

*Off-prints of the*  
JOURNAL OF INTERNATIONAL ARBITRATION

Geneva

December 1992

Vol. 9 No. 4

THE INDEPENDENCE AND NEUTRALITY OF ARBITRATORS

BY  
M. SCOTT DONAHEY

---

Publisher and General Editor

JACQUES WERNER  
Geneva — Switzerland

Editorial Assistant

RUTH BENJAMIN

---

Correspondence and Subscriptions

*All correspondence, including subscriptions, should be addressed to:*

The Publisher, Journal of International Arbitration  
P.O. Box 5134, 1211 Geneva 11, Switzerland  
Tel. (41-22) 310 34 22 Telefax (41-22) 311 45 92

The Journal of International Arbitration is published quarterly.

Annual Subscription: Sfr. 250 or U.S.\$195 including air mail postage  
Single copies: Sfr. 75 or U.S.\$55

*For U.S. Subscribers:  
Second Class Postage paid at Rahway N.J.*

*Postmaster:  
Send address corrections to Journal of International Arbitration  
c/o Mercury Airfreight International Ltd. Inc.  
2323 Randolph Avenue, Avenel, NJ 07001*

---

NOTE TO AUTHORS

The Editor will be pleased to consider contributions provided they are not submitted for publication elsewhere. Articles must be presented in their *final form*, double-spaced, in English. Special attention should be given to quotations, footnotes and references, which should be accurate and complete. Due to strict production schedules, it is not possible to amend texts after acceptance or send proofs to authors for correction. The submission of a text indicates that authors consent, in the event of its publication, to the automatic transfer of all copyrights therefor to the publisher of the Journal of International Arbitration.

---

© 1992 Werner Publishing Company Ltd.

The copyright covers the exclusive rights to reproduce and distribute the article, including reprints, photographic reproduction, microform or any other reproduction of similar nature, and translations. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, electrostatic, magnetic tape, mechanical, photocopying, recording or otherwise, without permission in writing from the Publisher.

For U.S. users authorization to photocopy items for internal or personal use, or the internal or personal use of specific clients, is granted by Werner Publishing Company Ltd. for users registered with the Copyright Clearance Center (CCC) Transactional Reporting Service, provided that the base fee of \$10 per copy, plus 25 cents per page is paid directly to CCC, 27 Congress St., Salem, MA 01970. For those organizations that have been granted a photocopy license by CCC, a separate system of payment has been arranged. The fee code for users of the Transactional Reporting Service is: 0255-8106/88 \$10.00 + .25.

Published by Werner Publishing Company Ltd.

ISSN 0255-8106

Mode of citation: 9 J. Int. Arb. 4

---

# The Independence and Neutrality of Arbitrators

M. Scott DONAHEY\*

This topic has been much discussed in the field of international commercial arbitration and has been the subject of much scholarly work. Because legal scholars and practitioners often use the terms "independence" and "neutrality" in differing ways, it would be helpful at the outset to define these terms. The definitions used are meant to be working definitions only, for purposes of consistency of this article, and they do not pretend to be formalisms in an area where nuance and implication are preferred.

## I. TERMINOLOGY

### A. "Independence"

The term independence is one which measures the relationship between the arbitrator and the parties—personal, social, and financial. The closer the relationship in any of these spheres, the less "independent" the arbitrator is from the party. The test is an objective one in that it is generally easy to measure whether the arbitrator and a party are in kinship, whether they have business or financial relations, and whether and to what degree they are involved socially. It is a test for the appearance of bias, not its actual presence. Thus, although it is possible for someone who is closely related to a party, in a party's employ, or a close friend of a party, to be able to judge that party's case without bias toward that party, the other party in the matter would likely doubt the impartiality of the arbitrator under the circumstances.

The test of independence was perhaps best described by Professor Pierre Lalive at the VIth Symposium on International Arbitration held in Paris in October 1988: "Independence implies the courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator."<sup>1</sup>

### B. "Neutrality"

The word "neutrality" as it applies to an arbitrator in the international

\* Partner, Holtzmann, Wise and Shepard, Palo Alto, California, USA.

