law of International Arbitration*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

156. See JOHN RAWLS, A THEORY OF JUSTICE § 24, at 136 (1971). Rawls affirmed, inter alia, that to be just, rules should be uninformed by any existing litigation strategy, not created in function of what some might call the “ouch test,” which looks to see who gets hurt by a particular rule. On some matters the “veil of ignorance” already finds limited recognition in arbitration. For example, although different methods exist to calculate arbitrators’ fees (ICC looks to the amount in dispute, while AAA and LCIA base fees on time spent), no institution gives an arbitrator discretion to opt for one approach or the other (*ad valorem* or hourly) after seeing how the case develops.

157. Similar principles obtain with respect to the substantive law applied to the merits of the dispute, where most business managers seek predictability in normal commercial

Ethical soft law forms part of a more general phenomenon by which standards elaborated by professional associations serve to guide arbitral decisionmaking in matters related to evidence<sup>158</sup> and case management.<sup>159</sup> Built on arbitral lore memorialized in articles, treatises, and learned papers, these guidelines represent what might be called the “soft law” of arbitral procedure, in distinction to the firmer norms imposed by statutes and treaties.<sup>160</sup> Nothing prevents parties from agreeing to override the guidelines, which enter the arbitration only when such agreement proves impossible.

#### *F. Professional Guidelines*

Among the many professional guidelines on arbitrator comportment, two of the most influential include the IBA Guidelines<sup>161</sup> and the Code of Ethics issued jointly by the American Arbitration Association and the American Bar Association.<sup>162</sup> Whatever one’s views about the wisdom

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relations. As the late Dr. Francis Mann noted, “[N]o merchant of any experience would ever be prepared to submit to the unforeseeable consequences which arise from application of undefined and undefinable standards described as rules of a lex of unknown origin.” F.A. Mann, *Introduction II* to *LEX MERCATORIA AND ARBITRATION*, at xix, xxi (Thomas E. Carbonneau ed., 1990).

158. See IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, 2 *BUS. L. INT’L* 16, 17 (2000); see also Michael Bühler & Carroll Dorgan, *Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration—Novel or Tested Standards?*, 17 *J. INT’L ARB.* 3 (2000). The rules are available at [www.ibanet.org](http://www.ibanet.org).

159. The American College of Commercial Arbitrators published a compendium of “Best Practices” for business arbitration. *COLL. OF COMMERCIAL ARBITRATORS, GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION* (Curtis E. von Kann et al. eds., 2006); see also ICC COMM’N ON ARBITRATION, PUBL’N NO. 843, *TECHNIQUES FOR CONTROLLING TIME AND COST IN ARBITRATION* (2007), available at [http://www.iccwbo.org/uploaded/Files/TimeCost\\_E.pdf](http://www.iccwbo.org/uploaded/Files/TimeCost_E.pdf); UNCITRAL, *UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS* (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

160. For a recent survey of these nongovernmental initiatives, see WILLIAM W. PARK, *Three Studies in Change*, in *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 3, 45–65 (2006).

161. IBA GUIDELINES, *supra* note 13, Gen. Standard 2; see Markham Ball, *Probity Deconstructed—How Helpful, Really Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?*, 15 *WORLD ARB. & MEDIATION REP.* 333 (2004); Jan Paulsson, *Ethics and Codes of Conduct for a Multi-Disciplinary Institute*, 70 *ARBITRATION* 193, 198–99 (2004).

162. The 2004 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes represents a modification of an earlier code adopted in 1977. See generally Paul D. Friedland & John M. Townsend, *Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association*, *DISP. RESOL. J.*, Nov. 2003–Jan. 2004, at 8; Ben

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of particular rules, most informed observers recognize the rules' far reaching effects, the latter principally for domestic arbitration conducted within the United States and the former with respect to most international commercial arbitral proceedings. For want of anything better, they get pressed into service to fill the gaps left by overly vague institutional rules or lack of foresight by the parties' advisers.

*1. International Bar Association Guidelines*

Perhaps the most oft-cited of these standards can be found in the IBA Guidelines.<sup>163</sup> Rightly or wrongly, this list has entered the canon of sacred documents cited when an arbitrator's independence is contested. The general standards are both objective and subjective. According to the IBA Guidelines, arbitrators should decline appointment if they have doubts about their ability to be impartial or independent<sup>164</sup> or if justifiable doubts exist from a reasonable third person's perspective.<sup>165</sup>

In practice, the dominant test as elaborated in judicial and institutional decisions will be an objective one. Inevitably, challenges by parties will focus on arbitrators who have already discounted any self-doubts they might have. Arbitrators who consider themselves incapable of performing their duties with integrity will normally decline appointment or resign. It would be odd to hear an arbitrator say, "Please note that I'm probably biased. But let me know if you think otherwise."

By contrast, the IBA Guidelines set forth a more subjective standard for disclosure, requiring communication of facts or circumstances that may "in the eyes of the parties" give rise to doubts about impartiality or independence.<sup>166</sup>

A disclosure does not necessarily mean disqualification. Evaluation of the potential conflict must be made by the parties as well as whatever body will hear the challenge.<sup>167</sup> In such instances, the relevant test will

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H. Sheppard, Jr., *A New Era of Arbitrator Ethics for the United States*, 21 *ARB. INT'L* 91 (2005).

163. The IBA Guidelines on Conflicts of Interest should not be confused with the less controversial IBA Rules of Ethics for International Arbitrators. The latter include broad, and somewhat bland, admonitions about being competent, diligent, efficient, and remaining "free from bias." See IBA RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS R. 1, 2 (1987).

164. IBA GUIDELINES, *supra* note 13, Gen. Standard 2(a).

165. *Id.* Gen. Standard 2(b).

166. *Id.* Gen. Standard 3(1).

167. In cases of supervised arbitration under the rules of the AAA, ICC, or LCIA, an institutional challenge will usually be brought prior to any court action. See, for example, *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 *Lloyd's Rep.* 127 (C.A.) (Eng.), available at 2000 WL 571190, where following a mix-up with various versions of the chairman's curriculum vitae, a challenge was brought for failure to report a position on



almost inevitably be something along the lines of justifiable doubts in the mind of a reasonable person.

Excessive disclosure can cause as many problems as inadequate disclosure. If an overscrupulous conscience announces links that would not normally raise questions, this might cause parties to wonder whether there is more going on than meets the eye.

One of the most useful (albeit controversial) features of the IBA Guidelines lies in its enumeration of illustrative elements that create varied levels of arbitrator disclosure.<sup>168</sup> A “Red List” describes situations that give rise to justifiable doubts about an arbitrator’s impartiality. Some are nonwaivable (such as a financial interest in the outcome of the case), while others (such as a relationship with counsel) may be ignored by mutual consent. An “Orange List” covers scenarios (such as past service as counsel for a party) that the parties are deemed to have accepted if no objection is made after timely disclosure. Finally, a “Green List” enumerates cases (such as membership in the same professional organization) that require no disclosure.

## 2. *American Rules*

One frequently hears complaints about the “Americanization” of arbitration,<sup>169</sup> connoting aggressive litigation tactics that include hefty boxes of unmanageable exhibits, costly pretrial discovery, and disruptive objections to evidence.<sup>170</sup> One also notes the internationalization of

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the board of directors of a company that was in direct competition with the losing party in the arbitration. *Id.* at 130. An unsuccessful challenge before the ICC Court preceded an equally unfruitful attempt to have the award vacated in a judicial action at the arbitral seat in London. *Id.* at 138.

168. See IBA GUIDELINES, *supra* note 13, pt. II.

169. See e.g., Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69 (2003). This article forms part of a symposium issue, *The Americanization of International Dispute Resolution*, which includes contributions by Susan Karamanian, Elena Helmer, and Cesare Romano. The wider influence of American law has also been noted by Bernard Audit in *L’Américanisation du droit*, 45 ARCH. PHILOSOPHIE DU DROIT 7 (2001) (Fr.).

