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

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<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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<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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<tr>
<td>ASA</td>
<td>Swiss Arbitration Association</td>
</tr>
<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>
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<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>
</tr>
<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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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

ECC - 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
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
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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
have undertaken a PhD. Finally, I am grateful to Professor Peter Gillies (Macquarie University), Professor Doug Jones AM, The Hon. Neil Brown QC, A. A. de Fina OAM and Professor Derek Roebuck for their advice and encouragement over the last four years.

Sam Luttrell
30 July 2009
CHAPTER 1

Bias in International Commercial Arbitration

Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially

- Socrates

1. Introduction

This thesis is concerned with procedural fairness in International Commercial Arbitration (ICA). Although ICA can be characterised as a ‘non-national’ process, it will earth itself in national legal systems at various stages. After all, national law is what makes arbitration binding. Today, all national laws require that some degree of procedural fairness be observed when the rights and liabilities of citizens are determined. In Civil Law states this requirement will usually be positively expressed in the form of an article of the municipal code of civil procedure that makes equal treatment of the parties a precondition for a valid decision or states the grounds on which a judge will be disqualified. In Common Law jurisdictions, where the expression ‘procedural fairness’ is often used interchangeably with the more emotive label ‘natural justice’\(^1\), the requirement is often expressed in the negative as a binding rule of precedent that a denial of natural justice shall entitle the affected party to challenge the decision maker or apply for judicial review of their determination. Americans call it ‘due process’, and to some extent this expression has caught on in ICA.

Modern principles of procedural fairness are derived from two maxims of law. The first is that no man shall be condemned unheard\(^2\). The second is that every man has a right to an impartial (and independent) adjudicator, a corollary of which is that no man may be a judge

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\(^1\) The writer prefers the term ‘procedural fairness’ because it refers only to procedure, and does not extend to the set of ‘fundamental’ or ‘natural rights’ sometimes associated with the expression ‘natural justice’.

\(^2\) The maxim audi alteram partem
in his own cause: *nemo debet esse judex in propria causa*. Observation of the first maxim includes the recognition of the right to be heard, present evidence, make submissions, and confront one’s accusers. Abiding by the second will mean that only a person who has no significant interest in the cause and no preference with respect to the parties involved may sit in determination of it. It is with the operation of the second maxim in international commercial disputes that this thesis is principally concerned.

### 2. International Commercial Arbitration (ICA)

Arbitration is at present the best means of peacefully establishing and preserving the rule of law in the world marketplace. There is no omni-jurisdictional world commercial court and no international bailiff to enforce state court judgments abroad. Most states have very few civil judgments enforcement agreements with other states; the United States, the world’s largest economy, is not party to one. As a result, ICA is essential to the proper functioning of global markets. In 1999, Klaus Peter Berger estimated that 90% of all cross-border trade contracts contained clauses stipulating that, in the event of a dispute, the parties will submit to arbitration. The figure would certainly be higher today; indeed we may even be at the stage where it can safely be said that ‘nearly all international contracts have arbitration clauses’.

Arbitration is a flexible process for the final determination of private rights in international contexts; when parties submit to arbitration they agree to appoint a third party (or third parties, in the case of multi-member tribunals common in high value disputes) to act quasi-judicially and finally decide their rights, duties and obligations in the dispute. Unlike the orders of national courts, arbitral awards are portable – there is no international enforcement instrument for court judgments comparable to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958). The New York Convention allows parties to transact across borders safe in the knowledge that, if a dispute arises, they will not have to press their substantive rights in the other party’s national courts in order to get a final result. The prospect of trial in foreign courts is alarming for a number of reasons: the substantive and procedural laws that apply may be different or poorly developed and the processes of the court may be inefficient or costly. There are also the risks of parallel

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3 The short form of this maxim is ‘*nemo judex in sua causa*’, or simply *nemo judex*. The writer will use the latter throughout this thesis.

proceedings in different countries and the operation of exotic conflict of laws rules determining jurisdiction.

From the international businessman’s perspective the most significant risk is that judges in other states may be biased against foreign parties. As Humphrey O’Sullivan said in 1831 ‘there is little use in going to law with the devil while the court is held in hell’. Private international actors go to arbitration to avoid adjudicatory risks, especially the risk of bias. It follows that safeguarding procedural fairness is a key concern in arbitral processes. The New York Convention recognises this by providing certain exceptions to the enforcement and recognition of foreign arbitral awards, one of which is that the enforcement of the award would be contrary to ‘public policy’.

It will be observed in this thesis that public policy has procedural and substantive facets; the New York Convention public policy exception therefore covers situations where one party has been denied procedural fairness by the tribunal in that one or more of its members were biased or had a conflict of interest when they sat. For Lew, Mistelis and Kroll, the ‘Magna Carta’ of ICA has two main rules:

(1) Due process and fair hearing; and
(2) The independence and impartiality of arbitrators.

Whilst it is right and proper to safeguard procedural fairness, experience has shown that wily defendants are willing to abuse it and cry bias as a way of delaying proceedings and escaping enforcement. Practitioners confirm this. Writing in 2004, Alan Redfern and Martin Hunter described ‘the ever-increasing recourse to arbitrator challenges as a means of delaying arbitrations or depriving a party of the arbitrator of its choice’. In 2006, Vice President of the London Court of International Arbitration (LCIA) William Park identified ‘spurious attacks on arbitrators’ independence’ as one of the four ‘problematic elements of arbitral procedure’. Driven by user-concern, the same year the LCIA resolved to start publishing its decisions on challenges. On the Continent, Finnish lawyer Matti Kukela has observed that ‘the problem

5 Diary of Humphrey O’Sullivan, 6 January 1831, in Park, below note 8, p. 423
[of conflicts of interest] seems to be increasing. Similarly, in their 2008 European review English lawyers David Foster and David Edwards note

the frequency of challenges in European arbitration seems to be increasing. Parties (or their legal advisors) have become highly adept at identifying a perceived flaw in the arbitral process or an extraneous factor affecting the partiality of an arbitrator, and are increasingly willing to make a formal objection when the opportunity arises.

Using anecdotal and empirical evidence – mostly in the form of case law but also some institutional statistics - this thesis will show that the rate at which bias challenges are being made is increasing, such that bias challenges are now a key means of ‘playing dirty’ in ICA. Mantilla-Serrano reports that ‘challenging the arbitrator on frivolous grounds’ is one solution to ‘clients’ pressing demands for immediate corrective action in the face of arbitrators’ procedural decisions against which there is no recourse. Margaret Moses has pointed the finger at Common Law practitioners, writing ‘as international arbitration becomes increasingly adversarial, there are more possibilities that a challenge to an arbitrator is simply a tactic to delay the proceedings’. Whilst the record shows that some challenges are justified, Professor Moses is right: the objective of a challenge is more often to cause delay, disrupt the Claimant’s case, and pressure the arbitrator into recusing himself. There are ways a challenge can be set up. One of the dirtiest tricks is to telephone the arbitrator and record the conversation, in the hope that the ex parte communication will yield some impropriety which will be admissible as evidence in a challenge to the arbitrator’s impartiality or independence. The cases surveyed in this thesis will reveal other ways of setting up challenges to arbitrators, not as a ‘how to’, but rather to warn users of arbitration (including arbitrators).

The writer sees an emerging ‘Black Art’ of bias challenge in ICA, and the way arbitration should respond is the central theme of this thesis. This thesis will make the point that ‘dirty’ challenge tactics are made viable by the prevalence of a judicially derived test for apparent bias which focuses on appearances, rather than facts. The writer will also argue that the

Black Art of bias challenge is further aided by the ‘lack of clear guidance on the standards to apply in making disclosure’\(^{13}\), and the very personality of the decision maker bias challenges target. Arbitrators are not public officials in Hobbesian social contract with a sovereign state like judges are, but rather ‘commercial men’ with private interests and lives; professional friends and personal foes. That they are something of a cartel is proven by the fact that the international arbitration community is regularly described as a ‘mafia’\(^{14}\), by both insiders and outsiders. According to one leading arbitrator

\[
\text{It’s a mafia because people appoint one another. You always appoint your friends – people you know. It’s a mafia because policy-making is done at these [ICC and ICCA] gatherings.}^{15}
\]

There is real strength to this description: the group is small, oligarchic, largely self-regulating and geared around the exchange of favours. It has been put that ‘because arbitrators get paid only when selected to serve, arbitrators have an incentive to favour parties more likely to select them in future’\(^{16}\). Studies of consumer and employment arbitration in the United States have called this ‘Repeat Player Bias’\(^{17}\). The pool of arbitrators in regular service in international disputes is made up mostly of barristers, partners of large international law firms and senior law professors. These actors demonstrate a high degree of role reversability: he (or she) who sits as arbitrator in one matter is just as likely to stand as counsel in the next; he who is doing the challenging today may himself be challenged tomorrow. This is not theory – it is reality. We need only look at the \textit{Telekom Malaysia} matter of 2005 to see how complicated things can get: two out of three arbitrators (including the challenged arbitrator, Professor Emmanuel Gaillard) were members of the nineteen-member International Bar Association Working Party that drafted the IBA Guidelines on Conflicts of Interest in International Arbitration in 2004; so was counsel for the challenger (Arthur Mariott QC)\(^{18}\).