This article was originally prepared as a paper for delivery to the conference on International Commercial Arbitration at Queens' College, Cambridge, England, in July 1992, co-sponsored by the School of International Arbitration, the Faculty of Laws at Queen Mary College, University of London, and by Euro Conferences Ltd. The author wishes to acknowledge the constructive criticism which Howard Holtzmann has kindly given to an earlier draft. However, all errors, misstatements, and opinions are solely those of the author.

<sup>1</sup> P. Lalive, *Conclusions in The Arbitral Process and the Independence of Arbitrators*, p. 121, ICC Publishing, S.A., Paris, June 1991.

commercial sphere is often used in the political or cultural sense. In this sense, an arbitrator is "neutral" if he is of a nationality different from that of either of the parties.

There are numerous examples of this principle in the international sphere. In international commercial arbitration, the sole or third arbitrator is generally not of the same nationality as that of either of the parties.<sup>2</sup> International rules sometimes require the chairperson of a three-person panel to be of a nationality different from those of the parties. Examples of such rules are those of the International Chamber of Commerce and of the London Court of International Arbitration (LCIA).<sup>3</sup> Others, such as the UNCITRAL Rules and the International Arbitration Rules of the American Arbitration Association (AAA), merely require that the nationality of the parties be taken into account in selecting the third arbitrator.<sup>4</sup> In fact, Martin Hunter prefers that his own client nominate as its party arbitrator an arbitrator of a nationality different from that of his client.<sup>5</sup>

In this political and cultural sense, "neutrality" addresses the appearance of bias, rather than its actual presence. While one might suppose that an arbitrator might be inclined toward the position of a party who shares with him the same language, culture, and general value system, this is not necessarily the case.<sup>6</sup> Nevertheless, the appearance that bias might be present has given rise to the general practice of selecting a third arbitrator from a nation other than that of the parties to the proceeding.

The term neutrality is also frequently used in the same sense as "impartiality". This is not a political or geographical test, but one of state of mind. It is a test for the lack of impermissible bias in the mind of the arbitrator toward a party or toward the subject-matter in dispute. This is a subjective test, since it is difficult to directly measure. It is a test, not for the appearance of bias, but for its actual presence. The presence of bias is inferred from the facts and circumstances surrounding the arbitrator's exercise of the arbitral function.

The International Chamber of Commerce Arbitration Rules (the ICC Rules) speak of independence and not of impartiality, and permit a party to challenge an arbitrator for "lack of independence or otherwise".<sup>7</sup> Shortly before the adoption of the current rules, it was suggested that the ICC Rules include the concept of impartiality. Because of the lack of time, because the concept was "subjective", and because no one offered a satisfactory definition of the term, the proposal was rejected.<sup>8</sup> Nevertheless, the ICC Court of Arbitration appears to view the phrase "or otherwise" as including the concept of impartiality.<sup>9</sup>

<sup>2</sup> A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, p. 172; Sweet and Maxwell, London, 1st Edition, 1986.

<sup>3</sup> ICC Rules of Conciliation and Arbitration, amended and in force as from 1 January 1988 (hereinafter ICC Rules), Article 2, para. 6; London Court of International Arbitration Rules (hereinafter LCIA Rules), Article 3, para. 3.3.

<sup>4</sup> Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter the UNCITRAL Rules), Article 6, para. 4; International Arbitration Rules of the American Arbitration Association, as amended and in force on or after 1 May 1992 (hereinafter the AAA International Rules), Article 6, para. 4.

<sup>5</sup> M. Hunter, *supra*, footnote 1, p. 25.

<sup>6</sup> See, generally, *ibid.* at p. 120.

<sup>7</sup> ICC Rules, Article 2, para. 8.

<sup>8</sup> S. Bond, *supra*, footnote 1, p. 11.