170. Not all American practices evoke disapproval, however. In a provocative article subtitled “Why civil law arbitrators apply common law procedures,” an eminent Zürich attorney studied the way some Continental lawyers can be reborn to an appreciation of Anglo-American litigation techniques such as cross-examination and document production. Markus Wirth, *Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil Law Schiedsrichter Common-Law-Verfahrensrecht anwenden?*, 1 ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [SCHIEDS VZ] [GERMAN ARB. J.] (2003).

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American dispute resolution practices, as reflected in greater use of written testimony and reasoned awards.<sup>171</sup>

Perhaps the most striking example of internationalization finds itself in the evolution of arbitral ethics. Traditionally, American practice presumed party-nominated arbitrators to be partisan, and thus permitted ex parte communication with their appointers.<sup>172</sup> Arbitrators nominated by one side were expected to be nonneutral unless explicitly agreed otherwise.<sup>173</sup>

Most arbitration conducted within the United States was brought into line with global standards requiring independence for all arbitrators. Under the 2004 joint AAA/ABA Code of Ethics, a party-nominated arbitrator may be nonneutral only if so provided by the parties' agreement, the arbitration rules, or applicable law.<sup>174</sup> The new attitude expressed in the Code was reinforced by changes in the American Arbitration Association's domestic commercial arbitration rules, effective July 2003, establishing a presumption of neutrality for all

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171. See Paul D. Friedland & Ank Santens, *The Internationalization of American Arbitration*, NEWS & NOTES FROM INST. FOR TRANSNAT'L ARB., Spring 2004, at 1. See generally David Branson, *American Party-Appointed Partisan Arbitrators—Not the Three Monkeys*, 30 U. DAYTON L. REV. 1 (2004); Friedland & Townsend, *supra* note 162; Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, DISP. RESOL. J., Feb.–Apr. 2004, at 10; Sheppard, *supra* note 162; Ben H. Sheppard, Jr., *A New Era of Arbitration Ethics: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*, NEWS & NOTES FROM INST. FOR TRANSNAT'L ARB., Spring 2004, at 1.

172. During the proceedings, arbitrators should not engage in ex parte communications about the case with counsel. Nevertheless, some institutional rules remain silent on the matter. Notably, the International Chamber of Commerce has shown itself reticent to publish an explicit prohibition. See YVES DERAÏNS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 131–32 (2d ed. 2005); see also W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 13.07, at 242 (3d ed. 2000) (seeming to acknowledge that a practice of ex parte communication might be agreed by the parties).

173. See CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VII (1977). For a critique of the practice, see Seth H. Lieberman, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye That Is "Nonneutral Neutrals"*, 5 CARDOZO J. CONFLICT RESOL. 215 (2004).

174. See AAA/ABA CODE OF ETHICS, *supra* note 16, preamble, Canon X; see generally Report to ABA House of Delegates, INT'L ARB. NEWS, Winter 2003/2004, at 15.

arbitrators.<sup>175</sup> These rules coexist along with idiosyncrasies of practice among particular institutions and states.<sup>176</sup>

Readers must be careful not to confuse the AAA/ABA Code of Ethics with other American guidelines,<sup>177</sup> including recently abandoned proposals from within the ABA for a “Disclosure Checklist.”<sup>178</sup> The risk in such guidelines, of course, is that an unhappy loser in an arbitration might take inspiration from the checklist as a roadmap for annulment motions. Like the mnemonic devices used by some administrative staff at arbitral institutions, checklists and “rules of thumb” should be seen as starting points for analysis rather than black letter destinations.<sup>179</sup>

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175. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, Rule 18 (applicable unless there has been agreement otherwise) prohibits parties from communicating ex parte with an arbitrator, except that parties may communicate with party-nominated (rather than presiding) arbitrators (i) to describe the nature of the controversy or (ii) to discuss selection of a presiding arbitrator. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R. 18 (Am. Arbitration Ass’n 2007). Under Rule 12(b), party-nominated arbitrators must meet general standards of impartiality and independence unless there has been agreement otherwise, as permitted by Rule 17(a)(iii). *Id.* R. 12(b).

176. See e.g., *Crédit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005) (involving the controversial California Ethical Standards for Neutral Arbitrators). In the case at bar, arising under the rules of the National Association of Securities Dealers, the California standards were found to be preempted by the 1934 Securities Exchange Act. *Id.* at 1121.

177. The College of Commercial Arbitrators has published useful commentary on the topic. See James H. Carter et al., *Appointment, Disclosures and Disqualification of Neutral Arbitrators*, in GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION, *supra* note 159, at 7, 7–26. Other thoughtful observations can be found in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 15, with contributions by Gerald Aksen (*The Tribunal’s Appointment*, Chapter 2), Andreas Lowenfeld (*The Party-Appointed Arbitrator*, Chapter 3), and Allan Philip (*The Duties of an Arbitrator*, Chapter 5).

178. Originally proposed in January 2008 by a subcommittee of the Arbitration Committee of the ABA Dispute Resolution Section, the draft “Best Practices for Meeting Disclosure Requirements” (often called simply the “Disclosure Checklist”) encountered considerable opposition from within both the ABA Section of International Law and the College of Commercial Arbitrators. ABA Section of Dispute Resolution, Best Practices for Meeting Disclosure Requirements Under the RUA and Similar Arbitrator Disclosure Standards (Jan. 10, 2008). In April 2009, the Council of the Dispute Resolution Section refused to approve the draft.

179. Mnemonic devices have occasionally been pressed into service. An acronym coined by a long forgotten Bostonian runs through five elements for arbitrator disqualification, asking whether a financial or personal relationship can be characterized as (i) substantial, (ii) continuing, (iii) recent, (iv) obvious, and/or (v) direct. The initial letters of each word spell *SCROD*, a name found on menus at New England restaurants to describe a white fish in the cod or haddock family, served split and deboned. One might puzzle over the attribute “obvious,” given that the temptation to defect from duty remains problematic even if occasioned by an otherwise hidden relationship.

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### G. Synthesizing Legal Norms

Decisions of national courts, arbitral institutions, and arbitrators (in the case of ICSID proceedings) all contribute to the elaboration of what might be called a jurisprudence of ethical standards. Those who must rule on disqualification motions will inevitably seek some understanding of what others have done in analogous cases. Although the decisions do not constitute binding precedent in the sense of many national legal systems, they do provide an indication of what others consider the right approach, and as such contribute to transnational ethical norms.

Admittedly, the practice of looking to different sources of authority will not be satisfying to those who seek a hierarchy of clear authority within a single legal jurisdiction. For better or for worse, however, no such unified judicial system governs the world of international economic relations.<sup>180</sup> In the world as we find it, an approach taking into consideration relevant national and administrative practice will likely provide greater predictability and fairness than allowing each challenge decision to be fashioned from whole cloth.

Grounds for challenge often present themselves with slight but relevant factual variations. For example, conflicts decisions commonly address an arbitrator's relationship with an institution or company that, in turn, has links to one of the parties in the case.<sup>181</sup> The potential for

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180. The closest approximation to a supreme court for international law might be found in the International Court of Justice (ICJ), a body with power to decide cases only when states accept jurisdiction through treaty or declaration. See Statute of the International Court of Justice arts. 34–36, June 26, 1945, 59 Stat. 1055. In diplomatic protection before the ICJ, foreign investors remain captive to the political predisposition of their home countries. Even when a state agrees to sponsor a claim, the Court itself may find the connection between the investor and the state insufficient to justify standing. See e.g., *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain, Second Phase)*, 1970 I.C.J. 3 (Feb. 5), available at 1970 WL 1 (I.C.J.) (forbidding Belgium from espousing claim of Belgian shareholders in Canadian company). For a rare case in which the ICJ did hear an investment dispute, see *Eletronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20), 28 I.L.M. 1109 (1989), available at <http://www.icj-cij.org/docket/files/76/6707.pdf> (finding no host state liability when Italy requisitioned American-owned plant to prevent liquidation). See generally F.A. Mann, *Foreign Investment in the International Court of Justice*, 86 AM. J. INT'L L. 92 (1992).

