BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST

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# TABLE OF CONTENTS

TABLE OF ABBREVIATIONS .................................................................................. ii  
TABLE OF AUTHORITIES .................................................................................. xi  
INTERNATIONAL TRIBUNALS AND INSTITUTIONS ........................................ xxii  
NATIONAL LAWS .......................................................................................... xxiv  
INSTITUTIONAL RULES .................................................................................. xxx  
CONVENTIONS AND TREATIES ..................................................................... xxxvi  
PREFACE ......................................................................................................... xxxviii  
CHAPTER 1 Bias in International Commercial Arbitration ................................. 1  
CHAPTER 2 Lord Hewart’s Ghost ..................................................................... 33  
CHAPTER 3 Varying Approaches in Europe ..................................................... 70  
CHAPTER 4 The American Way ....................................................................... 144  
CHAPTER 5 Competing Tests in the Asia Pacific ............................................ 182  
CHAPTER 6 Rules of Bias in the Lex Mercatoria ........................................... 207  
CHAPTER 7 Bias Challenges in Investor State Arbitration ............................ 233  
CHAPTER 8 Causes and Cures ....................................................................... 274  
BIBLIOGRAPHY ............................................................................................. 310
# TABLE OF ABBREVIATIONS

## Institutions and Organisations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<tr>
<td>ABA</td>
<td>American Bar Association</td>
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<tr>
<td>ACICA</td>
<td>Australian Centre for International Commercial Arbitration.</td>
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<td>AIA</td>
<td>Italian Arbitration Association</td>
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<tr>
<td>APRAG</td>
<td>Asia Pacific Regional Arbitration Group</td>
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<td>ASA</td>
<td>Swiss Arbitration Association</td>
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<tr>
<td>CAMCA</td>
<td>Commercial Arbitration and Mediation Centre for the Americas</td>
</tr>
<tr>
<td>CAS</td>
<td>Court of Arbitration for Sport</td>
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<tr>
<td>CCPIT</td>
<td>China Council for the Promotion of International Trade</td>
</tr>
<tr>
<td>CEPANI</td>
<td>Centre belge pour l'étude et la pratique de l'arbitrage national et international</td>
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<tr>
<td>CIArb</td>
<td>Chartered Institute of Arbitrators</td>
</tr>
<tr>
<td>CIETAC</td>
<td>China International Economic and Trade Arbitration Commission</td>
</tr>
<tr>
<td>CMEA</td>
<td>Council for Mutual Economic Assistance (Eastern Europe)</td>
</tr>
<tr>
<td>CMI</td>
<td>Comité Maritime International</td>
</tr>
<tr>
<td>CRCICA</td>
<td>Cairo Regional Centre for International Commercial Arbitration</td>
</tr>
<tr>
<td>CRT</td>
<td>Claims Resolution Tribunal for Dormant Accounts in Switzerland</td>
</tr>
<tr>
<td>DIFC</td>
<td>Dubai International Finance Centre</td>
</tr>
<tr>
<td>DIS</td>
<td>German Institute of Arbitration</td>
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<tr>
<td>EBCC</td>
<td>East Berlin Chamber of Commerce</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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</table>
ECAFE - United Nations Economic Commission for Asia and the Far East
ECOSOC - United Nations Economic and Social Council
FIDIC - Fédération Internationale des Ingénieurs-Conseils
GAFTA - Grain and Feed Trade Association
HKIAC - Hong Kong International Arbitration Centre
IACAC - Inter-American Commercial Arbitration Commission
IAMA – Institute of Arbitrators and Mediators Australia
IBA - International Bar Association
ICAC - Moscow International Commercial Arbitration Court
ICANN - Internet Corporation for Assigned Names and Numbers
ICC - International Chamber of Commerce
ICCA - International Council for Commercial Arbitration
ICDR - American Arbitration Association International Centre for Dispute Resolution
ICSID - International Centre for the Settlement of Investment Disputes
IFCAI - International Federation of Commercial Arbitration Institutions
IMF - International Monetary Fund
JCAA - Japan Commercial Arbitration Association
KLRCA - Kuala Lumpur Regional Centre for Arbitration
LCIA - London Court of International Arbitration
LMAA - London Maritime Arbitration Association
LME - London Metal Exchange
MIGA - Multilateral Investment Guarantee Agency
NAI - Netherlands Arbitration Institute
NASD - National Association of Securities Dealers of the United States
NOFOTA - Netherlands Oil, Fats and Oilseeds Trade Association
OECD - Organisation for Economic Cooperation and Development
PCA - Permanent Court of Arbitration at The Hague