<sup>9</sup> *Ibid.*

### C. *Terminology in Arbitration Rules*

In addition to the ICC, other international arbitration systems have grappled with the terminology related to the arbitrator's obligation to decide fairly and without bias. The UNCITRAL Rules require "impartiality" and "independence."<sup>10</sup> The AAA International Rules require that an arbitrator be "impartial" and "independent".<sup>11</sup> The LCIA Rules use the same terminology.<sup>12</sup> All are aimed at the same ideal: an arbitrator who will decide the issues put to him for decision fairly and without bias.

### D. *Requirements of National Laws*

It is important to remember that an arbitration may be subject to the requirements of the national law of the *situs* of the arbitration or of the procedural law which the parties have chosen; in addition to the arbitration rules the parties might have crafted or adopted. This article cannot pretend to an exhaustive treatment of national laws, but some examples can give a sampling of the way different laws treat the qualifications of an arbitrator.

Some national legislation treats arbitral requirements in the same general way as do international arbitration rules. In the United States, the Federal Arbitration Act recognizes that an arbitral award can be vacated "where there was evident partiality or corruption in the arbitrators".<sup>13</sup> In the United Kingdom, courts may remove an arbitrator "where the arbitrator has misconducted himself or the proceedings".<sup>14</sup> Commentators have said that such "misconduct" is more than errors of fact or law, and involves "actual or potential bias", or unfair, dishonest, or corrupt actions.<sup>15</sup>

Other national laws may specify particular qualifications or disqualifications for service as an arbitrator. For example, under Swedish law, an arbitrator may not be: (1) a minor; (2) one who has previously tried the dispute submitted to arbitration; (3) one who has given evidence on the dispute; (4) one who is related to a party in such a way that if he were a judge, he would be disqualified.<sup>16</sup> In Uruguay, an arbitrator would be disqualified if he had a family relationship to any party within the fourth degree of consanguinity or the second degree of affinity.<sup>17</sup> And Greek law would exclude from the arbitral ranks anyone who has been excluded from the exercise of civic rights following the conviction of a crime.<sup>18</sup>

### E. *Guidelines in Codes of Ethics*

There exist two codes of ethics for arbitrators that are generally recognized

<sup>10</sup> UNCITRAL Rules, Article 10, para. 2.

<sup>11</sup> AAA International Rules, Article 7.

<sup>12</sup> LCIA Rules, Article 3, para. 3.1.

<sup>13</sup> 9 U.S.C. Section 10(a)(2) (1992).

<sup>14</sup> Arbitration Act of 1950, Great Britain Statutes, Vol. 88, 1950.

<sup>15</sup> H. Smit and V. Pechota, *2A World Arbitration Reporter*, p. 2736, Transnational Juris Publications, Inc., Ardsley-on-Hudson, New York, 1991.

<sup>16</sup> Swedish Arbitration Act of 1929 (as amended and in force on 1 January 1982), Section 5.

<sup>17</sup> Uruguay Code of Civil Procedure (1970), Article 580.

<sup>18</sup> Code of Civil Procedure of Greece, Book Seven (Law No. 44 of 21 June 1967, as amended by Law No. 958 of 15 September 1971) Article 871, para. 1.

around the world. The first of these is the American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes (hereinafter the AAA/ABA Code of Ethics). Adopted in 1977, it was the first such code devised for commercial arbitration. The first six canons are directed to all arbitrators. The seventh canon is directed toward the party-appointed arbitrator. The primary consideration in the preparation of Canon VII was the principle of party autonomy. It recognized that the parties' rights to agree on their procedure was primary, and that this right encompassed the standard of behavior to which the arbitrators would be held. For example if Party A and Party B agreed that Party A's husband would be an excellent arbitrator of their dispute, it was their right to designate him as arbitrator, and no code of arbitral ethics should prohibit them from exercising that right. The drafters were aware that the use of a non-neutral arbitrator might create problems in international arbitrations, and expressly warned practitioners of the risks involved: "It should be noted that in cases where the arbitration is conducted outside the United States the applicable law may require that all arbitrators be neutral. Accordingly, in such cases the governing law should be considered before applying any of the following provisions relating to non-neutral party-appointed arbitrators."<sup>19</sup>