\(^{13}\) Above note 7, p.497
\(^{15}\) Ibid
\(^{17}\) Ibid
\(^{18}\) \textit{Telekom Malaysia v Republic of Ghana}, decision of the District Court of The Hague, 18 October 2004 (Challenge No. 13/2004; Petition No. HA/RK/2004.667). The \textit{Telekom Malaysia} matter is discussed in Chapter 3
This equation has positive and negative integers. Writing in 1996, Dezalay and Garth observed:

Because of a mixing of roles, the same individuals who belong to the networks around the central institutions of arbitration [ICC, LCIA et al] are found in the roles of lawyers, co-arbitrators, or chairs of the arbitral tribunal. The principal players therefore acquire a great familiarity with each other, and they develop also, we suspect, a certain connivance with respect to the role held by the adversary of the moment. The extraordinary flexibility of this rotation of roles contributes greatly to the smooth running of these mechanisms of arbitration.

The situation is ‘Catch 22’: whilst the international arbitration system works well because its actors know each other, the perceived validity of their deliberations is jeopardised by this very fact. Institutions have reacted sharply to this - maintaining the integrity and reputation of international arbitration was a driving concern behind the IBA Guidelines. But it was the clients who noticed first: a party to a large international arbitration may well be alarmed to enter the room and find that everybody (including their own lawyers) knows one another except them. The people they see might be current or former partners of the same law firm, members of the same chambers, panelists at the same arbitral institution; sworn enemies or dear friends. It comes as no surprise, therefore, to see that by far the most common ground for bias challenge is professional relationship between the arbitrator and a party or their counsel. Allegations of pecuniary interest bias are catching up. The increased uptake and use of arbitration as a dispute resolution method has corresponded with an unprecedented increase in the economic and social interdependency of states and private individuals. The drafters of the IBA Guidelines noted:

The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures [of conflicts of interest] and have created more difficult

19 Above note 14, p.49
20 See paragraph 4 of the Introduction to the IBA Guidelines on Conflicts of Interest in International Arbitration (2004), where the Working Party stressed ‘The Working Group has attempted to balance the various interests of parties, representatives, arbitrators and arbitral institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international commercial arbitration’
conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges to arbitrators to delay arbitrations or deny the opposing party the arbitrator of its choice.

In a similar vein to the IBA Working Party, Ahmed El-Kosheri and Karim Youssef wrote recently:

In the world of globalised business and legal services in which international commercial arbitration operates, many, if not most, players are in some way acquainted with each other.

Whilst there is nothing new about international trade, the volume and scale of current international capital exchange has no precedent in history. The world market we participate in today must be seen as a new construct. We can now transact at distances and speeds that were unthinkable a century ago. The efficiency of modern cross-border transactions is correlated to arbitration; market efficiency has increased as the law and practice of international arbitration has developed to guarantee investors the ability to avoid foreign courts. William Park has said:

no econometric model should be required for the proposition that merchants and investors will be less likely to enter into business transactions if they fear that potential disputes will be settled by biased judges of the other side’s home courts.

The fear of bias lies at the very heart of ICA, so much so that it might not be too much to say that the prevention of partiality is its raison d’être.

22 The IBA Guidelines are discussed in Chapter 6.
24 We can place the turning point – what economic historian Fernand Braudel called the evenement – in the closing stages of the Second World War. In July 1944 the victors-to-be met in Bretton Woods, New Hampshire, for United Nations Monetary and Financial Conference. The purpose of the Bretton Woods meeting was to negotiate the program of post-war reconstruction. The Bretton Woods meeting produced the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF) and the General Agreement on Tariffs and Trade (GATT). All of these institutions have contributed to and required the development of international commercial arbitration; the IBRD and IMF by their establishment of the International Centre for the Settlement of Investment Disputes (ICSID), and GATT as the parent instrument of the various bilateral and multilateral free trade agreements (notably the Marrakech Agreement which established the World Trade Organisation) which frame investor-state arbitration today.
25 Above note 8, p. 513
3. Variation in National Court Approaches to Arbitrator Bias

Actual bias will always be actionable; an award made by an arbitrator who was actually biased against a party will be null and void in every jurisdiction that has an arbitration law. The writer has found no exceptions. In Chapter 6 the writer will show that this rule is so widely accepted that it is part of the lex mercatoria. It is so well settled as to be uncontroversial, and for this reason the writer will not dwell on it. Rather, this thesis is more concerned with apparent bias (or what the Europeans call ‘objective bias’), in relation to which the writer will expose a paradox: although the equal treatment and challenge provisions of most national arbitration laws are very similar, the tests for apparent bias are very different seat-to-seat. The writer will show that this paradox stands even amongst UNCITRAL Model Law states, where the relevant posited law is identical and, supposedly, uniform.

In the four survey chapters of this thesis, the writer will demonstrate that there are three competing tests for apparent bias in the leading arbitral seats of the world today. As a Common Law practitioner, the writer will use designations derived from English case law to describe these standards. The competing tests are:

1. the ‘reasonable apprehension’ test (the ‘Sussex Justices test’). This test requires that ‘a fair minded and informed observer would have a ‘reasonable apprehension’ that the arbitrator was biased. It is derived from the judgment of Lord Hewart CJ in Sussex Justices. In Chapters 2 and 5 the writer will observe that the majority of Common Law states follow the Sussex Justices test, and in Chapter 3 the reader will see that the test for bias under European Human Rights Law is to all intents and purposes the same.

2. the ‘real possibility’ test (the ‘Porter v Magill’ test). This test requires that ‘a fair minded and informed observer would say that there was a ‘real possibility’ that the arbitrator was biased. It comes from the 2002 decision of the House of Lords

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26 In European arbitral parlance, the term ‘objective bias’ is used to distinguish between actual (or ‘subjective’) bias and the circumstances where there is only an appearance of that the arbitrators lacks impartiality or independence.
in *Porter v Magill*. In Chapter 5 the writer will observe that nearly all of the Common Law states that followed *Gough* now follow *Porter v Magill*. In this thesis the *Porter v Magill* test will be shown to be the middle ground or ‘compromise’ test: its First Arm (court vantage) comes from *Sussex Justices* and its Second Arm (‘real danger’) comes from *Gough*.

(3) the ‘real danger’ test (the ‘*Gough* test’). This test requires that the Court must find there to be a ‘real danger’ of bias before apparent bias will be made out. It comes from the decision of the House in *Gough*. Chapter 2 will show that the *Gough* test has the highest threshold in its Second Arm, and a different First Arm to *Sussex Justices* (*Gough* doesn’t use a ‘reasonable third person’ vantage point).

In this thesis the writer will argue that the second and third tests - ‘real possibility’ and ‘real danger’ - make it harder to succeed on an allegation that there was a lack of impartiality and independence. This makes the arbitral award stronger at the all-important enforcement stage. Given that there is a trans-national public policy strongly in favour of the use of arbitration as a means of settling international commercial disputes, and accepting that a process is only as good as its product, it will be argued that the ‘real danger’ test, or failing that the ‘real possibility’ test, should be used in ICA because it limits the prospect of arbitrators being removed and arbitral awards being rendered unenforceable for bias. It is the purpose of this thesis to reason out this conclusion.

4. Sourcing Procedural Fairness in ICA

The modern rules of procedural fairness grew up around public and ‘quasi-public’ bodies. One need only skim the pages of an administrative law text book to see that racing associations, licensing authorities and trade unions have played an equal (perhaps even superior) role in the development of the laws of procedural fairness as municipal courts and tribunals. These origins have not prevented the application by analogy of these rules to private bodies like arbitral tribunals. Indeed, this thesis will show that the vast majority of modern legal systems impose the same standard of impartiality and independence on arbitrators as they do upon judges.
Most national arbitration laws do not allow the parties to contract out of the ‘fundamental’ rules of procedural fairness. These fundamental rules include the right to challenge for a lack of impartiality or independence. Impartiality and independence are mandatory requirements under Article 4 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985; as amended in 2006). Arbitration agreements that purport to totally exclude the rules of procedural fairness will be read down by most national courts on the basis of offence to public policy. The writer takes no issue with this – these basic rules are essential to arbitration and it is rational to treat them as mandatory. And even if their exclusion ex contractus was permissible it would, practically speaking, be very difficult to achieve. This is because the rules of procedural fairness enter the arbitral process in different ways and at different stages. According to William Park ‘the international business lawyer must call the talents of an archeologist to find legal sources, and on the skills of comparative anthropology to discern what judicial decisions will be enforced in a cross-border dispute’. Whilst this is certainly true for the sources of substantive law, the writer has found procedural law to be less hazardous. The three sources of the rules of procedural fairness in ICA are:

(1) Municipal laws: the municipal arbitration law of a state – be it a sui generis Arbitration Act or a chapter of the local code of civil procedure – will bind the tribunal to act fairly. All of the municipal arbitration laws studied in this thesis include the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Some include the UNCITRAL Model Law. The ‘impartiality and independence’ provision of the Model Law (Article 12) is referred to regularly in this thesis. Attaining status as a New York Convention state is a relatively simple matter of accession and ratification. Becoming a Model Law state is more complicated; the Model Law is not a Convention. It is a template municipal law with

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27 See for example Bezerksgericht, Affoltern am Albis, 26 May 1994, XXIII YBCA 754 (1998) at 24-7, confirmed by the Zurich Court of Cassation, 26 July 1995, where the court refused to enforce an award rendered by a sole arbitrator who was named as irremovable in the contract. The sole arbitrator was also the Claimant’s lawyer in the negotiation and drafting of the contract.
29 Hereinafter referred to as ‘UNCITRAL’ and the ‘Model Law’ respectively
30 See the decision of the Higher Regional Court of Cologne, 10 June 1976, IV YBCA 258 (1979) at 6, cited in Lew et al., above note 6 at 308. Exceptions are limited to those states that allow the parties to contract out of state court supervision: Tunisia, Turkey, Switzerland and Belgium.
31 Above note 8, p.518
32 Hereinafter referred to as the ‘New York Convention’ or the ‘NYC’
certain optional provisions (eg. the Article 7 ‘Agreement in Writing’ requirement). A state becomes a Model Law seat by passing a municipal arbitration law which UNCITRAL considers to be a Model Law statute. At present there are around 45 Model Law states – the figure is inexact due to variation in the status of the enacting political units: some are states (eg. Australia) and some are territories within states (eg. Macau and Hong Kong are Model Law Special Administrative Regions of the People’s Republic of China, which as a country is not Model Law)\(^\text{33}\). Some Model Law states enact and add to the template of the Model Law – the arbitration laws of these seats are referred to by ICA specialists as ‘Model Law Plus’.

(2) Institutional rules: institutional rules are usually incorporated by reference into the arbitration agreement. Since the foundation of the International Chamber of Commerce in 1923, ICA has been in a process of competitive ‘institutionalisation’\(^\text{34}\). Although every institution is different, the procedural rules of all arbitral institutions require that basic rules of procedural fairness be observed in the decision making process. When a set of institutional rules are chosen, they ‘out-rank’ all but the mandatory provisions of the municipal law of the seat in which they are put to use. If the rules prescribe a process for the determination of challenges to arbitrators, then so long as it does not offend the mandatory laws of the seat this process will have to be exhausted before recourse to a state court is available to the aggrieved party. An example of this institutional challenge model can be found in the arbitration rules of the Stockholm Chamber of Commerce (SCC). The SCC rules provide that when a challenge is made, the matter will go to a standing panel of the Arbitration Institute of the SCC for final determination\(^\text{35}\).

(3) The Arbitration Agreement: the Doctrine of Party Autonomy allows for the tailoring of the arbitral process within the parameters of the mandatory laws of the seat. This is most common on ad hoc arbitrations. Party Autonomy requires that the number of provisions of a municipal arbitration law that are treated as mandatory (or non-waivable) is minimal. For the most part, it is open to the parties to make their own rules, including (to a limited extent) rules of procedural fairness. This thesis will

\(^{33}\) A list of the states and territories which UNCITRAL considers to be Model Law is available at www.uncitral.org/en-index.htm

\(^{34}\) Above note 14, p.44

\(^{35}\) SCC Rules, Article 15
assert this prerogative in that the writer will propose a ‘Gough Clause’ in which a higher standard for the disqualification of arbitrators is implemented.

There is, depending on your view, a fourth source: trans-national customary commercial law (or *lex mercatoria*). In the last quarter of the twentieth century, international legal practice and European scholarship (Berthold Goldman, Klaus-Peter Berger *et al*) revived the *lex mercatoria*. In Chapter 6 the writer will argue that *lex mercatoria* is a valid source of the rules of procedural fairness in ICA, and that the trans-national customary expression of the rule against bias is the same as the ‘justifiable doubts’ wording of Article 12 of the Model Law. As for the test that informs the rule, the writer will argue that the IBA Guidelines are *lex mercatoria*, and that they display a preference for the test in *Porter v Magill*.

The IBA Guidelines identify circumstances that may expose arbitrators to bias challenges. They include three colour-coded ‘Application Lists’: Red, Orange and Green. The Red List deals with situations where a conflict of interest exists. In recognition of the Doctrine of Party Autonomy (and its limits), the Red List is split in two. The ‘Non-Waivable Red List’ identifies conflicts of interest where the arbitrator must not act; the situations in the ‘Waivable Red List’ must be disclosed, and the arbitrator may only act where the parties are fully aware and give their express consent. In the middle is the Orange List, which describes situations where a conflict could exist in the eyes of the parties. At the far end of the spectrum is the Green List of matters where no conflict of interest will exist and disclosure is not necessary.

The writer will examine this fourth source separately in Chapter 6. Until then the focus will be on posited arbitration law.

5. The Role of the *Lex Arbitri*

The first point of entry is the election of a procedural law for the arbitration – the *lex arbitri*) - which may take the ‘singular’ form of a contractual choice of a place for the proceedings (which brings with it a national procedural law to govern them) or the ‘dual’ form of a seat

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36 The full text of the IBA Guidelines Application Lists is included in Chapter 6
37 Where there is no express choice of *lex arbitri*, the presumption will be that the law of the seat will govern procedure. Where no seat is chosen, or the arbitration clause/agreement is defective in choice of law, it will be
and a set of rules (eg. the clause states ‘ICC Rules Arbitration in Singapore’). Allegations of bias that invoke the procedural rules of the arbitration (as opposed to the principles of procedural fairness recognised in the law of the seat) are usually made whilst the proceedings are under way. Depending upon the *lex arbitri*, the allegation will either be made as a challenge heard by the tribunal, or as separate institutional or state court proceedings for the removal of an arbitrator. In contrast, once the award is made it will be the bias law of the seat that will be pleaded in an annulment application. Indeed, this is the only option in some states: American arbitration law, for example, provides no procedure for mid-arbitration bias challenges - the parties simply have to wait for an award to be handed down before they can make the bias challenge in the form of an application for annulment. This approach is, however, a rarity; all Model Law countries, and the vast majority of leading *non*-Model Law seats, have arbitration laws which expressly provide for mid-proceeding challenge and removal of arbitrators.

The second point of entry is at the stage of enforcement of the arbitral award under the New York Convention. This is when national laws other than the mandatory laws of the seat will be relevant. There are two possibilities in the post-award phase. First, bias may be pleaded as a compositional irregularity for the purposes of New York Article V(1)(d) – member states may refuse to enforce awards where the composition of the delivering arbitral authority was not in accordance with the law of the country where the arbitration was conducted. Secondly, Article V(2)(b) of the New York Convention provides that the recognition and enforcement of a foreign arbitral award may be refused by the national courts of a member state if its enforcement or recognition would be contrary to the public policy of that state. Article V(1) is for the party opposing the award to plead. The grounds listed at Article V(2) may be invoked by the court on its own initiative *sua sponte*. The public policy exception is, therefore, a reserve power to refuse enforcement that is at the court’s convenience.

6. The New York Convention and ‘Public Policy’

The origins of the expression ‘public policy’ lie in the Anglo-Saxon legal tradition. For the purposes of this preface, public policy can be defined as the set principles that protect the for the arbitrators to determine the *lex arbitri* by application of conflicts of law principles. The latter scenario is beyond the scope of this thesis, but does have interesting ramifications for procedural fairness. See the discussion of foreign judgments enforcement rules in Chapter 8.
interests of a community. Its meaning is not fixed by the New York Convention, and the most states prefer to ‘define the exact exclusion rule as each situation arises’\(^{38}\). The Civil Law equivalent of public policy is probably ‘public order’ \((\text{ordre public})^{39}\), although it may be that this Continental expression connotes ‘a wider range of judicial concerns’\(^{40}\) than the Anglo-Saxon notion of ‘public policy’. Public morals, health and safety are widely (if not universally) recognised public policy considerations; so are the prohibitions against fraud and corruption, and ‘internationally recognised basic standards of human rights and morality’\(^{41}\).

But the devil is in the details: some public policy considerations are ‘state-specific’. State-specific public policy considerations are reflections of the economic and social preferences of individual national communities. They are not necessarily shared by other communities. For example, the domestic public policy of a free market state will include a policy rule that the law does not countenance anti-competitive trade practices\(^{42}\). The courts of this state will be guided by this aspect of public policy when, for example, they refuse to enforce an agreement between traders that fixes the price of cement. The same result might not follow if the agreement was taken to the courts of a state with a planned economy, where state directives (rather than supply and demand alone) fix commodity prices. The extension of the legal concept of ‘public policy’ is, therefore, unclear. This is due in part to the general and specific contextual inputs discussed above. It is also deliberate: public policy is closely related to state sovereignty. To define ‘public policy’ in a civil judgments enforcement treaty (such as the New York Convention, the Inter-American Convention or the Riyadh Convention) would be to limit the sovereignty of its signatory states - something diplomats and their governments are loathe to do.