SCC – Stockholm Chamber of Commerce

SIAC - Singapore International Arbitration Centre

UNCC - United Nations Compensation Commission

UNCITRAL - United Nations Commission for International Trade Law

UNECE - United Nations Economic Commission for Europe

UNIDROIT - The International Institute for the Unification of Private Law

VIAC – Vienna International Arbitration Centre

WAIDM – Western Australian Institute of Dispute Management

WIPO - World Intellectual Property Organisation

General Abbreviations


ACCP – Austrian Code of Civil Procedure

Additional Facility – the mechanism which allows for NAFTA Chapter 11 arbitrations involving non-ICSID member states to be administered by ICSID

ADR - Alternative Dispute Resolution

All ER – All England Law Reports

ALQ – Arab Law Quarterly

AO – Arbitration Ordinance

Arb – Arbitration (Chartered Institute of Arbitrators)

Arb J – Arbitration Journal

Art - Article

ADRLJ – Arbitration and Dispute Resolution Law Journal

ALR – Australian Law Review
Am J Comp L – American Journal of Comparative Law

Am J Int L – American Journal of International Law

Am Rev Int Arb – American Revue of International Arbitration

Arb Int – Arbitration International

ASA Bull – Swiss Arbitration Association Bulletin

ASM Shipping familiarity – apparent bias by reason of familiarity of arbitrator with representatives of a party

Assn – Association

BG – bundesgericht (Swiss Supreme Court)

BGG – Swiss Federal Supreme Court Act 2007

BGH – bundesgerichtshof (German Supreme Court)

BJC – Belgian Judicial Code

BLR – Building Law Reports

CA – Court of Appeal

Cal Energy bias - apparent bias by reason of arbitrator's personal pro-arbitration policy

Catalina bias – actual bias for reasons of nationality

CCP – Code of Civil Procedure

CCCP - California Code of Civil Procedure

ChD – Chancery Division


Comm – Commercial

Concordat – Swiss Inter-Cantonal Arbitration Convention

Con LR – Construction Law Reports

Co – Company

Corp – Corporation
CPR – Civil Procedure Rules
DAA - Dutch Arbitration Act (1986)
DAB - Dispute Adjudication Board
DAC – Departmental Advisory Committee
DCCP – Dutch Code of Civil Procedure
Dis Res J – Dispute Resolution Journal
ECHR – European Convention on Human Rights
ECJ – Court of Justice of the European Communities
EDNY – Eastern District of New York
EDF - European Development Fund
EEC - European Economic Community
EFTA – European Free Trade Area
ER – English Reports
EU - European Union
EWCA – England and Wales Court of Appeal
FAA – US Federal Arbitration Act (1925)
F 2d – US Federal Reporter Second Series
F 3d – US Federal Reporter Third Series
F Supp – Federal Supplement
FALCA - Fast and Low Cost Arbitration
GCCP – German Code of Civil Procedure
Global Arb Rev – Global Arbitration Review
Gough – 'real danger' test for apparent bias
**Green List** - the part of the IBA Guidelines that identifies situations where no conflict of interest exists and the arbitrator can act

**Harv Int LJ** – Harvard International Law Journal

**HKHC** – High Court of Hong Kong

**HKLJ** – Hong Kong Law Journal

**HL** – House of Lords

**HL Cas** – House of Lords Cases

**Hrvatska conflict** - challenge to counsel on the basis that they share chambers with the arbitrator

**IAA** – International Arbitration Act


**ICA** – International Commercial Arbitration

**ICAS** - International Council of Arbitration for Sport

**ICCA** – International Council for Commercial Arbitration

**ICJ** – International Court of Justice

**ICLQ** – International Comparative Law Quarterly

**ICSID Rev** – ICSID Review/Foreign Investment Law Journal


**IBRD** - International Bank for Reconstruction and Development (the World Bank)

**ILA Rep** – International Law Association Reporter

**ILM** – International Legal Materials

**Int ALR** – International Arbitration Law Review

**ISA** – Investor-State Arbitration
Laker Airways familiarity - apparent bias by reason of the fact that arbitrator and counsel for a party are from the same chambers

Mitsubishi doctrine – pro-arbitrability/pro-arbitration doctrine


NYAD – New York Appellate Division

NYC - New York Convention

NSWLR – New South Wales Law Reports

OG - Swiss Federal Judicial Organization Act

OLG – oberlandesgericht (German Court of Appeal)