The AAA/ABA Code of Ethics does not form part of the AAA Commercial Rules or any other set of AAA arbitration rules or of those of any other organization. It is intended to provide guidance in all types of commercial arbitration and is not specifically directed at the international area. However, it does provide useful guidelines as to specific relationships and specific conduct which could call into question an arbitrator's "independence", "neutrality", or "impartiality". Rather than attempt to summarize, permit me to quote some of the more pertinent provisions:

- D. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of relationship or interest.
- E. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest.
- F. When an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules.
- G. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.<sup>20</sup>

<sup>19</sup> AAA/ABA Code, Canon VII, Introductory Note.

<sup>20</sup> AAA/ABA Code, Canon I, paras. D, E, F and G.

The International Bar Association Rules of Ethics for International Arbitrators (hereinafter the IBA Code) is, as the name suggests, specifically directed at international commercial arbitrators. Adopted by the IBA in 1986, the IBA Code is designed to "reflect internationally acceptable guidelines developed by practising lawyers from all continents."<sup>21</sup> Like the AAA/ABA Code, the IBA Code is not directly binding on the arbitrators or the parties and not intended to create grounds for the setting aside of awards by national courts.<sup>22</sup>

As with the AAA/ABA Code, it makes sense to reproduce the provisions verbatim, rather than to attempt to summarize their effect:

1. Fundamental Rule  
Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias . . .
3. Elements of Bias
  - 3.1 The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.
  - 3.2 Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure as described in Article 4 below.
  - 3.3 Any current direct or indirect business relationship between an arbitrator and a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed. Examples of indirect relationships are where a member of the prospective arbitrator's family, his firm, or any business partner has a business relationship with one of the parties.
  - 3.4 Past business relationships will not operate as an absolute bar to acceptance of appointment, unless they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment.
  - 3.5 Continuous and substantial social or professional relationships between a prospective arbitrator and a party, or with a person who is known to be a potentially important witness in the arbitration, will normally give rise to justifiable doubts as to the impartiality or independence of a prospective arbitrator."<sup>23</sup>

Both Codes give arbitrators specific examples of the types of relationships that may give rise to bias or the appearance of bias. Both, however, vest much discretion in the potential arbitrator to determine whether a specific relationship is one which would preclude one from becoming an arbitrator in the dispute at hand.

<sup>21</sup> IBA Code, Introductory Note.

<sup>22</sup> *Ibid.*

<sup>23</sup> Text of the IBA Rules of Ethics from *The 1989 Guide to International Arbitration and Arbitrators*, The Parker School of Foreign and Comparative Law, Columbia University, Transnational Juris Publications, Inc., Dobbs Ferry, N.Y., 1989, at pp. 411-412.

## II. THE DUTY OF DISCLOSURE AND ITS CLEANSING EFFECT

Virtually all rules impose a duty on a prospective arbitrator to disclose all facts and circumstances which might give rise to doubts as to his impartiality and independence, even if not in his own eyes. However helpful the rules and codes of ethics are, it is still left to the arbitrator to determine what facts and circumstances are significant enough to require disclosure.<sup>24</sup> It has become an international custom and usage that an arbitrator must determine and disclose those facts and circumstances that might conceivably give rise to a challenge of his fitness to serve.<sup>25</sup>

### A. *Disclosure Requirements of Arbitration Rules*

While the various systems of arbitration rules express the requirement somewhat differently, they are unanimous in their mandate that arbitrators disclose circumstances which might cause a party to believe that they are incapable of independence or impartiality. The UNCITRAL Rules require that a potential arbitrator disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence".<sup>26</sup> The new AAA International Rules borrow this language directly.<sup>27</sup> The ICC Rules require the arbitrator to put herself in the place of the parties and mandate a disclosure of "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."<sup>28</sup> The LCIA Rules take a different tack. Rather than a requirement of disclosure, the LCIA Rules require the prospective arbitrator to evaluate the facts and circumstances which may give rise to justifiable doubts as to his impartiality, and then to either decline appointment or to execute a declaration that there are no circumstances likely to give rise to any justifiable doubts as to his impartiality or independence.<sup>29</sup>

### B. *Disclosure Requirements of National Laws*

Various national laws also impose independent disclosure obligations on the arbitrators. Generally, these obligations are as general and as discretionary as those imposed by institutional rules.