181. In this respect, several challenges have been rejected with respect to an arbitrator's membership on the board of a Swiss bank that managed pension funds and whose portfolio contained shares of one of the parties. See *Suez v. Argentina*, ICSID Case No. ARB/03/17 (claimant Suez, Aguas de Barcelona, and InterAguas Servicios); *Suez v. Argentina*, ICSID Case No. ARB/03/19 (claimant Suez, Vivendi, and Aguas de Barcelona); *Electricidad Argentina S.A. v. Argentina*, ICSID Case No. ARB/03/22 (claimant Electricidad Argentina and EDFI); *EDF International S.A. v. Argentina*, ICSID Case No. ARB/03/23 (claimant EDF International S.A., SAUR International S.A. & León Participaciones Argentinas S.A.).

taint will depend on the specific nature and intensity of the relationship, whether as director, owner, counsel, or customer.<sup>182</sup>

In an effort to guide both arbitrators and litigants, at least one arbitral institution has published sanitized versions of its challenge decisions. A compendium of challenges under the rules of the LCIA groups the various grounds for disqualification, including the two general rubrics of impartiality or independence, as well as the British formulation of a “duty to act fairly between the parties.”

## V. THREE RECURRING PROBLEMS

### A. *Trivial and “De Minimis” Contacts*

On a planet where butterflies flap wings in Africa so as to cause Canadian snowstorms, clever minds can present scenarios under which most individuals might be deemed less than virgin in attitude or predisposition. Experiences or relationships might create distant but nevertheless worrisome relationships with litigants. Some chance statement by the arbitrator might raise the prospect of troubling predilections about controverted issues in the arbitration.

If a dispute resolution system aims to be useful in a professionally and economically interdependent world, some principles of proportionality and reasonable nexus must operate to triage between genuine and spurious challenges.<sup>183</sup> Analysis does not end with the discovery of some remote link between arbitrator and dispute. If assessments of arbitrator challenges were entirely subjective, ethical standards would become irrelevant to any useful ethical canons.

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182. In a dispute implicating a manufacturer of household appliances, an arbitrator who owns a dishwasher made by the manufacturer would present a very different position from that of an arbitrator who served as corporate secretary. An arbitrator who serves on the board of a company with 100,000 customers (one of whom has a link with an affiliate of the respondent) would pose different concerns from those obtaining if the respondent’s affiliate was the principal customer.

183. In this connection, one remembers the delightful tirade in Molière’s *Don Juan* when the valet Sganarelle proves the inevitability of his master’s damnation by invoking a series of causal links, each plausible on its own, but together reaching a conclusion in no way justified by the reasoning. The bird clinging to a branch reminded Sganarelle of the duty to cling to moral precepts, and then led him through sky, sea, ships, earth, and beasts to the conclusion that his miscreant philandering boss was lost forever, which in any event was the place that the scandalized wanted to reach from the beginning. MOLIÈRE, *DON JUAN* act 5, sc. 2.

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Notions of de minimis contacts, related to the proximity or intensity of the troublesome relationship, have been called into service to evaluate an arbitrator's allegedly disqualifying links with one side.<sup>184</sup> In this connection, the IBA Guidelines attempt to provide concrete criteria for judging arbitrator relationships and predispositions. General Standard 2 of the Guidelines obliges arbitrators to resign if they know of facts or circumstances which, from a reasonable person's point of view, give rise to "justifiable doubts" about the arbitrators' impartiality or independence.<sup>185</sup> In defining justifiable doubts, Standard 2(d) speaks of a "significant" economic or personal interest, not "any" interest.<sup>186</sup>

Looking to national law for analogies, a de minimis standard can also be found in Canon 2 of the American Bar Association 2007 Model Code of Judicial Conduct, which requires a judge to perform the duties of judicial office impartially, competently, and diligently. Following this general Canon, the ABA Model Code provides as follows:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

.....

- (2) The judge knows that the judge . . . has more than a de minimis interest that could be substantially affected by the proceeding.<sup>187</sup>

The ABA Model Code of Judicial Conduct defines de minimis to mean "an insignificant interest that could not raise a reasonable question

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184. See the concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), where Justice White considered it enough that the challenged arbitrator had done "more than trivial business" with one of the parties. *Id.* at 152 (White, J., concurring). This test was adopted recently by the Second Circuit Court of Appeals in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007). See also decisions dismissing the challenges in ICSID cases ARB/03/17 (Suez, Aguas de Barcelona, and Interagua Servicios v. Argentina) and ARB/03/19 (Suez, Vivendi, and Aguas de Barcelona v. Argentina). In their decision of May 12, 2008, the remaining arbitrators identified four criteria relevant to their colleague's links with the party that had nominated her: (i) proximity of the connections; (ii) intensity of interaction; (iii) dependence on the party by virtue of benefits said to have been conferred; and (iv) materiality of any benefits allegedly accruing to the arbitrator. The challenge was based on the challenged arbitrator's position as a director of a Swiss bank that apparently held portfolio investments in small amounts of the claimant companies.

185. Standard 2(a) speaks of the arbitrator's subjective "doubts" while standard 2(b) refers to an objective test based on a "reasonable third person's point of view." IBA GUIDELINES, *supra* note 13, Gen. Standards 2(a), 2(b).

186. A comment to General Standard 6 discussing troublesome relationships throws further light on the overlap of arbitrators' interests with those of their law firm. Explanation 6(a) states that "the activities of the arbitrator's firm should not automatically constitute a conflict of interest." Rather, each firm activity must be considered in the individual case. IBA GUIDELINES, *supra* note 13, Gen. Standard 6 cmt. (a).

187. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

regarding the judge's impartiality."<sup>188</sup> It also defines "economic interest" to mean ownership "of more than a de minimis legal or equitable interest."<sup>189</sup> In applying this principle, the ABA Model Code of Judicial Conduct states that an economic interest does not include an interest in "a mutual or common investment fund."<sup>190</sup>

Other jurisdictions with developed arbitration laws take a similar perspective. In *ATT v. Saudi Cable Co.*, the English Court of Appeal had to consider the effect of an arbitrator's ownership of shares in a telecommunications company in competition with one of the parties. Any benefit from the arbitration's outcome that could indirectly accrue to the company whose shares were owned by the arbitrator was deemed "of such minimal benefit to [the arbitrator]" that the court held it unreasonable to conclude that the arbitrator's share ownership would be a relevant influence.<sup>191</sup> An insignificant ownership interest in a company will not be cause for disqualification.

The costs of an absolutist perspective will often outweigh any advantages. If ethical standards did not include some notion of triviality, it would be unduly easy to derail arbitration by asserting a tenuous connection between arbitrators and facts that might arguably have an effect on their decisions. A "no-link-too-small" theory would permit removal of arbitrators simply because they occasionally socialized with colleagues from the host state. The damage to the stability and efficiency of the arbitral process would affect all those who depend on it to provide relatively fair and neutral adjudication.

### *B. Saying Too Much Too Early*

Arbitrators may be challenged not just for pecuniary or personal links with one side to the dispute, but also when their conduct creates an objective impression of having prejudged a case. For example, a procedural order might express conclusions about a matter that has not yet been the subject of evidentiary hearings, such as reference to ownership of contested property.

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188. *Id.* Terminology.

189. *Id.*

190. *Id.*

191. *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 Lloyd's Rep. 127, ¶ 43(c) (C.A.) (Eng.), available at 2000 WL 571190.

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Whether or not such expressions of opinion taint the arbitrator depends very much on the facts and circumstances of each case. The context of the order might make clear that ownership was presumed merely for the sake of determining whether to grant interim relief to prevent assets from being diverted. The offending language might be tentative and prima facie with no intention of depriving either side of a full and fair hearing on the matter, and inserted in an order with qualifying language such as “if so decided by the Tribunal” or “on the assumption that Claimant is ultimately found to be the owner.”