What is clear, however, is that the New York Convention Article V(2)(b) ‘public policy’ exception has both substantive and procedural dimensions. An example of ‘substantive public policy’ in action would be a Court in an Islamic country refusing to enforce an arbitral award handed down in relation to an agreement for the sale of alcohol or pornography.

\(^{39}\) Dr Christoph Liebscher, in his book ‘*The Healthy Award: Challenge in International Commercial Arbitration*’ (Kluwer 2003) notes (at p.26) that ‘the public policy provision in art.16 Rome Convention [on the Law Applicable to Contractual Obligations] bears the heading ‘ordre public’ and speaks of ‘public policy’ (“ordre public”) of the forum’
\(^{40}\) Above note 11, p.164
\(^{41}\) Above note 38, p.349
\(^{42}\) Ibid, p.346
Redfern and Hunter give the example of an award relating to profits from a casino\(^{43}\). Western states invoke similar prohibitions in relation to the sale of small arms. ‘Procedural public policy’ is closely related to due process, and as such includes the tenets of procedural fairness: the parties must be treated equally and each allowed the opportunity to present their case.

The mandatory provisions of the Model Law reflect these pillars of procedural public policy\(^{44}\). Article 18 (Equal Treatment of Parties) is one of these ‘imperative articles’; it is mandatory and cannot be excluded by agreement. Article V(2)(b) of the New York Convention captures both the substantive and procedural forms of public policy. As such it entitles national courts to refuse to enforce arbitral awards where one or more of the arbitrators comprising the tribunal were (actually or apparently) biased when they made their decision. A respondent who seeks the protection of Article V(2)(b) will be required to show that the arbitrator lacked the degree of impartiality and independence that is required as a matter of procedural public policy. What approach to procedural public policy is employed will depend upon where the Respondent makes this request. Developed states are more likely to assess a bias challenge using principles of trans-national procedural public policy. The courts of less experienced seats tend to approach public policy domestically. One of the tasks of the writer is to explain how these two judicial methods produce different tests for apparent bias.

### 7. Defining ‘Bias’ in ICA

The word ‘bias’ will be used in this thesis as a generic term to connote the status of a decision maker who is (either actually or apparently) *not impartial and independent* with respect to one of the parties to the dispute before them or the subject matter of that dispute. A bias challenge is an action against an arbitrator, run after they have been appointed (or confirmed, in the ICC system), in which apparent or actual bias is alleged by the party initiating the challenge (the ‘challenger’). Whilst not exclusively, this thesis is more concerned with the test for *apparent* bias than actual bias. The writer’s focus in this regard is justified on three main grounds: firstly, actual bias (like corruption, its most extreme form\(^{45}\)) is rare in the ICA.

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\(^{43}\) Above note 7, p.497  
\(^{44}\) *Corporacion Transnacional de Inversiones, SA v Stet International SpA* (1999) 91 ACWS 3d 520  
record. This thesis will point to some examples but they are few and far between. Secondly, actual bias is universally repugnant. It will always entitle the aggrieved party to *vacatur*, and as such it is uncontroversial as a procedural rule. Thirdly, the rule against actual bias does not rely on a test for its application; actual bias is distinctly factual and does not require the use of any form of analogy or legal fiction.

The majority of national arbitration laws – including those of all UNCITRAL Model law states - recognise an apparent lack of impartiality as a basis for challenging an arbitrator. As has been noted, Article 18 of the Model Law requires that the parties be treated equally. Article 12 of the Model Law reads ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence’. Article 10(1) of the UNCITRAL Arbitration Rules creates a very similar rule, as does General Standard 2 of the IBA Guidelines. General Standard 2(c) of the IBA Guidelines expands on the test for ‘justifiable doubts’, explaining that doubts are justifiable where a reasonable and informed party would conclude that there was a likelihood that the arbitrators, in reaching his or her decision, may be influenced by factors other than the merits of the case as presented by the parties. In arbitral proceedings between two states in 1995 under the UNCITRAL Arbitration Rules the appointing authority elaborated on the standard created by Model Law Article 12(2):

> the test to be applied is that the doubts existing on the part of the Claimant here must be justifiable on some objective basis. Are they reasonable doubts as tested by the standard of a fair minded, rational, objective observer? Could that observer say, on the basis of the facts as we know them, that the Claimant has a reasonable apprehension of partiality on the part of the Respondents’ arbitrator?

English and Commonwealth readings anchor the term ‘impartiality’ to public perception, observing Lord Chief Justice Hewart’s famous dictum in *Sussex Justices* that ‘justice must be done and be seen to be done’. The courts of many other states, including those of the Civil Law tradition and seats supervised by the European Court of Human Rights at Strasbourg, have agreed that impartiality is a matter of ‘appearances’. Commenting on General Standard 2 of the IBA Guidelines - which in Chapter 6 the writer will argue are *lex*

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46 Above note 6, p.304
mercatoria - Australian arbitrator Professor Doug Jones (a member of the IBA working Party that produced the Guidelines) confirmed ‘appearances, not fact, are the touchstone’. This thesis will show that the primacy of appearance is well settled in the jurisprudence of bias challenges; it will also show why this approach is misconceived at law.

Municipal laws and institutional rules rarely define ‘impartiality’. As a result, it is with some reluctance that the writer approaches the task. ‘Impartiality’ certainly does not mean utter indifference, and in this thesis the writer will argue that it also has a different meaning to the word ‘neutrality’. Rather, ‘impartiality’ means ‘complete receptivity to the parties’ arguments: the concurrent absence of both party and outcome preference. ‘Party Preference’ relates to identity – the identity of the decision maker and identities of the disputants; ‘Outcome Preference’ means pre-judgment of one or more of the legal issues in dispute. One of the things the reader will take away from this thesis is that outcome preference is becoming more and more complicated in ICA. Party preference is the older form of bias.

(a) Party Preference

When a decision maker is more inclined to decide in favour of one party than the other, then that decision maker will have a Party Preference. The writer’s theory of Party Preference presumes two things: firstly that there is more than one party to the proceedings (‘the presumption of party multiplicity’); and secondly that neither party chose the decision maker (‘the presumption against adjudicatory choice’). An unthinkable situation would be when there is only one party whose rights and liabilities are being determined, and that party alone has chosen the person that will judge the same. Party Preference will not be available to that party as a ground of review because both presumptions fail in their situation. Actionable

50 Exceptions include Sweden and the People’s Republic of China.
51 Exceptions include the Code of Ethics of the American Arbitration Association (1977) and the International Bar Association Ethics for International Arbitrators (1987), which provide guidelines for interpreting the concepts of ‘impartiality’ and ‘independence’.
party preference depends upon the validity of both presumptions, and the failure of one will render the ground unavailable. This is why, the writer will argue later, it makes sense that party-appointed arbitrators are not subject to the same standard of impartiality as non-party appointed arbitrators.\textsuperscript{55} Party preference is not actionable in such a situation because if the party appointed arbitrator has a party preference then it can be assumed to be for the party that appointed them (and the other party accepts this violenti non fit injuria), and the ‘one-per-party’ rule means that the preferences of the party appointed arbitrators cancel each other out when they make their decision.

Due to its close relation to identity, party preference may take a number of different forms. It may be based on (1) the characteristics of the party (relative to the characteristics of the decision maker (‘Identity Characteristics’), or (2) the familiarity of the relevant party with the decision maker (‘Party Familiarity’).

Identity Characteristics include:

(i) Nationality or domicile (causing ‘Catalina Bias’\textsuperscript{56});

(ii) Race (causing ‘Noble China Bias’\textsuperscript{57});

(iii) Political persuasion/association (causing ‘Pinochet Bias’\textsuperscript{58});

Identity characteristics (ii) and (iii) usually do not apply to corporate parties. It is true that corporations can have sophisticated politics, especially when they are wholly or partly state-owned – the political persuasion of a para-statal entity (and the arbitrator they appoint) is most likely to arise in investor-state arbitration\textsuperscript{59}. Generally though, corporate identity will generally depend on domicile and business type, but may also be influenced by the identities of the company officers as natural persons (in which case all five identity characteristics will be applicable to those people). This is especially so where company officers appear as

\textsuperscript{55} See for example Sunkist Softdrinks v Sunkist Growers, 10 F 3d 753 (11th Cir. 93)
\textsuperscript{56} Re the Owners of the Steamship ‘Catalina’ and the Owners of the Steamship ‘Norma’ [1938] 61 LlL Rep 360
\textsuperscript{57} Noble China Inc v Cheong (1998) 43 OR (3d) 69
\textsuperscript{58} R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No.2)[1999] 2 WLR 272
\textsuperscript{59} The ways in which corporations can have political persuasions and associations are beyond the scope of this paper, suffice to say here that corporate politics is a very real feature of international markets, particularly in developing countries with high degrees of nationalization and state ownership.
witnesses before the decision maker and constitute the secondary identity of the corporation. Secondary identity may also extend to the corporation’s advocates, but this is more properly an aspect of familiarity.