The French Code of Civil Procedure requires an arbitrator to disclose any personal cause of disqualification of which he is aware.<sup>30</sup> The Swiss law on international arbitration requires the arbitrator to disclose circumstances that might give rise to doubts as to his independence.<sup>31</sup> In the United States, the Supreme Court

<sup>24</sup> H. Holtzmann, *supra*, footnote 1, p. 41.

<sup>25</sup> G. A. Alvarez, *The Challenge of Arbitrators*, (1990) Vol. 6, No. 3, *Arbitration International* 203, 217.

<sup>26</sup> UNCITRAL Rules, Article 9.

<sup>27</sup> AAA International Rules, Article 7.

<sup>28</sup> ICC Rules, Article 2, para. 7.

<sup>29</sup> LCIA Rules, Article 3, para. 3.1.

<sup>30</sup> M. L. Smith, *Impartiality of the Party-Appointed Arbitrator*, (1990) Vol. 6, No. 4, *Arbitration International* 320, 327.

<sup>31</sup> G. R. Delaume, *New Swiss Arbitration Statute Emphasizes Party Autonomy and Restricts Judicial Review*, in *The New Swiss Law on International Arbitration* 21, 31, Swiss Arbitration Association, Basle, 1990.

has ruled that an arbitrator must disclose "any dealings that might create an impression of possible bias".<sup>32</sup> Thus, national laws generally mirror arbitral rules on the duty of disclosure, giving general guidelines, but leaving much to the discretion of the arbitrator.

### C. *Disclosure Requirements of Codes of Ethics*

Codes of ethics, while still leaving broad discretion to the arbitrator, offer more specific guidelines regarding disclosure than do either arbitral rules or national laws. The AAA/ABA Code requires that a prospective arbitrator disclose:

- "(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;
- (2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners or business associates."<sup>33</sup>

The IBA Code is similar in its disclosure requirements:

- "4.1 A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.
- 4.2 A prospective arbitrator should disclose:
  - (a) any past or present business relationship, whether direct or indirect as illustrated in Article 3.3, including prior appointment as arbitrator, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration. With regard to present relationships, the duty of disclosure applies irrespective of their magnitude, but with regard to past relationships only if they were of more than a trivial nature in relation to the arbitrator's professional or business affairs. Non-disclosure of an indirect relationship unknown to a prospective arbitrator will not be a ground for disqualification unless it could have been ascertained by making reasonable enquiries;
  - (b) the nature and duration of any substantial social relationships with any party or any person known to be likely to be an important witness in the arbitration;
  - (c) the nature of any previous relationship with any fellow arbitrator (including prior joint service as an arbitrator);
  - (d) the extent of any prior knowledge he may have of the dispute;
  - (e) the extent of any commitments which may affect his availability to perform his duties as arbitrator as may be reasonably anticipated."<sup>34</sup>

<sup>32</sup> *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145, 149, 89 S. Ct. 337, 339, 21 L. Ed. 2d 301 (1968).

<sup>33</sup> AAA/ABA Code, Canon II.

<sup>34</sup> IBA Rules of Ethics, *op. cit.*, footnote 23, p. 412.

It is clear from the language of both Codes that the potential arbitrator is required to exercise his discretion in evaluating what relationships deserve disclosure and which are insignificant. One should be careful not to take too literally the language contained in the IBA Code which suggests that an arbitrator could be disqualified for the mere failure to disclose. Howard Holtzmann has pointed out that the language "failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification" should only be applied where the arbitrator consciously attempted to cover up a fact or circumstance, and not where the arbitrator merely exercised his judgment in the manner which is contemplated by the Code.<sup>35</sup>