Orange List – the part of the IBA Guidelines that identifies situations where a conflict of interest could exist in the eyes of the parties and best practice is to give disclosure


PC – Privy Council

PCIJ – Permanent Court of International Justice

PECL - Principles of European Contract Law (1998)

Pinochet bias – breach of the Rule in Dimes by reason of political persuasion

Porter v. Magill - 'real possibility' test for apparent bias

Pty Ltd – Proprietary Limited

QBD – Queen's Bench Division

QC – Queen's Counsel


Red List - the part of the IBA Guidelines that identifies situations where a conflict of interest exists and the arbitrator cannot act

Rev Arb – Revue de l'arbitrage


Rustal Trading familiarity – familiarity arising from prior dealings between arbitrator and a party

Saudi Cable bias - breach of the Rule in Dimes by reason of the fact that the arbitrator has commercial interests which are aligned with those of a party

S - Section

SC – Senior Counsel
S Ct – Supreme Court of the United States
SDNY – Southern District of New York
SLR – Singapore Law Reports
SPIIL – Swiss Private International Law (1987)
Strasbourg jurisprudence – the jurisprudence of the European Court of Human Rights
Sussex Justices – 'reasonable apprehension' test for apparent bias
TCPRC - Texas Civil Practice and Remedies Code
Telekom Malaysia bias – apparent bias by reason of the arbitrator's prior determination of an unrelated matter factually or legally similar to the case before them
UAE – United Arab Emirates
UDHR – Universal Declaration of Human Rights (1948)
UN – United Nations
UNCITRAL – United Nations Commission on International Trade Law
UNCTAD – United Nations Conference on Trade and Development
WAMR – World Arbitration and Mediation Report
WAR – Western Australia Reports
Washington Convention - Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)
WTAM – World Trade and Arbitration Report
World Bank – International Bank for Reconstruction and Development
Yale LJ – Yale Law Journal
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PERMANENT COURT OF ARBITRATION
Alabama Claims, Decision and Award 14 September 1872
Radio Corporation of America v. China (1941) 8 ILR 26
Russian Indemnity (Russia v Turkey), Final Award 11 November 1912
Norwegian Shipowners Claims (Norway v. United States), Final Award 13 October 1922)

STOCKHOLM CHAMBER OF COMMERCE
SCC Arbitration 60/1999
SCC Arbitration 87/2000
SCC Arbitration 60/2001
SCC Arbitration 120/2001
SCC Arbitration 078/2000
National Laws

ARGENTINA

*National Code of Civil and Commercial Procedure*

Art 768
Art 768(2)(1)
Art 768(2)(2)

*Public Emergency and Exchange Rate Reform Law 2001*

AUSTRALIA

*Australia Acts 1986 (Cth)*

*Colonial Laws Validity Acts*

*Commercial Arbitration Act 1984 (NSW)*

S 4(1)
S 42(2)
S 44(a)

*Commercial Arbitration Act 1985 (WA)*

S 42(1)

*Constitution of the Commonwealth of Australia (1901)*

Chapter III

*International Arbitration Act 1974 (Cth)*

Part II
S 16(1)
S 19
S 21
Schedule 2

*Interpretation Act 1901 (Cth)*

*Trade Practices Act 1974 (Cth)*

S 2
S 51AA
S 52
AUSTRIA

*Code of Civil Procedure*

Art 557
Art 618

BELGIUM

*Judicial Code*

Art 1690
Art 1717(4)
Part 6

*Law Amending Belgian Legislation Relating to Arbitration 1998*

CANADA

*Charter of Rights and Freedoms*

Section 11(d)

*Commercial Arbitration Act*

*Constitution Act 1982*

Schedule B

*British Columbia International Commercial Arbitration Act*

*Ontario Arbitration Act*

S 15
S 46

*Quebec Code of Civil Procedure*

Art 234
Art 942

ENGLAND

*Arbitration Act 1950*

S 23

*Arbitration Act 1979*
Arbitration Act 1996
S 1(a)
S 24
S 33
S 68

Colonial Laws Validity Acts

Civil Procedure Rules 1998
S 25.1(1)(h)

Foreign Jurisdiction Act 1890

Human Rights Act 1998

FRANCE

Art 341
Art 588
Art 611
Art 1502(5)
Art 1592(4)

GERMANY

Code of Civil Procedure
Art 41
Art 42
Art 1036
Art 1037

HONG KONG

Arbitration Ordinance
s 2
s 2GA
s 26(1)
s 40E
s 44(2)(e)
s 44(3)
INDONESIA

Law Concerning Arbitration and Alternative Dispute Resolution 1999

Art. 12(1)(c)