Types of Party Familiarity include:

(i) Professional familiarity: the party and the decision maker have or have had professional dealings (eg. the decision maker has judged the party before, or has acted as counsel or advocate for the party in the past) (*Rustal Trading familiarity*\(^{60}\));

(ii) Commercial familiarity: the party and the decision maker have either continuing or past commercial dealings, or common commercial interests (eg. the arbitrator owns shares in the corporate party – ‘bias by portfolio’; the writer will call this *‘Saudi Cable familiarity’*\(^{61}\));

(iii) Social familiarity: the party (or their witnesses) and the decision maker know or are related to one another (eg. by consanguinity, marriage, membership of the same chambers or common membership of social or sporting clubs; the writer will call this *‘Laker Airways familiarity’*\(^{62}\));

(iv) Representative familiarity: the officers, agents or servants called as witnesses by, or the advocates of, the party are professionally, socially or commercially familiar to the decision maker, or vice versa (*‘ASM Shipping familiarity’*\(^{63}\). The newest form of *ASM Shipping* Familiarity is *Hrvatska* Counsel Conflict, where the objection is to counsel rather than to the arbitrator they know. To date this new ground for challenge is only recognized in ICSID jurisprudence\(^{64}\).

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\(^{60}\) *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd’s Reps 14

\(^{61}\) *AT&T Corporation and Lucent Technologies Inc v Saudi Cable Company* [2000] All ER (Comm) 625

\(^{62}\) *Laker Airways v FLS Aerospace* [1999] 2 Lloyd’s Rep 45

\(^{63}\) *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] APP.L.R.10/19

\(^{64}\) *Hrvatska Elektroprivreda dd v Slovenia; Re David Mildon QC*, ICSID Case ARB/05/24 (Tribunal’s ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008)
Each of the first three heads of familiarity can be categorised as either pecuniary or non-pecuniary. Commercial familiarity is, naturally, pecuniary in nature. The professional and social forms of familiarity are, generally, non-pecuniary (although the basis for professional familiarity may have originally been commercial familiarity). Being secondary, representative familiarity may fall into either category depending upon the basis of the familiarity of the natural person and the decision maker.

(b) Outcome Preference

This is often referred to as ‘Prejudgment’ or ‘Substantive Bias’. An outcome preference can be based on party preference or legal opinion. Outcome preferences that flow from party preference will include, at their most extreme, situations of corruption where the decision maker’s outcome preference has been procured by payment or favour. This is what the writer will term ‘Procured Bias’. It is rare and only a handful of national arbitration laws deal with it expressly (examples include the PRC\(^65\) and Japan\(^66\)). Procured Bias will be actionable as a contravention of public policy in every state. It is also important to note that a small handful of states have laws which forbid their nationals from acting against the national interest, and these laws extend to arbitrators. Syria is an example: if a Syrian national is appointed as an arbitrator in a matter involving the state of Syria, or a Syrian state enterprise, then they will have a \textit{de jure} outcome preference because, if they decide against the Syrian party, they commit a crime. Such laws are very rare, and are not considered in detail in this thesis.

The more common form of outcome preference is where the arbitrator goes into the arbitration with a view as to who should win, and why. Outcome preferences based on legal opinion are actionable where a decision maker gives the appearance that they have judged the facts or merits prior to the scheduled hearing\(^67\). This substantive bias may be the result of an arbitrator’s prior determination of a matter that is factually or legally similar to the case now before them (‘Telekom Malaysia Bias’\(^68\), their previous public expression of opinion on a legal issue that is live in the current proceedings (‘Uni-Inter Bias’), or involvement in the facts of the dispute. The latter will include situations where the decision maker has acted as

\(^{65}\) China Arbitration Law Article 38

\(^{66}\) Japan Arbitration Act 2003, Sections 50-52

\(^{67}\) Above note 52, p.160

counsel in the matter at an earlier stage. Outcome preferences can be abstract, or policy-based. The challenge in *Himpurna California Energy Ltd (Bermuda) v The Republic of Indonesia*\(^69\) provides a colourful illustration: counsel for Indonesia challenged the Chairman of the tribunal – one of the world’s leading arbitrators – on the basis that his well known commitment to international arbitration gave rise to the appearance that he had prejudged the issue of jurisdiction. Counsel claimed the Chairman was well known throughout the arbitration community to be on a constant crusade to elevate international arbitration, and thus the power of international arbitrators such as himself, to a level above and beyond the jurisdiction of any court in the world. He has now found himself in a situation in which he believes he can prove his theory and ignore the rightful jurisdiction of the Indonesian courts, at the same time preventing such courts from engaging in their proper and legal authority to review his previous decision\(^70\)

This kind of challenge – where the conflict of *Mitsubishi* pro-arbitration policy and sovereignty is projected onto the arbitrator personally – will be referred to as ‘*CalEnergy Bias*’. In ICSID arbitration, where the substantive legal principles of foreign investment law are derived from sources which include the decisions of ICSID (and *ad hoc* ISA) tribunals, the problem of ‘Issue Conflict’ (of which *Telekom Malaysia* bias is one form) is especially acute, and is the subject of a separate discussion in Chapter 7. The new avenue of *Hrvatska* Counsel Conflict is also considered in the ICSID chapter of this thesis.

### 8. The Question of ‘Independence’

Independence has been described as the *modus operandi* of the arbitrator\(^71\). In ICA, independence issues usually arise where the arbitrator has a relationship with a party; where the arbitrator has a relationship with an entity linked to a party; and where the arbitrator has a relationship with counsel (or an entity linked to counsel)\(^72\). Strictly speaking – and the writer must - these situations *do not* bring the arbitrator’s impartiality into question: they only cast a

\(^{69}\) Extract of partial award in (2000) XXV YB Comm Arb 109
\(^{70}\) (2000) XXV YB Comm Arb 109 at 151
\(^{71}\) Above note 23 at p.46
shadow on his independence. But the distinction between impartiality and independence is not well recognized: many commentators see the two terms as ‘legally synonymous’; others have labeled attempts to distinguish the two concepts as pedantic. The writer respectfully disagrees: for reasons offered below, it will be put that there most definitely is a difference between the two notions, and when issues of independence arise they are often confused with impartiality. There is one main reason for this: as shall be observed in the survey chapters that follow, impartiality is often paired with ‘independence’ in national laws and procedural rules. The due process ‘guarantee’ at Article 6 of the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms uses both adjectives, as does Article 14.1 of the United Nations International Covenant on Civil and Political Rights. The dual requirement of ‘impartiality and independence’ can be found in Article 5.3 of the Arbitration Rules of the London Court of International Arbitration, which states ‘Arbitrators shall be and shall remain at all times impartial and independent of the parties’. Article 10(1) of the UNCITRAL Arbitration Rules states that ‘Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’. As has been noted, Article 12(2) of the UNCITRAL Model Law is cast in similar terms, with a corresponding disclosure requirement at Article 12(1). It follows that Model Law states recognise the dual requirement of impartiality and independence.

In fact, few national laws and institutional rules depart from this norm, and the dual standard seems to prevail. There are four important exceptions. The first is the ICC. The General Provisions (Article 7) of the ICC arbitration rules require ‘independence’ but do not mention impartiality. Sub-article (1) of the General Provisions states ‘every arbitrator must be and remain independent of the parties involved in the action’. Sub-article two requires disclosure of circumstances which may ‘call into question the arbitrator’s independence’. Article 11(1) provides that an arbitrator may be challenged for a ‘lack of independence or otherwise’. The

74 Article 14.1 of the Covenant reads ‘Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’
75 UNCITRAL Arbitration Rules, Article 10. Similar provisions can be found at Article 22(a) of the Arbitration Rules of the World Intellectual Property Organisation (WIPO); Canon III of the International Bar Association (IBA) Code of Ethics; and Canon II of the American Arbitration Association (AAA) Code of Ethics.
76 The statute of the International Court of Justice is silent on independence: it requires only that judges exercise their duties impartially.
77 See Article 11(1) of the ICC Rules, which confer the right to challenge an arbitrator ‘whether for lack of independence or otherwise’.
78 ICC Arbitration Rules, Article 7(2)
word ‘Impartiality’ is used in Article 15 (2), where it is paired with the adjective ‘fairly’. This semantic preference for ‘independence’ mirrors the French lex arbitri. The New Code of Civil Procedure (NCCP) makes no express reference to impartiality but does ‘independence’, going so far as to list eight instances in which the latter will be deemed lacking\(^\text{79}\). It is notable that French courts have not let the statutory absence of the term ‘impartiality’ deprive appellants of recourse to the principle it connotes. It will be observed that the NCCP concept of ‘independence’ extends to ‘independence of mind’, an elaboration synonymous with impartiality\(^\text{80}\). Second and similar is Swiss law. Article 180 of the Swiss Private International Law (SPIL) provides for challenges based on a lack of independence but is silent on impartiality\(^\text{81}\). The Swiss judicial approach is similar to the French, meaning that a lack of impartiality can be pleaded notwithstanding absence in the black letters of the SPIL. This is also true of the International Centre for the Settlement of Investment Disputes: although the Washington Convention (1965) and the ICSID Arbitration Rules (2006) do not refer to impartiality – Article 14 speaks only to the arbitrator’s ‘the capacity to exercise independent judgment’ – ICSID tribunals tend to treat a lack of impartiality as a ground for challenge nonetheless. The fourth exception is the English Arbitration Act 1996, which is drafted in the reverse: section 24 of the English Act requires impartiality but says nothing of independence. The London tradition of trade and reinsurance arbitration is the historical cause of this drafting\(^\text{82}\). Besides demonstrating the almost perfect opposition of Civil and Common Law statutory approaches, these examples raise an important question – is there any real difference between impartiality and independence?