Prejudgment causes problems under both the statutory provisions of developed legal systems and the rules of most arbitral institutions. The interaction of these rules might be illustrated by a hypothetical arbitration in London. The English Arbitration Act establishes mandatory norms that an arbitral tribunal shall “act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.”<sup>192</sup> A rich English case law on “apparent bias” makes clear that justice must not only be done, but must be seen to be done.<sup>193</sup> Among the tests proposed by judicial and scholarly pronouncements, one that commends itself looks to see whether the circumstances of the case would lead a fair-minded and informed observer to conclude that there was a real danger that the tribunal was biased.

Institutional rules often applied in London follow similar lines. The LCIA Rules provide that an arbitrator may be considered unfit if he or she “does not act fairly and impartially as between the parties,”<sup>194</sup> and that an arbitrator may be challenged if “circumstances exist that give rise to justifiable doubts as to his impartiality or independence.”<sup>195</sup> Bias

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192. Arbitration Act, 1996, c. 23 § 33(1) (Eng.).

193. Cases include *R v. Sussex Justices*, [1924] 1 K.B. 256; *Locabail Ltd. v. Bayfield Properties Ltd.*, [2000] 1 All E.R. 65; *R v. Gough*, [1993] A.C. 646 (H.L.); *In re Medicaments & Related Classes of Goods (No. 2)*, [2001] 1 W.L.R. 700 (C.A.); *Porter v. Magill*, [2002] 2 A.C. 357 (H.L.); *ASM Shipping Ltd. v. TTMI Ltd.*, [2005] EWHC (Comm) 2238; *National Assembly for Wales v. Condon*, [2006] EWCA (Civ) 1573; *Hagop Ardahalian v. Unifert International S.A., (The “Elisssar”)*, [1984] 1 Lloyd’s Rep. 206 (Q.B.); *AWG Group Ltd. v. Morrison*, [2006] EWCA (Civ) 6; *Modern Engineering (Bristol) Ltd. v. C. Miskin & Son Ltd.*, [1981] 1 Lloyd’s Rep. 135 (C.A.); *R v. Bow Street Metropolitan Stipendiary Magistrate, Pinochet No. 2*, [2000] 1 A.C. 199 (H.L.); *Gillies v. Secretary of State for Work & Pensions*, [2006] 1 W.L.R. 781 (H.L.); and *Flaherty v. National Greyhound Racing Club*, [2005] EWCA (Civ) 1117. See also discussion *supra* Part II.A.

194. LCIA Arbitration Rules, *supra* note 130, art. 10.2.

195. *Id.* art. 10.3.



under that text includes prejudgment of an issue, in the sense of deciding without giving each side an opportunity to present its case.<sup>196</sup>

### *C. Barristers*

#### *1. Shared Chambers*

To the extent London remains one of the great centers for private dispute resolution, the role of British barristers takes on a special significance for international arbitration. In at least one investor-state case, an arbitral tribunal itself held that a barrister should not appear as counsel before another member of his chambers.<sup>197</sup> Although free to select its lawyers prior to constitution of the arbitral tribunal, the Respondent was not entitled to change the composition of its legal team in a way that might imperil the tribunal's legitimacy.<sup>198</sup> The tribunal found no absolute bar to barristers from the same chambers being involved as counsel and arbitrator in the same case, but found equally no absolute rule to the opposite effect. Consequently, the justifiability of an apprehension of bias would depend upon "all relevant circumstances."<sup>199</sup>

Barristers, the arm of the legal profession most often charged with actually arguing cases, traditionally practice from "chambers" that bear both similarities and differences when compared with law firms in general. The chambers include shared office space and administrative assistants styled as clerks, as well as the normal amenities of law practice such as word processors, fax machines, and photocopiers. Younger lawyers receive guidance and referrals from more senior members.

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196. Sometimes it is said that a party-nominated arbitrator should possess maximum predisposition and minimum bias. Although the value of this unduly cute saying remains doubtful, it is true that for international arbitration, the party-nominee often plays a special role in assisting the presiding arbitrator to understand arguments that may otherwise be less accessible, due to differences in legal culture.

197. *Hrvatska Elektroprivreda, d.d. v. Slovenia*, ICSID Case No. ARB/05/24 (2008), (implicating claims by a Croatian entity before a tribunal composed of David Williams (Chairman), Jan Paulsson, and Charles Brower). It was determined that David Milton (appointed co-counsel of the Respondent) could not participate further in the case because Messrs. Milton and Williams were both members of Essex Court Chambers.

198. Article 56 of the ICSID Convention stresses the stability of properly constituted tribunals, providing that a tribunal's composition shall remain unchanged except for death, incapacity, or resignation. ICSID Convention, *supra* note 29, art. 56. The continued appearance of Mr. Milton might have undermined the legitimacy of the tribunal by giving an appearance of impropriety, or by requiring resignation of Mr. Williams, the tribunal's Chairman.

199. *Hrvatska Elektroprivreda*, *supra* note 197, Decision on Jurisdiction ¶ 31 (2008).

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Most barristers seem to reject application of the conflict-of-interest rules that would normally be relevant to practice within a law firm. Considering themselves independent and self-employed, sharing expenses but not revenues,<sup>200</sup> barristers see no reason why two members of the same chambers should refrain from acting for opposite sides of an arbitration, or why one should not sit as arbitrator in a case where another serves as advocate.

Not all are convinced, however, that the integrity of proceedings remains uncompromised when barristers from one set of chambers serve as arbitrator and counsel in the same arbitration. Shared profits are not the only type of professional relationships that can create potential conflicts. Senior barristers often have significant influence on the progress of junior colleagues' careers. Moreover, London chambers increasingly brand themselves as specialists in particular fields, with senior "clerks" taking on marketing roles for the chambers, sometimes traveling to stimulate collective business. Moreover, a barrister's success means an enhanced reputation, which in turn reflects on the chambers as a whole.<sup>201</sup>

In response to doubts about the ethics of their practice, some barristers suggest that outsiders just do not understand the system, characterizing the critiques as naïve. Like a Paris waiter impugning a tourist's ability to speak French in order to distract him from insisting on the correct change, the critique aims to camouflage what is at stake. Often, however, outsiders do understand the mechanics of chambers. They simply evaluate the dangers differently.

## 2. *International Bar Association Guidelines*

The position under English law is what it is.<sup>202</sup> This does not prevent justifiable doubts from arising among parties to international arbitration

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200. See, e.g., R. Pillai, *Independence and Impartiality: The Situation of English Barristers Acting in Arbitrations*, TRANSNAT'L DISP. MGMT., July 2008, <http://www.transnational-dispute-management.com/> (subscription only); David Branson, *Note on Hrvatska Elektroprivreda v. Republic of Slovenia*, 25 ARB. INT'L (forthcoming 2009).

201. Skeptics also note that salaried legal associates in the United States and other countries assume the conflicts of their firm affiliation even without sharing in profits.