JAPAN

Arbitration Law

MALAYSIA

Arbitration Act 1952
Arbitration Act 2005
S 14(3)(a)

PEOPLE’S REPUBLIC OF CHINA

Arbitration Law 1995

Art. 34
Art. 58
Chapter VII
S 3

SINGAPORE

Arbitration Act 2001
International Arbitration Act 2002
Part II

SWEDEN

Arbitration Act 1999

Art. 8
s 33(2)

SWITZERLAND

Inter-Cantonal Concordat
Constitution 2000
  Art. 29
  Art. 30

Federal Judicial Organisation Act
  Art. 22
  Art. 23

Federal Supreme Court Act 2007
  Art 34(1)

Private International Law 1987
  Art. 180(1)
  Art. 190(2)

THE NETHERLANDS
  Arbitration Act 1986
  Code of Civil Procedure
    Art 1033
    Art 1035(2)
    Art 1073

UNITED ARAB EMIRATES
  Federal Arbitration Law 2008
    Art 12(1)(c)
    Art 12(1)(d)

UNITED STATES OF AMERICA
  Arbitration Fairness Act Bill 2007
  California Code of Civil Procedure
    S 1297.121
    S 1297.122
  Federal Arbitration Act 1925
    S 10(a)
    S 10(2)
    S 10
Fair Arbitration Act Bill 2007
  S 1135
  S 2(b)(2)(C)
  S 1(b)(2)(B)
  S 1(b)(2)(B)(iii)(I)
  S 1(b)(2)(B)(iii)(II)
  S 1(b)(2)(B)(iii)
Revised Uniform Arbitration Act
  S 12
  S 23
Texas Civil Practice and Remedies Code
  S 172.209
  S 172.056
  S 172.056(A)(1)
  S 172.056(A)(2)
Uniform Arbitration Act
United States Constitution
  Fourteenth Amendment
Institutional Rules

AMERICAN ARBITRATION ASSOCIATION

Code of Ethics for Arbitrators in Commercial Disputes
  Canon II
  Canon V
  Canon X
  Canon X, Item A(1)
  Canon X, Item C(2)
  Canon X, Item E

Domestic Arbitration Rules 1999
  Rule 15

International Arbitration Rules 1997
  Art 7(1)

CHINA INTERNATIONAL AND ECONOMIC TRADE ARBITRATION COMMISSION

Arbitration Rules 1994
  Art 2
  Art 28
  Art 29
  Art 53

Ethical Rules for Arbitrators
  Art 5

GERMAN INSTITUTE OF ARBITRATION (DIS)

Arbitration Rules
  Art 18.1

HONG KONG INTERNATIONAL ARBITRATION CENTRE

Domestic Arbitration Rules 1993
  Art 3
  Art 3.2
INTERNATIONAL BAR ASSOCIATION

Guidelines on Conflicts of Interest in International Commercial Arbitration 2004

General Standard (1)

General Standard (2)
  General Standard 2(c)
  General Standard 2(d)

General Standard (3)

General Standard (4)

General Standard (7)
  General Standard 7(c)

Red List
  Item 1.1
  Item 1.2
  Item 1.3
  Item 1.4
  Item 2.1
    Item 2.1.1
    Item 2.1.2
  Item 2.2
    Item 2.2.1
    Item 2.2.2
    Item 2.2.3
  Item 2.3
    Item 2.3.1
    Item 2.3.2
    Item 2.3.3
    Item 2.3.4
    Item 2.3.5
    Item 2.3.6
    Item 2.3.7
    Item 2.3.8
    Item 2.3.9
Orange List

Item 3.1
  Item 3.1.1
  Item 3.1.2
  Item 3.1.3
  Item 3.1.4
  Item 3.1.5

Item 3.2
  Item 3.2.1
  Item 3.2.2
  Item 3.2.3

Item 3.3
  Item 3.3.1
  Item 3.3.2
  Item 3.3.3
  Item 3.3.4
  Item 3.3.5
  Item 3.3.6
  Item 3.3.7