9. The Difference Between ‘Impartiality’ and ‘Independence’

Whilst the terms ‘independence’ and ‘impartiality’ may be paired so regularly as to appear interchangeable, and even though independence is sometimes found to ‘include’ impartiality, it is certainly not the case that these words mean the same thing. At best they overlap. The writer finds the IBA Rules of Ethics for International Arbitrators (1987) useful in this regard. Article 3.1 (Elements of Bias) states:

\(^{79}\) NCCP Article 341  
\(^{81}\) SPIL Article 180; Swiss courts will, however, hear challenges based upon impartiality. See above note 6, p.304  
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 arbitrator and one of the parties, or with somebody closely connected with one of the parties.

There is also authority for the proposition that the two requirements have different ‘life-spans’. The requirement of independence lasts the entire proceeding, and (at least arguably) into the period immediately after it. Impartiality is more limited in the chronological sense: it must end if an award is to be rendered. Sir Robert Jennings, appointing authority for the Iran-United States Claims Tribunal (IUSCT) in Re Judge Broms, put it as follows:

any judge, though he ought to begin in an impartial stance, is required as a matter of judicial duty eventually and on the basis of the presented arguments to become partial to one side or the other. To remain neutral to the end would be a dereliction of duty.

Some erosion of impartiality is necessary and acceptable for the proper performance of adjudicative function; as the arbitrator is convinced his partiality for one side develops and increases. The same is not true of the element of independence, which William ‘Rusty’ Park has defined as ‘the absence of inappropriate personal or financial links with a party’. Winning a case does not make the victor literally proximate to the decision maker. It is therefore logically sound to say that a decision maker who lacks independence will necessarily lack impartiality, but a decision maker who lacks impartiality will not necessarily lack independence. This is because the appearance of party preference flows from proximity, but the appearance of proximity does not necessarily flow from party preference. As was

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83 If an arbitrator starts working for the winning party immediately after the arbitration there are grounds for challenging the award on the basis of apparent bias. In such a situation, the subsequent relationship between decision maker and victor is usually seen as supporting the reasonableness of the applicant’s apprehension of bias.

84 Decision of Appointing Authority to the Iran-United States Claims Tribunal (May 7, 2001) at 5-6, in ‘Challenge of Iran-U.S. Claims Tribunal Judge Bengt Broms’, American Journal of International Law, Vol. 95, No.4 (October 2001), p.896

85 Above note 8, p.380

86 This dicta was relied upon most recently by the respondent in National Grid PLC v Argentina, LCIA Case No.UN7949, para 63. For a competing view see paragraph 102 of the English Departmental Advisory Committee’s Report on the Arbitration Bill (1996), reprinted in (1997) 13 Arb Int 275. See also the judgment of
observed by the ICSID tribunal in the second challenge to Arbitrator Kaufmann-Kohler in *Suez & Ors v Argentina*, a decision maker does not forfeit their independence just because they prefer one party (or outcome) over another. They can stay where they are and still find for a party. Although multifaceted, independence is a more concrete concept than its legislative bedfellow. It is structural and social, being concerned with relationship rather than attitude. In *Saudi Cable*, Lord Justice Potter said

‘Independence’ connotes an absence of connection with either of the parties in the sense of an absence of any interest in, or of any present or prospective business or other connection with, one of the parties which might lead the arbitrator to favour the party concerned.

Some definitions, particularly those attempted by Continental commentators, draw on the French notion of ‘independence of mind’ and relate independence back to impartiality: independence becomes the position from which impartial decisions can be made. At the VIth Symposium on International Arbitration in Paris in 1988, Pierre Lalive came up with a ‘well chosen, albeit cynical’ definition: “Independence” implies courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator’. Similarly, it has been said that, as an ‘intellectual process’, independence allows the arbitrator to decide the dispute ‘free of all contingency’. Professor Ahmed El-Kosheri and Dr Karim Youssef have said that the legal usage ‘independence’ refers to the customary mental operations performed in evaluating opposing claims and rendering justice, a function preceded by a ‘process of self-neutralisation’.

This thesis will demonstrate that allegations of Party Preference or Outcome Preference based on familiarity will manifest themselves as questions of independence. Where in a Common Law jurisdiction the Rule in *Dimes* is pleaded, the challenge will be more properly
characterised as an asserted lack of independence than an allegation of partiality\(^\text{92}\). The task for the challenger will be to identify the *kind of familiarity* that exists between the decision maker and the relevant party. Putting standards aside for a moment, such a case is simple in the evidentiary sense. Either there is familiarity, or there is not. There may be professional familiarity where, for example, a panel member has sat on the board of one of the corporate parties to the dispute, and a search of company records will prove this. There may be commercial familiarity in the fact that a member of the tribunal has a pecuniary interest in the cause. The *Dimes* example is where the judge holds shares in a corporate party appearing before him. More abstract forms of familiarity are, especially in Common Law states that have followed the decision of the House of Lords in *Pinochet (No.2)*, captured by the rules of bias proper.

There may be an appearance of bias where an arbitrator and a disputant are members of the same golf club. Challenges based on social familiarity like this raise questions of fact. According to Binder ‘the test for independence is an objective one, as prior business or financial relations are easy to determine’\(^\text{93}\). They require only that a line be drawn between the dots – if the line is dark enough, the challenge will succeed. Impartiality is, in contrast, more abstract and subjective. When a decision maker is said to lack impartiality, their state of mind is put in issue. Unless words or deeds support the allegation (like they did in ‘*Catalina* v *Norma*’, for example) it will be necessary to prove on balance that the decision maker had in their mind something that they properly should not have. Thus, it is more difficult to prove a lack of impartiality than it is a lack of independence.

**10. The Meaning and Place of ‘Neutrality’ in ICA**

These questions of definition require the writer to offer an opinion on one more point. The expression ‘neutral’ is often used in international arbitration. It has two functions: (1) to describe the status of the arbitrator, and (2) to describe the status of a seat. The first function is most prominent in the American ADR lexicon, where it is used to distinguish between the absolute impartiality and independence expected of Chairmen and the ‘relative’ impartiality

\(^{92}\) *Ebner* per Kirby J at 449  
\(^{93}\) Above note 53, p.83
and independence of party-appointed arbitrators in domestic proceedings. Whilst the writer agrees with the Sunkist distinction, the writer finds the American use of the term ‘neutral’ to be problematic, and will in this thesis refrain from using it. For reasons of vernacular efficiency and legitimate nexus with sovereignty the second function is less troublesome.

With respect to the first use, it has been suggested that being ‘neutral’ involves ‘the arbitrator taking a certain distance in relation to his legal, political and religious culture’. This use of the word ‘neutral’ might pin it more to independence than impartiality. The writer’s view is that, in ICA, the personal aspect of the term ‘neutral’ is misconceived: impartiality and independence are not the same as ‘neutrality’ and cannot be captured by it as a blanket expression. Binder has also observed that ‘impartiality is occasionally incorrectly referred to as ‘neutrality’.

‘Neutrality’ is a term derived from the Public International Law of armed conflict, connoting the status of a sovereign entity that refrains from participation in an armed conflict and neither materially assists nor obstructs the belligerents involved in it. Switzerland and Sweden were neutral in World War Two; neutrality is ‘the situation of a state which is unaligned’ and stays that way for the duration of hostilities. Although it is relative to a state of affairs, ‘neutrality’ is absolute for those sovereign entities involved. The writer’s objection to the term is as follows: an arbitrator may start off much like a neutral state in a time of war, but they end up taking a side. Indeed, as Sir Robert Jennings observed in Re Judge Broms, they are duty bound to do so. The description of the arbitrator as a ‘neutral’ might fit with the Anglo-American adversarial nature of modern arbitral practice, but it contradicts the function of the arbitrator, which is to render an award. The term ‘neutral’ does not acknowledge the necessity and inevitability of the arbitrator’s ‘participation in the conflict’.