202. At least one English case has rejected a challenge to an arbitrator who shares chambers with a barrister serving as advocate in the same case. See *Laker Airways Inc. v. FLS Aerospace Ltd.*, [1999] 2 Lloyd's Rep. 45 (Q.B.) (judgment of Mr. Rix., as he then was). A more nuanced view, however, may be evolving. See e.g., *Smith v. Kvaerner Cementation Foundations Ltd.*, [2006] EWCA (Civ) 242, [2006] 3 All E.R. 593 (C.A.) (involving litigation for personal injuries sustained in a road accident). Both sides' barristers and the "Recorder" (legal officer acting as magistrate within a given locality) were from the same chambers. On appeal from a judgment against the claimant Smith, the Court of Appeal expressed concern that the claimant's barrister had not properly explained to his client the complexity of the matter. The judgment was reversed, with Mr. Smith's waiver found to be ineffective.

concerning independence as between two barristers of the same chambers in a single proceeding. Under the IBA Guidelines, the “Orange List” Section 3.3 includes relationships “between an arbitrator and another arbitrator or counsel.”<sup>203</sup> As mentioned earlier, this nonexhaustive iteration of various fact patterns covers common scenarios that, depending on the circumstances of each case, might give rise to justifiable doubts as to arbitrator impartiality or independence in the eyes of the parties. The arbitrator thus has a duty to disclose problematic facts, which the parties are deemed to have accepted if no timely objection is made following disclosure.<sup>204</sup>

The Orange List’s broad category of “[r]elationship[s] between an arbitrator and another arbitrator or counsel” is amplified by Section 3.3.1, which includes a situation where “the arbitrator and another arbitrator are lawyers in the same law firm.”<sup>205</sup> This is supplemented in Section 3.3.3 by a further enumeration of troublesome relationships, to include an arbitrator who was “within the past three years a partner or colleague of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.”<sup>206</sup>

A special provision covers barristers, however. The Orange List, a nonexhaustive enumeration of fact patterns that “may” give rise to justified doubts, includes the following relationship: “The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers’ chambers.”<sup>207</sup> The IBA Guidelines’ inclusion of this category was not without debate or objection, and became the subject of a discussion in the “Background” report issued by the IBA Working Group.<sup>208</sup>

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203. IBA GUIDELINES *supra* note 13, pt. II, § 3.3.

204. *Id.* Gen. Standard 4(a).

205. *Id.* pt. II, § 3.3.1.

206. *Id.* pt. II, § 3.3.3.

207. *Id.* pt. II, § 3.3.2.

208. Otto L.O. de Witt Wijnen et al., *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT’L 433, 455–56 (2004), available at <http://www.ibanet.org/images/downloads/Background%20Information.pdf>. The IBA Working Group notes the distinction between the operation of law firms and barristers chambers (including differences among barristers in different jurisdictions) but then adds: “[I]n light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers’ chambers should be treated the same way as law firms.” *Id.* at 455.

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### 3. Collegiality and the “Outside” Arbitrator

When barristers from the same chambers oppose each other as advocates, each wants to show special cleverness. Competitive juices work against inappropriate behavior. Incentives to deviate from duty normally remain outweighed by the goal of proving oneself the better gladiator. Similar considerations reduce risks when one barrister serves as arbitrator while another (from the same chambers) acts as counsel.

Different factors operate, however, when two barristers from the same chambers sit together as arbitrators and exclude meaningful participation by the third member of the tribunal.<sup>209</sup> Their bilateral deliberations remain outside the reach of party scrutiny. The junior of the two barristers might draft the award for the senior to present as “our award” to the third arbitrator, followed perhaps by a perfunctory conference call replacing genuine deliberations.

When a same-chambers relationship is apparent from the start, the litigants will have renounced any objection to composition of the tribunal as such. This does not mean, however, that they waive integrity and good faith in the tribunal’s internal communications, which form an essential part of due process. Parties that stipulate three arbitrators have a right to expect that all will be allowed to participate in discussions.

Exclusion of the third arbitrator derives not from any inherent wickedness in the two affiliated barristers, but from the moral hazard implicit in any hidden in-group complicity and facilitated by the confidential nature of deliberations. Enlightened English arbitrators will remain concerned to avoid the appearance of impropriety in dealings with each other. Nevertheless, when busy barristers have the opportunity to save time by deciding as a twosome, the temptation exists that a “short-on-time” card will be played to justify procedural irregularity, much as a street thief might invoke the “short-on-cash” defense to explain bag snatching.<sup>210</sup>

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209. The situation is more troubling in some types of disputes than in others. For example, in “Bermuda Form” insurance arbitrations, the insurers invariably appoint a senior barrister, and often insist on another barrister as chairman. The dispute resolution clauses in such cases represent a compromise between the American policyholders and the non-American insurance companies, with London as the situs and New York law as applicable to the merits of contract interpretation. The insurers’ reasoning runs that an English barrister is needed to understand how to conduct a London proceeding. The logic is not self-evident, given that the English Arbitration Act imposes no preference whatsoever for English rules on procedural and evidential matters, but leaves them to the discretion of the tribunal and the parties. Arbitration Act, 1996, c. 23, § 34 (Eng.). On “Bermuda Form” arbitration, see generally RICHARD JACOBS ET AL., *LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION: THE BERMUDA FORM* (2004).

210. On good practice in arbitral deliberations, see generally Yves Derains, *La pratique du délibéré arbitral*, in *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE*

## VI. INTELLECTUAL INTEGRITY

A. *Baby Splitting*

Even if not biased or corrupt, arbitrators may lack *intellectual* integrity if they fail to decide disputes according to the mission conferred upon them by the parties. If evidence indicates that a clearly right answer to a dispute does exist, arbitrators deviate from duty if they render compromise decisions without being so authorized by the parties.

In this connection, one sometimes hears complaints of “splitting the baby,” a reference to awards not justified by facts or law.<sup>211</sup> One strain in American legal literature suggests that arbitrators are pushed toward unprincipled decisions in order to attract business through reappointment.<sup>212</sup>

Although some arbitrators might behave that way, most remain puzzled by assertions that “incentives” promote improper comportment. No empirical data permits a firm conclusion on the matter, at least not from variations in records of “win rates” to the extent they can be determined<sup>213</sup> or the size of damages in arbitration as opposed to court

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& DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 221 (2005). M. Derains distinguishes between harmonious and pathological deliberations. In the latter situation he suggests that a first draft of the award is to be prepared by the chairman alone, and presented at a fixed meeting for deliberations. *Id.* at 229, ¶ 12. Of course, a different practice may obtain when informal discussions among the tribunal members lead to a consensus that the merits favor one side or the other, or when issues can easily be parceled for drafting after general agreement has been reached. All three arbitrators may agree that no credible evidence supports the claim, or that one arbitrator has expertise that can be pressed into service in drafting an award along lines previously accepted by all.

211. The imagery of baby-splitting seems to originate in the Biblical child custody dispute decided in ancient Jerusalem by King Solomon. When one woman accused another of stealing her baby, the King called for a sword so the child might be divided in two, with one half for each woman. Of course, the metaphor hides the character of Solomon’s decision as an *interim* award, followed by grant of custody to the real mother whose compassion led to abandonment of her claim in hopes of saving her son. 1 *Kings* 3:23–28.

212. See e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 127–28 (2008) (asserting that courts and juries are “more likely to adhere to the law and less likely than arbitrators to ‘split the difference’ between the two sides thereby lowering damages” (quoting *Armendariz v. Foundation Health Psychare Services*, 6 P.3d 669, 693 (Cal. 2000))); see also Alon Klement & Kvika Neeman, *Does Private Selection Improve the Accuracy of Arbitrators’ Decisions* (Mar. 28, 2009) (workshop paper, on file with author).

213. A claimant awarded \$100 on a \$5 million claim “wins” in the sense of receiving something. However, the respondent would likely be the happier of the two parties. The distinction between rates of success in proving liability and the amounts of awards is discussed more fully in Eisenberg & Hill, *infra* note 214.

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litigation.<sup>214</sup> Moreover, existing studies focus on employment and consumer controversies,<sup>215</sup> which present concerns different from those present in business-to-business cases.<sup>216</sup>

As mentioned earlier, the contention that arbitrators render sloppy decisions with the hope of greater gain for themselves runs counter to logic as well as evidence, at least for complex international cases amongst sophisticated parties. Successful arbitrators gain reputations by rendering awards that reflect fidelity to the parties' shared ex ante expectations, establishing track records for understanding difficult factual and legal matrices. Moreover, arbitrators sitting on three-member tribunals have far more to gain from demonstrating intellectual integrity to each other (thus enhancing positive references for future cases) than in urging disregard of the right result.<sup>217</sup>

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214. See Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, looking at state and federal court trials as compared with AAA arbitrations. In noncivil rights disputes, higher paid employees (earning over \$60,000 per year) generally prevailed at greater rates (64%) in arbitration than in state court (56%). For lower paid employees the win rate was 39%. However, the size of the mean award was greater in court cases, at \$462,000 for courts compared with \$211,000 for higher paid employees in arbitration and \$30,000 for lower paid employees in arbitration. Looking to the median (rather than mean) award, the higher paid employees actually received more in arbitration (\$94,000) than in court litigation (\$68,000). *Id.*; see William M. Howard, *Arbitrating Claims of Employment Discrimination, What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.–Dec. 1995, at 40; David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78 (2005); Adriaan Lanni, Case Note, *Protecting Public Rights in Private Arbitration*, 107 YALE L.J. 1157 (1998).