#### D. *Commentators on the Duty of Disclosure*

In deciding what to disclose, it is always preferable to disclose anything conceivably compromising. While a prospective arbitrator need not disclose insignificant facts and circumstances, whenever he is in doubt, he should err on the side of disclosure. In addition to the guidance given by national laws, arbitration rules and codes of ethics, commentators have suggested certain facts and circumstances which a potential arbitrator should disclose to the parties. An arbitrator should always disclose any financial interest in the dispute or with one of the parties, especially an ongoing employment relationship.<sup>36</sup> Present relationships of whatever nature should be disclosed.<sup>37</sup> Any relationship which the prospective arbitrator determines is "direct", rather than "remote", "substantial", "ongoing", and "significant", rather than "uncertain" and "speculative", should be disclosed.<sup>38</sup> Disclosure should be made of any relationship that is "close, substantial, recent and proven".<sup>39</sup> In summary, an arbitrator should always disclose an "interest . . . so connected with his duties as an arbitrator as to render it inequitable that the parties should be held bound by the agreement to accept his decision."<sup>40</sup>

#### E. *The Cleansing Effect of Disclosure*

Once an arbitrator has made his disclosures, it is up to the parties to evaluate them, and, where appropriate, make timely objections to the arbitrator acting in the matter. Failure to timely object waives the right to object at a later stage of the proceedings. National courts generally will not tolerate the objections of a party made

<sup>35</sup> H. Holtzmann, *supra*, footnote 1, p. 41.

<sup>36</sup> Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, p. 229, Oceana Publications, Inc., Paris (2nd Edition 1991).

<sup>37</sup> *Ibid.*

<sup>38</sup> M. Hollering, *supra*, footnote 1, p. 5.

<sup>39</sup> S. Bond, *supra*, footnote 1, p. 13.

<sup>40</sup> *Russell on the Law of Arbitration*, 20th edition, Anthony Walton, Q.C. and Mary Victoria, Stevens and Sons, London, 1982.

long after the alleged grounds for the challenge are made known to him. A recent decision in the Federal courts of the United States typifies this attitude. In rejecting the challenge to an arbitral award based on, among other grounds, an alleged failure of the arbitrator to disclose allegedly significant relationships, the court noted that the challenger cited as its source of knowledge of the relationship an article which appeared in *The Wall Street Journal* during the course of the arbitration, and yet, at the time of publication, made no objection to the continued service of the arbitrator in question.<sup>41</sup> The challenge was rejected and the award confirmed.<sup>42</sup>

Arbitral rules also look with disfavor on the dilatory, and require that challenges be made promptly after receiving a disclosure or upon learning in another fashion of facts and circumstances which the party believes go against independence and impartiality.<sup>43</sup> A failure to object when first confronted with the facts and circumstances can be viewed from at least two perspectives. First, it can be viewed as a waiver of the party's right to object. Second, it can be viewed as an implied admission that, in the first instance, the party did not regard the facts and circumstances as sufficiently touching upon the arbitrator's impartiality and independence.

### III. THE PARTICULAR PROBLEM OF THE PARTY ARBITRATOR

The duty of disclosure and the rules surrounding it are designed to bring to light evidence of a relationship between an arbitrator and a party that could raise questions concerning the arbitrator's ability to remain independent and impartial. Yet, in international commercial arbitration, there is a practice that at first seems at odds with independence and impartiality: the party-appointed arbitrator. Europeans regard the right to select their arbitrator in a three-person panel as just short of fundamental. In international arbitrations, the party-appointed arbitrator, who has often been selected because of his perceived predisposition to the party and its legal position, is expected to maintain his independence and impartiality. That this paradox works well in practice is one of the strengths of international commercial arbitration.

#### A. *Why a Party-Appointed Arbitrator?*

In an international commercial dispute, the parties are from different countries, often with decidedly different cultures. The sole arbitrator or third arbitrator will most likely be chosen from yet a third country, with possibly different cultural mores from those of either party. It is a clearly perceivable risk that the arbitrator will not be able to grasp one or the other of the parties' positions. Out of this dilemma, the party arbitrator tradition developed.