The writer suspects that the vernacular acceptance of the term ‘neutral’ is one of the reasons the test for bias is set low in most of the states surveyed in this thesis. Neutrality is a colloquialism that has elevated impartiality and independence to the unattainable level of

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94 This will be referred to as ‘the Sunkist distinction’ after the US case Sunkist Soft Drinks Inc. v Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993)
95 De Boisseson, M., ‘Le Droit Français de l’Arbitrage Interne et International’ (2nd ed. 1990) 770 at 782
96 Above note 53, pp.83-4
98 See decision of Appointing Authority to the Iran-United States Claims Tribunal (May 7, 2001) at 5-6, above note 84, p.896
absolutes. That is not to say, however, that the expression has no place in ICA: the term ‘neutral’ is rightly (but still analogically) used as a designation for acceptable seats, especially in investor-state arbitrations. This is the second use - the ‘jurisdictional aspect’ of neutrality. The jurisdictional aspect of the term has a much longer history in the language of private international law, where the word ‘neutral’ has long been used to describe the objectives of forum selection clauses. In modern ad hoc arbitrations the parties will shop around for an appropriate seat, and along with the suitability of municipal law a key consideration will often be the perceived neutrality of the candidate state. Experience shows that in heated investor-state disputes, neutrality may in fact trump strictly legal considerations in the selection of seat.

This is precisely how Stockholm emerged as a seat during the Cold War\(^99\); Swedish arbitration law was not especially well developed but the Russians saw it as neutral (even mildly ideologically hostile) \textit{vis-a-vis} the United States, and so it was agreed as site for arbitration\(^100\). An arbitrator who served in the well known \textit{Pertamina} arbitration\(^101\) (which, like the \textit{CalEnergy} arbitration, initially involved the Republic of Indonesia) recalled the difficulty the tribunal encountered in selecting an appropriate place for the proceedings in that heated disputed: ‘we had to find a state that’s not a state - we looked at San Marino and Vatican City\(^102\). After convening in The Hague, the tribunal ultimately settled in Switzerland, a state with a legal system which the disputants accepted as a ‘neutral’. The writer has no real problem with this use of the word.

\section*{11. Method}

Now that the key words have been defined, the method of this study must be explained. The reader will notice that a good deal of this thesis is taken up with survey of municipal laws. This is necessary due to the method applied in this thesis, which is as follows:

\footnotesize
\begin{itemize}
\item \(^99\) Above note 14, p.188
\item \(^100\) This perception was fuelled by the fact that, for a period in the 1970’s, Sweden broke off diplomatic relations with the United States. See Dezalay & Garth, above note 14, p.188
\item \(^101\) Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara. See Luttrell, S.R., ‘Lex Arbitri Indonesia - The Law, Practice and Place of Commercial Arbitration in Indonesia Today’ [2007] \textit{Int. A.L.R.} 190. It is notable that prominent international arbitrator and Freshfields partner Jan Paulsson was unsuccessfully challenged in this matter on the basis of his prior representation of a party.
\item \(^102\) Private discussion between the writer and Mr AA de Fina, May 2008
\end{itemize}
1. Define key terms and parameters of inquiry
2. Establish variation in the municipal laws of leading seats
3. Compare municipal laws of emerging seats
4. Identify trend in investor-state (and ICSID) arbitration
5. Extract principles from trans-national customary commercial law
6. Locate causes of the increased rate of bias challenge
7. Argue for the Gough standard using municipal and trans-national law and policy
8. Test the municipal laws for their tolerance for an agreement implementing Gough for challenges (the ‘Gough Clause’)

12. State Selection

The writer has not surveyed every New York Convention member state, and although the focus is on uniform jurisdictions, a number of UNCITRAL Model Law states are left out. Choices have been made, and they must be explained. Firstly, as a matter of academic practicality the writer was not in a position to study every jurisdiction in the world; there was neither the time nor the need. Only the most productive states, in both the commercial and jurisprudential senses, were selected.

Secondly, although the finger is pointed at times (especially in Chapter 8), there is a Common Law bias in this thesis, both in the states selected and the language used. The writer is an Australian trained legal practitioner, and is therefore far better placed to study the laws of Common Law states than Civil Code jurisdictions. For this reason significant attention is paid to England (Chapter 2) and the Model Law/Common Law states of the Asia Pacific region (Chapter 5). The United States is given a full chapter (Chapter 4) because of its economic significance, the complexity of its dualist arbitration law (some states in the Federation of fifty are Model Law, but the Federal Arbitration Act is not) and the fact that US Courts tend to take a strict approach to bias challenges that is similar the English position under Gough. Each European state considered in Chapter 3 has been chosen on the basis of its:

(i) Significance as a seat, as determined by the volume of arbitrations which are physically conducted within its territorial limits (eg. Switzerland), or
(ii) Perceived neutrality as a state (eg. Sweden), or
(iii) Role as a host state for permanent arbitral tribunals (eg. The Netherlands)
The writer hopes that the group of states chosen is sufficiently broad as to enable a comparative analysis to be undertaken and the argument for the ‘real danger’ test to be developed. The reader will see that ICSID investor state arbitration stands alone in Chapter 7. This is because ICSID is a stateless institution severed from municipal law by operation of the Washington Convention – ICSID is its own jurisdiction. Other international arbitration institutions are dealt with in the parts covering the states in which they are located: the ICC in the France section of Chapter 3, the LCIA in the chapter on English law, etc. Unlike ICSID, these institutions are linked to the municipal legal systems of their surrounding states.

The ICSID chapter is prefaced by a discussion of the IBA Guidelines and transnational customary commercial law (*lex mercatoria*). The purpose of this chapter is two-fold: firstly to argue that the IBA Guidelines are so widely used and accepted that they are part of the *lex mercatoria*; and secondly, to argue that the IBA Guidelines prefer the *Porter v Magill* test for apparent bias (rather than *Sussex Justices*). In the writer’s opinion, the placement of the IBA Guidelines chapter ahead of the investor-state chapter is appropriate because the force of both the IBA Guidelines and customary international commercial law is strongest in investor-state arbitration.

Although this thesis will point to certain exceptions, most national courts are averse to the application of inflexible rules when it comes to bias and conflict of interest in ICA. The majority of courts evaluate allegations of bias on a ‘case-by-case’ basis; every challenge will turn on its own facts. The facts of the impugned relationship are paramount where independence is put in issue, and where a lack of impartiality is alleged the material facts of the challenger’s perception (and the arbitrator’s preference) will be decisive. It follows that, in order to fully understand the law as it pertains to bias challenges in ICA, a thorough survey of case law must be undertaken. It is for this reason that large portions of this thesis are taken up with case summaries and often lengthy recitations of material facts (especially in the Common Law chapters). The list of cases provided in this thesis is not exhaustive. Indeed, it could not be: unlike state court adjudication, ICA is private (and often confidential) and very few institutions publish their challenge decisions. Indeed, the lack of transparency in challenge jurisprudence was one of the driving concerns of the Working Group that drafted the IBA Guidelines on Conflicts of Interest was the lack of transparency in challenge
jurisprudence\textsuperscript{103}. Challenges are only made public when they are reported by the institution that decided them (as is the practice of the ICC, IUSCT, PCA, ICAS and the SCC), made directly to a national court from an \textit{ad hoc} arbitration (in which case the party names are often replaced with ‘X’ and ‘Y’ or ‘Undisclosed’), or published by consent of the parties. In this sense, it is worth prefacing much of this thesis with the words ‘as far as the writer is aware…’

13. Language

Law is a language game the writer must take very seriously. Accordingly, a glossary of key terms precedes the tables of legislation, rules and decisions at the beginning of this thesis. The words and expressions defined in the glossary include the Common Law designations used above under ‘Party Familiarity’ and ‘Identity Characteristics’. Done properly, there can be efficiency in jargon; the Glossary is intended to serve this purpose.

The writer is a speaker of the English legal language. Accordingly, the Common Law tradition of referencing a principle with the name of the case in which it was formulated is observed throughout this thesis, both in Common Law and Civil Code states (where the absence of \textit{stare decisis} makes it less appropriate). The Anglo Common Law designation ‘\textit{Sussex Justices}’ will be used to refer to any test for apparent bias that has as its elements (1) assessment of the impugned conduct from the vantage of a ‘reasonable observer’ (the ‘First Arm’), (2) a ‘reasonable apprehension’ (or ‘reasonable suspicion’) threshold (the ‘Second Arm’), and (3) a stated policy imperative of ensuring that ‘justice must be seen to be done’ (‘Lord Hewart’s dictum’). The writer will show that the test used by the European Court of Human Rights equates with \textit{Sussex Justices}. The case name ‘\textit{Sussex Justices}’ is therefore used by the writer in respect of Common Law and European Civil Law seats, not to imply that the English expression of the test is binding on the Continent, but rather to make the point that Strasbourg jurisprudence in this area is consistent with the \textit{Sussex Justices} line of Common Law authority. The writer is not implying any Common Law hegemony in ICA, but simply working in his mother tongue.