215. Yet another category to consider would be “grievance” cases arising pursuant to collective bargaining agreements in the United States, often called “labor union” arbitration. Some colleagues have suggested to the Author privately that arbitrators in “grievance” cases sometimes endorse untruthful results as a component of enhancing industrial cooperation and goodwill between company and union. In that context, the arbitrator’s role seems to include both a truth-seeking and a peacemaking function.

216. It may be that obtaining legal counsel for court cases precludes the less wealthy from commencing litigation except when attorneys will take matters on a contingency fee. More significantly perhaps, civil juries might be unduly sympathetic to the “little guy” (consumer or employee) in a battle against the “big guy” (manufacturer, bank, or boss). In hearing a lender’s claims against a borrower, it would not be surprising if the jury included individuals who themselves had “run-ins” with banks or brokers related to items such as home mortgages, car loans, or pension funds. Although not immune from such emotions, the arbitrators as professional decisionmakers might tend to decide more in tune with the evidence. If so, court damages might be too high rather than arbitral damages too low. Finally, it may be that the legal cost of going to court (which would arguably be greater than for arbitration, at least in the United States) imposes a certain selection on the cases that are actually pushed to trial, with the employee less likely to find an attorney willing to pursue small or doubtful claims on a contingency basis.

217. Any “horse trading” on a three-member tribunal will usually occur as accommodation on issues as to which reasonable arbitrators might differ. In a construction case, for example, one arbitrator might see the evidence of defective workmanship in the turbine blades, while another might not. The first arbitrator might agree to reflect more on the

### B. Amiable Composition

In some circumstances, of course, the parties may in essence authorize compromise by empowering the arbitrator to depart from the terms of the contract or the strict rigors of otherwise applicable law. French law has long recognized the role of an arbitrator authorized to act as an “*amiable compositeur*,” sometimes referred to as *amiable composition*, to describe the process rather than the person.<sup>218</sup> Such power may be granted explicitly by contract,<sup>219</sup> or through incorporation by reference to institutional rules such as those of the International Chamber of Commerce.<sup>220</sup>

The arbitrator authorized by the parties to act as *amiable compositeur* may disregard or temper rules of law whose strict applications would violate equity under the circumstances.<sup>221</sup> Examples include adjustment of payment date due to substantial completion of construction projects, price changes due to alternation in the fundamental economic balance between the parties, proportionality for liquidated damages, adjustment of contract terms in the event of unexpected inflation or exchange rate modification, and extension of statutes of limitation.<sup>222</sup>

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turbine blades, while asking his colleagues to think again about her conclusions on the quality of the cement mix. Such give-and-take represents no more than an attempt to reach consensus on complex matters, thus permitting the type of unanimous award that more easily withstands potential challenge.

218. See Nouveau code de procédure civile [N.C.P.C.] art. 1474 (Fr.), translated in THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH (Christian Dodd trans., 2005) [hereinafter N.C.P.C.], applicable in purely domestic arbitrations, and N.C.P.C. art. 1497, applicable in international cases, defined to include arbitrations that “implicate the interests of international commerce.” N.C.P.C. art. 1492 provides, “Un arbitrage qui met en cause des intérêts du commerce international.” *Id.* art. 1492.

219. For arbitration outside France, the role of *amiable compositeur* conferred by contract may assume less precise contours than those provided under French law, a bit like the way “due process” has come to be used in transborder arbitration with a meaning that does not necessarily coincide with its significance in the United States Constitution.

220. Article 17(3) of the ICC Rules allows arbitrators to assume the powers of *amiable compositeur* only if agreed by the parties. ICC RULES, *supra* note 43, art. 17(3).

221. See generally ERIC LOQUIN, L’AMIABLE COMPOSITION EN DROIT COMPARE ET INTERNATIONAL: CONTRIBUTION A L’ETUDE DU NON-DROIT DANS L’ARBITRAGE COMMERCIAL (1980) (Fr.) (proposing in the title an interesting juxtaposition by the use of “non-droit” (nonlaw) after the colon and “droit comparé” (comparative law) before); see also CRAIG, PARK & PAULSSON, *supra* note 172, § 8.05, at 110–14; JEAN-LOUIS DELVOLVÉ ET AL., FRENCH ARBITRATION LAW AND PRACTICE §§ 276–295, at 151–61 (2003).

222. For an empirical study of decisions *ex aequo et bono* (as discussed below, a close cousin or even sister to *amiable composition*), see Martim Della Valle, Decisões por Equidade na Arbitragem Comercial Internacional ch. 8, 372–402 (May 2009) (doctoral thesis, University of São Paulo) (copy on file with author), translated in ON DECISIONS

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In stipulating to *amiable composition*, parties pursue a different sort of truth from what would otherwise be sought by those deciding the dispute.<sup>223</sup> Rather than aiming at legal accuracy, the arbitrators reach toward general notions of “right” encrusted with emotional overtones and sometimes in tension with court decisions, statutes, or strict contract terms.<sup>224</sup>

A longstanding debate surrounds whether *amiable composition* amounts to the same thing as decisionmaking *ex aequo et bono*, according to the “right and good.”<sup>225</sup> Although the terms are often used interchangeably, the notion of *amiable composition* may connote a broader range of options. Arbitrators deciding in *amiable composition* could go directly to their preferred solution without first asking whether the applicable law produces a clearly unfair result. In the alternative, they could start with a national law and then depart, if necessary, to achieve the “right” result. The latter approach defines *amiable composition* by a negative, in that the arbitrators are *not* required to apply rules of law. By contrast, the former path corresponds to *ex aequo et bono* in taking shape in a more positive way, beginning and ending with the arbitrators’ private sense of justice.<sup>226</sup>

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EX AEQUO ET BONO IN INTERNATIONAL COMMERCIAL ARBITRATION ch. 8, at 188–21 (2009).

223. Some commentators suggest that *amiable composition* would permit avoidance of what they term “technical legal constraints” in order to reach “conclusions that are fair and just.” See WELLS & AHMED, *supra* note 85, at 294. One wonders from whose perspective (investors or host states) the “fair and just” label would be applied.

224. Only in a very limited sense does *amiable composition* overlap notions of public policy. Although policy serves as a defense to contract claims, its function lies not in doing justice but in making sure a contract is not enforced in a way that violates the forum’s most basic notions of justice and morality. Public policy has long been seen as an “unruly horse” in that once astride the animal, we never know where it will carry us. See Richardson v. Mellish (1824) 2 Bing. 229, 252, in which one Captain Richardson sued for reinstatement as master of the ship *Minerva*, which respondent appears to have given to his nephew, allegedly contravening a policy of that day against selling command of important vessels.

225. ICC Rules Article 17(3) mentions both the role of an *amiable compositeur* and *ex aequo et bono* in the same sentence, speaking of a tribunal that shall “assume the powers of an *amiable compositeur*” or “decide *ex aequo et bono*.” ICC RULES, *supra* note 43, art. 17(3). The French version follows a similar structure: “Le tribunal arbitral statue en amiable compositeur ou décide *ex aequo et bono*.” In this connection, Article 17 mentions both “*amiable compositeur*” and “*ex aequo et bono*” in the same sentence, speaking of a tribunal that shall “assume the powers of an *amiable compositeur*” or “decide *ex aequo et bono*.” *Id.* The French version follows a similar structure: “Le tribunal arbitral statue en amiable compositeur ou décide *ex aequo et bono*.” This construction seems to leave open more than one reading. In some instances, “or” joins distinct notions (“arbitrators may decide according to law or according to equity”), while on other occasions, “or” simply suggests slight variations on roughly the same theme (“citizens may worship according to the dictates of their personal faith or belief system”).