The party arbitrator is most often one who is a national of the same country as the

<sup>41</sup> *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1500 (S.D.N.Y. 1987).

<sup>42</sup> *Ibid.*, at 1520.

<sup>43</sup> ICC Rules, Article 2, para. 8 (within 30 days); AAA International Rules (within 15 days); UNCITRAL Rules, Article 11 (within 15 days).

party appointing him, and therefore familiar with the party's culture. The party arbitrator, even though he may be skillful in more than one language, understands thoroughly the language of the party that selected him. He is familiar with the party's legal system. And he is well versed in the trade practices of his appointing party. If, during deliberations, the presiding arbitrator is confused, whether as the result of language, cultural differences, differences in legal systems, or unfamiliarity with trade practices, the party arbitrator can set him straight. The party thus has a check against being misunderstood. This avoidance of cultural misunderstanding is the *raison d'être* of the party-appointed arbitrator.

### B. *Standards for the Party Arbitrator*

Virtually all rules designed specifically for international arbitration require the same standards for both the party-appointed arbitrator and the sole or presiding arbitrator.<sup>44</sup> The IBA Code is to the same effect.<sup>45</sup> The AAA/ABA Code, originally promulgated for use in all commercial arbitrations, domestic and international, makes a distinction. The party arbitrator "may be predisposed to the party who appointed him, but in all other respects is obligated to act in good faith and with integrity and fairness".<sup>46</sup> The party arbitrator is able to consult with the appointing party regarding the selection of the presiding arbitrator (where the presiding arbitrator is to be selected by the two party-appointed arbitrators), and he may communicate with the appointing party on any other aspect of the case, provided that he first informs the other arbitrators and the parties of his intent to do so.<sup>47</sup> Again, the AAA/ABA rules were subject to the guiding principle of party autonomy. It is the recommendation of the AAA that parties in all cases agree that all arbitrators act as neutrals.<sup>48</sup>

### C. *The Party Arbitrator in Practice*

Is the practice in international commercial arbitration that much different from the AAA/ABA Code when it comes to the use of party arbitrators? It appears not to be. The party arbitrator is predisposed to his party's position, yet is expected to act with integrity and fairness and impartiality.

Under both the AAA/ABA Code and the IBA Code, as well as international practice, all arbitrators are required to prevent delaying tactics, harassment of parties or participants, or other abuse or disruption of the arbitral process.<sup>49</sup> In ICC arbitrations the parties may select an arbitrator who is clearly sympathetic to their case, although this is not advised.<sup>50</sup> While the party arbitrator must be "independent",

<sup>44</sup> See UNCITRAL Rules, Articles 9 and 10; ICC Rules, Article 2; LCIA Rules, Article 3; AAA International Rules, Article 7; AAA Supplementary Procedures for International Commercial Arbitration, Article 2.

<sup>45</sup> IBA Code, Article 1.

<sup>46</sup> AAA/ABA Code, Canon VII, para. A(1).

<sup>47</sup> *Ibid.*, paras. C(1) and (2).

<sup>48</sup> H. Holtzmann, *American Arbitration Association Rules, Introduction*, in XIV *Yearbook Commercial Arbitration* 263, 267, 1989.

<sup>49</sup> AAA/ABA Code, Canon I, para. G; IBA Code, Article 7.

<sup>50</sup> Craig, Park, and Paulsson, *supra*, footnote 36, p. 212.

he may not be "neutral"; that is to say that an arbitrator of the same nationality, from a similar economic and social milieu, is expected to be sympathetic to the positions taken by and embracing the legal doctrines favorable to his appointing party.<sup>51</sup> The parties may also agree to waive the independence requirement of the party arbitrator, though this is rare in practice.<sup>52</sup>

The above practice is not unique to the ICC. It is not uncommon in international arbitrations conducted under the UNCITRAL, LCIA and ICSID Rules for the party arbitrator to be "predisposed towards the party who appointed him".<sup>53</sup> It is common for the party arbitrators to consult their parties where the presiding arbitrator is to be selected by the party arbitrators.<sup>54</sup>

Martin Hunter has candidly admitted that in selecting a party arbitrator he looks for "maximum predisposition towards my client, consistent with the minimum appearance of bias", someone who is likely to be sympathetic to the client's position and likely to be genuinely persuaded by counsel's argument.<sup>55</sup> Nevertheless, that arbitrator is expected to be neutral and impartial, and if it is otherwise, this fact must be disclosed beforehand.<sup>56</sup> In international arbitration, a party arbitrator may be predisposed to his appointing party's position, but must conduct himself and render his decision in good faith and an independent manner.