Item 3.4
  Item 3.4.1
  Item 3.4.2
  Item 3.4.3
  Item 3.4.4

Item 3.5
  Item 3.5.1
  Item 3.5.2
  Item 3.5.3
  Item 3.5.4

Green List

Item 4.1
  Item 4.1.1

Item 4.2
  Item 4.2.1
Item 4.3
  Item 4.3.1

Item 4.4
  Item 4.4.1
  Item 4.4.2

Item 4.5
  Item 4.5.1
  Item 4.5.2
  Item 4.5.3

*Rules of Ethics for International Arbitrators 1987*

Art 3.1
Canon III

*Rules on the Taking of Evidence in International Arbitration*

**INTERNATIONAL CHAMBER OF COMMERCE**

*Arbitration Rules*

Art 2.13
Art 7
Art 7(1)
Art 7(2)
Art 11(1)
Art 15 (2)

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES**

*Arbitration Rules*

Rule 6
Rule 6(2)
Rule 9
Rule 9(1)
Rule 18
Rule 19
Rule 27
Rule 39
Rule 53

Additional Facility Rules

LONDON COURT OF INTERNATIONAL ARBITRATION

Arbitration Rules

Art 5.3
Art 8.1
Art 8.2

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Code of Arbitration Procedure 1990

S 23(b)

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Arbitration Rules 1976

Art 9

Art 10(1)
Art 10(2)
Art 11(1)
Art 11(2)
Art 11(3)
Art 12(1)
Art 12(2)

Art 13(1)
Art 13(2)

Model Law on International Commercial Arbitration 1985

Art 12
Art 12
Art 13
Art 14
Art 15
Art 16
Art 17
Art 18
WORLD INTELLECTUAL PROPERTY ORGANISATION

Arbitration Rules

Art 22(a)
Conventions and Treaties

*American Convention on Human Rights*

Art 8

*Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*

Art II(1)
Art II(1)
Art V
Art V(1)
Art V(1)(d)
Art V(1)(d)
Art V(1)(d)
Art V(1)(e)
Art V(1)(e)
Art V(2)
Art V(2)(b)
Art V(2)(b)
Art V(2)(b)

*Convention on the Law Applicable to Contractual Obligations*

Art 16
Art 10

*Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965*

Art 1(1)
Art 1(2)
Art 2
Art 13
Art 14
Art 14(1)
Art 37(2)
Art 38
Art 38(1)
Art 40(2)
Art 42
Art 44
Art 52
Art 52(1)(d)
Art 52(3)
Art 53
Art 53(1)
Art 53(3)
Art 54
Art 56(1)
Art 57
Art 58
Art 62
Art 63(a)
Art 67

Energy Charter Treaty 1994
Art 26(4)
Chapter 3, Part V

European Convention for the Protection of Human Rights and Fundamental Freedoms
Art 6

General Treaty of Friendship, Commerce and Navigation 1794

North American Free Trade Agreement
Chapter 11

United Nations International Covenant on Civil and Political Rights
Art 14.1

Universal Declaration on Human Rights
Preface

My first experience with arbitration was as an articled clerk in a construction dispute in Perth, Western Australia, in 2004. The arbitrator was a very fair man, and the proceedings were conducted efficiently and without incident. To me, the only appearance was one of complete impartiality and fairness. This prompted me to ask myself what if the arbitrator was not impartial, and what would I need to show the court if I wanted to challenge him? When I looked at the statutes and case law, I found that the ‘reasonable apprehension’ test would be decisive of such an application, but that different tests had been used in other countries, namely England. As my curiosity grew, I found that bias challenges were in fact quite common in arbitration, particularly international commercial arbitration. When I asked why, I saw that many of the countries in which international arbitrations are held use the ‘reasonable apprehension’ test which, it seemed to me, set the bar fairly low. This then led me to ask myself whether the ‘reasonable apprehension’ makes it too easy to challenge an arbitrator. My conclusion in this thesis is that it does, and that a higher threshold for the appearance of bias should be used for international commercial arbitration.

What follows is an indictment of the ‘reasonable apprehension’ test for apparent bias in so far as it applies to international arbitrators in certain states. This thesis is not an argument against use of the ‘reasonable apprehension’ test in public law contexts, where the presumption of innocence and the policy imperative of public confidence undeniably justify its use. This thesis is about international commercial arbitration. It is intended to be a mixed theoretical and practical response to the procedural problem of tactical bias challenges in international commercial arbitration. I hope that it goes some way to achieving these objectives.

This thesis is dedicated to my wonderful parents Kevin and Sally, whose love and support has made everything possible.

I would like to thank my supervisor and dear friend, Professor Gabriël Moens, Dean of Law at Murdoch University, for introducing me to international commercial arbitration and guiding me in my studies. I would also like to thank Professor Phil Evans for leading me to academia by offering me my first teaching job, without which offer I am sure I would never
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Sam Luttrell
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