226. A slightly different perspective is taken in PHILIPPE FOUCHARD ET AL., TRAITÉ DE L’ARBITRAGE COMMERCIAL INTERNATIONAL § 1502, at 836–37 (1996). The authors



Of course, arbitrators can very well reach an equitable result by applying applicable legal norms. In such instances there is no need to reinvent the wheel by seeking some novel “nonlaw” solution to the parties’ problem.<sup>227</sup>

### C. Creeping Legalism

Ironically, a parallel critique increasingly presents itself in connection with arbitrators who allegedly show too much rigidity in their decisionmaking. Mediation proponents often disparage arbitration as burdened with undue formality, suggesting that the arbitral process has fallen prey to “creeping legalism.”<sup>228</sup>

Sometimes, of course, the critique will be justified. Few argue against the search for better ways to balance fairness and efficiency, or suggest that corporate managers should learn to relish the legal bills and waste of time on unnecessary litigation. It is usually better to give peace a chance before starting litigation, and often wise to avoid costly “scorched earth” practices that have become legendary in American courts.

On occasion, however, the critique forgets that impartial arbitrators must establish the facts and ascertain the law by weighing evidence and listening to argument. Arbitration aims at a binding result, as close as possible to the shared *ex ante* expectations memorialized in the relevant

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seem to admit the negative manner for defining *amiable composition*, and the option either to proceed directly to justice or first to consider the applicable law. Nevertheless, they suggest that such a nuance lacks significance (“une telle distinction . . . paraît artificielle”) because the arbitrators can always do what they think justice requires.

227. See MATTHIEU DE BOISSÉSON, *LE DROIT FRANÇAIS DE L’ARBITRAGE* § 371, at 315 (1990) (suggesting that equity remains the goal (“le but”) not the means (“[le] moyen”) of *amiable composition*).

228. In this connection, one notes the discussion of what “users” want from international arbitration, a topic discussed in the CPR-sponsored International Dispute Negotiation (IDN) Podcast of November 21, 2008, conducted by Michael McIlwrath, Senior Counsel, Litigation for GE Infrastructure, Oil & Gas, based in Florence, Italy. Mr. McIlwrath interviewed Mr. Volker Mahnken, senior counsel of Siemens A.G., with respect to the article that the latter co-authored with Messrs. Paul Hoebeck and Max Kroebke called *Time for Woolf Reforms in International Construction Arbitration*, 11 INT’L ARB. L. REV. 84, 84–99 (2008). The authors suggest some equivalent of the 1999 reform of civil procedure in England and Wales to address what was perceived as dissatisfaction among the main consumers of international construction arbitration, which is considered too long, too expensive, and too adversarial. Proposed reforms include more intensive (“front loaded”) pleadings at an earlier stage and more aggressive case management by arbitrators. See Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, DISP. RESOL. J., Feb.–Apr. 2003, at 37 (2003); David W. Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 ARB. INT’L 375 (2008).

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contract or investment treaty. The conscientious arbitrator will normally adopt procedures whose level of formality withstands ethical scrutiny.<sup>229</sup>

Mediation is different, and can no more substitute for arbitration than a dinner date can replace a wedding, or a train trip between Boston and Washington can replace a flight between New York and Hong Kong. Arbitration aims at a binding result imposed regardless of the parties' ex post will. Mediation succeeds only when both sides agree.

Another seductive but problematic argument suggests that business managers no longer want due process at the cost of simplicity. Rather, so the argument goes, they just want a streamlined way out of their commercial mess.<sup>230</sup>

Such generalizations beg the more difficult question of what should happen when no consensus can be reached on how to streamline. The two sides can always simplify things in a postdispute procedural agreement. Often, however, the hypothetical "they" who seek simplicity turns out not to be the third person plural at all. Instead, one side advocates some procedural measure that the other side resists as fundamentally unfair. Absent both sides' consent to simplified procedural protocols, ethical arbitrators must seek the best indication of the parties' shared ex ante procedural expectations as memorialized in their arbitration clause and the context of their dispute.<sup>231</sup>

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229. In commercial arbitration, the litigants are normally also the parties to the agreement giving rise to the arbitrator's jurisdiction. By contrast, for treaty-based investor-state proceedings, the investor's home country (not the investor) is the party to the BIT or free trade agreement, but not the arbitration itself. Thus predispute expectations contemplate those shared by the two contracting states, each of which stand as surrogates for the perspective of their own investors as well as interests related to their roles as host states.

230. See, e.g., Jean-Claude Najar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, 25 *ARB. INT'L* (forthcoming 2009). After cataloguing the defects of international arbitration today, the author concludes, "By whatever means necessary, arbitration needs to be repaired, to be returned to its simple foundations—speed, cost efficiency, and user-friendliness." Of course, only time will tell how far in-house counsel will go in accepting the "whatever means necessary" when the fortunes of their own companies are at stake.

231. In this connection, the American Arbitration Association through its affiliate International Centre for Dispute Resolution (ICDR) has adopted default rules on information exchange making clear that parties to ICDR arbitration should not expect American court-style discovery. See *GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION* (Int'l Ctr. for Dispute Resolution 2008), available at <http://www.adr.org/si.asp?id=5288>. For better or for worse, neither the International Chamber of Commerce nor the London Court of International Arbitration has followed suit with any similar guidelines.

*D. Arbitrators and the Search for Truth*

Matters that “go without saying” often bear saying nevertheless. Any consideration of arbitrator integrity reveals an intriguing intersection among three notions: due process, conflicts of interest, and the search for truth.

Arbitrators are supposed to arrive at some understanding of what actually happened and what legal norms determine the parties’ claims and defenses. In finding facts and applying law, arbitrators should aim at getting as near as reasonably possible to a correct view of the events giving rise to the controversy, and to consider legal norms applied in other disputes that raise similar questions.

This does not mean that arbitrators do not balance truth-seeking against other goals. Indeed, they do so all the time, notably in connection with document production (which competes with economy and speed) and attorney-client privilege (which inhibits attempts to get at what corporate officers really knew). However, such balancing of interests does not require abandonment of truth-seeking as an aspiration.

Parties to commercial or investment disputes can always decide to resolve matters through combat, rolling dice, or consulting the entrails of a disemboweled chicken. Duels, gambling, and augury find little favor these days, however. Arbitration usually imposes itself *faute de mieux* where mediation has failed and neither side wants to end up in the other side’s courts, thus attaching a premium on the search for truth.

This trivial point, that arbitration implicates a reasoned evaluation of facts and legal norms, explains why analogies to practices applicable in other types of nonjudicial dispute resolution usually fall short.<sup>232</sup> In choosing arbitration, the parties have not sought simply to make peace, noble as that goal might be. Rather, they have committed to a decisionmaking process founded on a search for an accurate portrayal of the facts and the law. Business managers who want simply to reach a solution to their conflict can always agree to a decision that ignores the law and the facts.

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232. See SWISS ARBITRATION ASS’N, *THE SEARCH FOR TRUTH IN ARBITRATION* (forthcoming 2009); see also Thomas J. Stipanowich, *Arbitration: The ‘New Litigation’* (Nov. 7, 2008) (working paper) (talking of “Thin-Slicing”), available at <http://papers.ssrn.com>.

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Arbitrators normally have no power to rewrite the parties' agreement, even if one side regrets having agreed to arbitration.<sup>233</sup> The common sense of this hypothesis can be tested if one imagines the surprise of a corporate general counsel who, believing she had a "good case" on the law, facts, and contract interpretation, received an award stating that the arbitrator had decided to grant each side half of what it requested because that seemed like the fair thing to do.