#### IV. THE CONDUCT OF ARBITRATOR FROM APPROACH TO AWARD

In addition to the duty to disclose and the obligation to treat all parties fairly and impartially and to avoid delay, there are general guidelines which the party arbitrator should observe from the time he is first approached by a party until, and even after, an award is issued. When a party interviews a prospective arbitrator, it is proper to discuss the issues with the party, so long as the potential arbitrator does not discuss or offer his opinion on the merits.<sup>57</sup> A recent decision by the Federal Court of the United States criticized an arbitrator who had discussed, at the party's Headquarters office, the merits of the defenses of the party who had appointed him, examined documentary evidence at that meeting, accepted hospitality from the appointing party, and attempted to discuss the merits of the case with the other party arbitrator prior to the selection of the presiding arbitrator.<sup>58</sup> Thus, it is wise to limit this initial discussion to those facts and issues an arbitrator must know in order to determine whether it would be appropriate for him to accept the appointment.<sup>59</sup>

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, p. 211.

<sup>53</sup> A. Redfern and M. Hunter, *supra*, footnote 2, p. 170.

<sup>54</sup> *Ibid.*, p. 172.

<sup>55</sup> M. Hunter, *supra*, footnote 1, p. 25.

<sup>56</sup> G. Bernini, *supra*, footnote 1, p. 36-37.

<sup>57</sup> G. Bernini, *supra*, footnote 1, p. 34; Craig, Park and Paulsson, *supra*, footnote 36, p. 224.

<sup>58</sup> *Metropolitan Property and Casualty Ins. Co. v. J. C. Penney Casualty Ins. Co.*, 780 F. Supp. 885, 888 and 893 (D. Conn. 1991).

<sup>59</sup> The "merits" of a case involve the likelihood of success of a claim or defense; the "issues" are the claims and defenses as stated by the parties. An eminent American commentator seems to treat the two as synonymous, which leads to confusion. See R. Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 *J.Int. Arb.* 2, 103, 105, June 1987.

There seems to be a divergence of views among commentators on whether *ex parte* communications between a party and the arbitrator appointed by that party are even appropriate after the presiding arbitrator has been selected. Some commentators seem to feel that such communications are never permitted.<sup>60</sup> Others feel such communications are permissible, but only by agreement of the parties or if announced beforehand to all parties and arbitrators.<sup>61</sup> However, it is clear that absent agreement or pre-announced intention, *ex parte* communication between a party and its appointed arbitrator is clearly improper, and such secret communication would constitute a clear violation of an arbitrator's duty of "independence" and "impartiality".

#### V. CONCLUSION

International commercial arbitration seeks to bridge the national, cultural, legal and language differences in order to provide the parties to a commercial dispute a fair and just result. The party-arbitrator system has evolved to prevent those differences from leading to a confused, and therefore unfair, resolution. The apparent paradox of the concept of the party-appointed arbitrator and the duties of "impartiality" and "independence" is, in practice, more apparent than real. The concept of party autonomy gives the parties the flexibility necessary to structure the procedure in a way best suited to their needs. It is this flexibility that has led to the success of commercial arbitration and made it the preferred means of resolving international commercial disputes.

---

<sup>60</sup> G. A. Alvarez, *supra*, footnote 25, pp. 216-17; M. L. Smith, *supra*, footnote 29, p. 341; G. Bernini, *supra*, footnote 1, p. 34.

<sup>61</sup> A. Redfern and M. Hunter, *supra*, footnote 2; Craig, Park and Paulsson, *supra*, footnote 36, p. 240.