## VII. THE OBJECT OF AN ARBITRATOR'S DUTIES

In a world lacking global commercial courts of mandatory jurisdiction,<sup>234</sup> arbitration provides one way to bolster confidence in cross-border economic cooperation. Without binding private dispute resolution, many business transactions would remain unconsummated from fear of the other side's hometown justice. Or, they would be concluded at higher costs to reflect the greater risk due to the absence of adequate mechanisms to vindicate contract rights or investment expectations.

In consequence, arbitrator integrity takes on significance not only for the direct participants in cross-border trade and investment, but also for the wider global community whose welfare is directly affected by the arbitral process. Even if universally accepted standards of conduct remain elusive, all communities implicated by cross-border arbitration must continue a dialogue on the subject that at the least will help to identify wrong directions and false solutions.

Arbitration's broader impact raises propositions of whether an arbitrator's ethical obligations flow to society at large rather than simply to the litigants. The answer, perhaps unsatisfying to ideologues, remains "sometimes."

As an initial matter, one must be cautious about unselective attempts to transplant judicial standards into the world of arbitration. Given a judge's clear obligations to the citizenry as a whole, the calculus of judicial duties will differ from what might be expected of arbitrators who remain principally (albeit not exclusively) creatures of the litigants' contracts.

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233. In practice, of course, a corporate officer may decide to resist compromise under the assumption that his company has a stronger position than the adversary, coming to regret that decision only when the arbitral tribunal finds for the other side.

234. Regional bodies such as the European Court of Justice do exist in the context of treaties for economic union, but would have no authority, for example, in a dispute between a French *Société Anonyme* and an American corporation, or between a Chinese trading entity and a Brazilian *Sociedad Limitada*.

For example, if urged by parties mindful of costs, an arbitrator might accept proceedings with reduced due process, even if not willing to go so far as looking into a crystal ball. By contrast, a judge may not feel comfortable abandoning state-imposed procedural mandates, even if so requested by litigants seeking a cheaper and quicker process. The state that pays the judge's salary sets the broad contours of the relevant procedure. Of course, there are limits to what arbitrators will do at the request of parties. Few will condone arbitration as a tool for money laundering<sup>235</sup> or proceedings designed to falsify what actually happened.<sup>236</sup>

In most instances, public and private goals will coincide, with each having a very real interest in the systemic integrity of the arbitral process. Seeking to decide disputes fairly as between the parties, arbitrators will normally adopt practices that comport with public concerns about basic procedural due process. The just enforcement of private contracts will normally promote the societal interest in promise-keeping and respect for bargains that underpin most cross-border commercial or financial cooperation.

Arbitrators thus bear a responsibility of the utmost seriousness to be mindful of the integrity of their proceedings when seeking an optimum balance between fairness and efficiency. Those who break faith with this duty make the world a poorer place.

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235. To move embezzled funds abroad, a corrupt official might conclude a contract with a foreign entity, controlled by the official's equally corrupt colleagues overseas. When the government fails to perform its obligations, arbitration, sometimes with honest arbitrators unaware of what has happened, would lead to an award whose execution ultimately implicates an unlawful transfer of funds abroad. For one case raising such suspicions, see *Gulf Petro Trading Co., Inc. v. Nigerian National Petroleum Corp.*, 512 F.3d 742 (5th Cir. 2008), discussed in Thomas Walsh, *Collateral Attacks and Secondary Jurisdiction in International Arbitration*, 25 ARB. INT'L 133 (2009).

236. A recent California case illustrates the potential for misuse of the arbitral process in employment law. *Nelson v. Am. Apparel, Inc.*, No. B205937, 2008 WL 4713262 (Cal. Ct. App. Oct. 28, 2008). The case implicated the founder of American Apparel, reported to have been the object of at least three sexual harassment lawsuits. In one, a strange piece of postsettlement theater involved payment of more than \$1 million to an employee who apparently accepted a sham arbitration by a retired judge whose "award" would stipulate facts and findings in the company's favor.

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VIII. APPENDIX: SELECTED STANDARDS FOR  
INDEPENDENCE AND IMPARTIALITY

I. ICSID

*Washington Convention, Article 14(1)*

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

II. New York Convention

*Article V(2)*

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- b. The recognition or enforcement of the award would be contrary to the public policy of that country.

III. Illustrative Statutes

A. English Arbitration Act

*Section 24 (1) Power of court to remove arbitrator.*

A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

- a. That circumstances exist that give rise to justifiable doubts as to his impartiality.

*Section 33 (1): General duty of the tribunal.*

The tribunal shall—

- a. Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.

*Section 68: Challenging the award: serious irregularity*

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2. Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:

a. Failure by the tribunal to comply with section 33 (general duty of tribunal);

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g. The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; . . . .

B. French Code of Civil Procedure

*Section 1502:*

An appeal against the decision which shall confer recognition or enforcement shall be open only in the following cases:

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5. Where the recognition or enforcement shall be contrary to public international order.

C. Swiss Conflicts of Law Statute (LDIP/IPRG)

*Article 190(2).*

An award can be challenged only . . . :

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e. If the award is incompatible with Swiss public policy (ordre public).

D. United States: Federal Arbitration Act

*Section 10. Same; vacation; grounds; rehearing*

a. In any of the following cases the United States court in and for the district wherein the award was made may make an award upon the application of any party to the arbitration:

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2. Where there was evident partiality or corruption in the arbitrators, or either of them.

E. UNCITRAL Model Law

*Article 34 Application for setting aside as exclusive recourse against arbitral award:*

(2)(b)(ii) the award is in conflict with the public policy of this State.

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IV. Illustrative Rules

A. ICC International Court of Arbitration (1998)

*Article 7 (1)*

Every arbitrator must be and remain independent of the parties involved in the arbitration.

B. Swiss Rules of International Arbitration

*Article 9(1)*

All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties.

*Article 10(1)*

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

C. American Arbitration Association (International/ICDR)

*Article 7(1)*

1. Arbitrators acting under these Rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. \*\*\*\*

D. American Arbitration Association (Domestic/Commercial)

*Rule 17. Disqualification of Arbitrator*

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

- (i) partiality or lack of independence,
- (ii) inability or refusal to perform his or her duties with diligence and in good faith, and
- (iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12<sup>237</sup> shall be non-

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237. Rule 12 provides:

Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to



neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

E. London Court of International Arbitration

*Section 10*

- (2) If any arbitrator acts in deliberate violation of the Arbitration Agreement (including these Rules) or does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court.
- (3) An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

F. UNCITRAL

*Article 10(1)*

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

V. Professional Guidelines

A. International Bar Association Guidelines

1. *General Principle:* Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.

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impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION R. 12(b) (2007).

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2. *Conflicts of Interest*

- a. An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.
- b. The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.<sup>238</sup>
- c. Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.
- d. Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

B. American Bar Association/American Arbitration Association<sup>239</sup>

*Canon II.*

An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

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238. General Standard 4 provides a thirty-day window for raising objections to an arbitrator, triggered by either an arbitrator's disclosure or a party's learning of facts or circumstances that could constitute a conflict of interest. IBA GUIDELINES, *supra* note 13, Gen. Standard 4.

239. The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee of the American Arbitration Association and the American Bar Association, and revised in 2003 by an ABA Task Force and Special AAA Committee.

*Canon II.*

Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this Code, except as exempted by Canon X.<sup>240</sup>

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240. Canon X covers party-appointed arbitrators designated as “nonneutral” by the parties, following the practice in certain types of domestic American arbitration. Nonneutral arbitrators may be predisposed toward the party who appointed them and may engage in ex parte communications if that intention has been disclosed to the other arbitrators and the parties. AAA/ABA CODE OF ETHICS, *supra* note 16, Canon X. The 2004 Code establishes in its preamble a presumption of neutrality for all arbitrators unless the parties’ agreement, the arbitration rules, or applicable laws provide otherwise. *Id.* note on neutrality. The preamble also confirms that all party-appointed arbitrators must ascertain and disclose whether the parties intended for them to serve as nonneutral. Even nonneutrals must make preappointment disclosures of any facts that might affect their independence or impartiality.

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