Finally, Latin is used throughout this thesis. In matters involving multiple legal systems the ‘Plain English’ argument (made loudest in the Anglo-American world) must certainly fail: Latin terms provide essential common linguistic ground between Civil and Common Law parties, and remain in constant use in international legal practice today. The place of Latin in the future language of international law is guaranteed by its centrality to the new lex mercatoria, and the importance of Latin terms in the procedural lexicon of ICA (exequatur, vacatur, ex aequo et bono, etc). In this thesis, certain principles are also referred to by their German and French names (eg. the German Kompetenz-Kompetenz, the French tronc common, etc). Other than in these situations the writer has worked entirely in English. For example, the English translation ‘Court of First Instance’ is used for the French Tribunal de Grande Instance, ‘Supreme Court’ for Bundesgerichtschoff and so on. For consistency this approach is also taken with acronyms. For example, the writer will refer to the French New Code of Civil Procedure as the ‘NCCP’, rather than the ‘NCPC’ (which is true to the sequence of the French form Le Nouveau Code de Procedure Civile Francais).
CHAPTER 2

Lord Hewart’s Ghost

The highest requirement that justice should manifestly be seen to be done may require that a judicial decision be overturned because of the manner in which it was reached, without it being demonstrated that the result produced injustice. But that is not the system applied to arbitrations by the 1996 [Arbitration] Act

- Bowsher J in Groundshire v VHQ (2001)

1. Introduction

The kernel of this thesis is that state courts should use a test for apparent bias that makes it harder to remove arbitrators and resist the enforcement of their awards. English law shows that there are two options for courts supervising arbitral proceedings. The first is to remove an arbitrator if a fair minded and informed observer would have a ‘reasonable apprehension’ that the arbitrator was biased. This test is derived from the judgment of Lord Hewart CJ in Sussex Justices. The second option is to remove if the same notional third person would perceive that there was a ‘real possibility’ that the arbitrator was biased. This test comes from the 2002 decision of the House of Lords in Porter v Magill. Breaking the 78 year Common Law trajectory between these two decisions was the 1993 case of R v Gough. In Gough the House of Lords held that the Court must find there to be a ‘real danger’ of bias before apparent bias will be made out. Although Porter v Magill marked the end of the force of the ratio in Gough, besides the revival of the fair minded observer, the two decisions are similar. The Second Arms of both tests posit a threshold that is more difficult to pass for the challenger than that laid down in Sussex Justices. The writer will therefore refer to two Common Law bloodlines in this chapter: a Gough-Porter v Magill line (marked by the ‘real possibility’ test) and a Sussex Justices line (made up of decisions employing the ‘reasonable

1 [2001] 1 BLR 395 at para 40
apprehension’ test). Later the writer will argue that, where arbitration is concerned, the ‘real
certainty’ test should be used.

This chapter starts with a discussion of the law of bias in England. This discussion will begin
with an analysis of the maxim nemo debet esse judex in propria causa (or the shorter form
nemo judex in sua causa) and the Rule in Dimes that is its modern expression. The blurring of
the line between this rule and the rule of disqualification for apparent bias will then be
attributed to the decision of the House of Lords in Pinochet (No.2). The writer will then
discuss English arbitration law and the sources of the obligations of impartiality and
independence. A survey of case law follows. This chapter closes with a discussion of the

2. The Law of Bias in England

The English approach to bias is informed by multiple sources, including Biblical teachings,
Classical philosophy and Roman law\(^2\). The absence of bias is a critical component of the
notion of procedural equilibrium which Common Law systems call ‘fairness’. Fairness has
moral and ethical overtones that draw directly on religious prescriptions. In Chapter 3 the
writer will briefly argue that the Iron Age peoples of Europe observed customary procedural
laws directed at achieving fairness, and that these customs persisted even after the arrival of
the first written laws in Roman times. If it occurred in Europe then the same historical legal
transition would have occurred in Britain, which first came under Roman control after Caesar
invaded in 55 BC. It was not until 436 AD that Roman legions left\(^3\). Between these dates
Roman law was in force in the colony’s towns and cities, most of which were in the south
east of present-day England.

In Chapter 3 the writer will observe that the practice of arbitration was well developed in
Roman law\(^4\). It was a general rule of Roman law that no one could adjudicate in their own

\(^2\) *Ebner* per Kirby J at 331.; these sources are examined in more detail in Chapter 3
\(^3\) The decline of Roman power in the British Isles was underway well before this date. In 410 AD, following the
sack of Rome by the Visigoths, Emperor Honorius instructed the British colonies to ‘defend themselves’. The
force of Roman law and authority in Britain suffered as a result.
\(^4\) Derek Roebuck’s outstanding work *Roman Arbitration* (Holo 2004) paints a detailed picture of Roman dispute
resolution laws and practices. It is a must read for any scholar of legal history.
cause. This basic principle must have been received by the communities of Britannia along with the wider body of Roman law. Although there is no hard evidence for the continuity of Roman law after the evacuation of the legions in the fifth century, the survival of the *nemo judex in sua causa* maxim in the English Common Law suggests that the Latin prohibition against judging one’s own cause was assimilated into the customary laws of the Anglo-Saxons in the sixth century. Post-Roman invasions by Germanic peoples, some of whom probably observed a customary equivalent of *nemo judex* in their own processes, may have further strengthened the British footing of the rule. Later, in the Norman Period, the desire for impartial adjudication of claims was a driving force behind the *Magna Carta* (1215). At Article 40 of the *Magna Carta* the Barons and their reluctant King declared that ‘to no one will we sell, to no one will we deny or delay right or justice’. We can read this as an early bar to decisions made in circumstances of Procured Bias. It was a valid objection to a Court of Assize that the sheriff-judge was the ‘actual prosecutor or party aggrieved’ or had an ‘actual affinity to either party’. In *Commentaries on the Law of Scotland, Respecting Crimes* (1844) the great proto-Positivist David Hume wrote

> It was nothing unusual formerly, to have an assizer rejected, (ordained to *stand aside*, as the style was) because he, or perhaps his wife, was second or third cousin, *seconds and thirds* as they called it, to the prosecutor.

Hume gave the cases of *Hew Crosbie* (1616) and *George Mylne* (1618) as examples. It is therefore probably the case that the customary and written laws of England have included general rules against bias for well over one thousand years.

Modern English law recognises two prime forms of bias – ‘actual’ and ‘apparent’. If a judge is shown to have actually been biased against a party, then their decision must be set aside.

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5 Ibid, p.57  
8 R v Sheppard 1 Leach 101; R v Edmonds 4 B & Ald 471, cited in Summers, above note 93, p.30  
9 Above note 6, p.30  
10 Ibid  
11 *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 per Lord Phillips at 83; see also paragraph 599 of the judgment of Lord Denning MR in *Metropolitan Properties v Lannon* [1969] 1 QB 577
The judge is presumed to be impartial and independent\(^\text{12}\) and where actual bias is not made out it will be for the applicant to establish that the judge appeared to be biased. There is, therefore, a distinction between the Common Law rule of automatic disqualification (which extends to the rule of automatic *vacatur* post-judgment) for interest in the cause and the body of law that relates to the appearance of partiality. The decision of the House of Lords in *Dimes v Grand Junction Canal Co Proprietors* (1852) 3 HLC 759 is authority for the availability of the former rule.

2.1 The Rule in *Dimes*

*Dimes* involved an application to disqualify Lord Cottenham from hearing a case involving the determination of the rights of a corporate entity in which he held a substantial shareholding. The appeal to the House of Lords was successful and His Lordship’s judgment was reversed. The reasoning in *Dimes* was predicated upon the ancient maxim *nemo judex in sua causa*: no man may be a judge in his own cause\(^\text{13}\). Although *Dimes* marked an important point in the development of the Common Law of pecuniary interest disqualification, the decision did not deal with bias as such. It dealt with interests in the cause\(^\text{14}\). The Rule in *Dimes* is a basic doctrine of English law. It is separable from the rules against bias in that it relates to disqualification by operation of law and not for any third party supposition of impropriety\(^\text{15}\). The Rule in *Dimes* is, therefore, closer to a Common Law ‘guarantee’ of judicial independence than a requirement of adjudicative impartiality\(^\text{16}\).

Until recently the record showed that the Rule in Dimes was separate and distinct from the rule of disqualification for apparent bias. The conventional wisdom is that appearance is not an element of the Rule in *Dimes* – it is an element of the rule of ‘discretionary’ disqualification for apparent bias. This view prevails in many Common Law states. In England the separation of the Rule in *Dimes* from the body of law we know by the expression

\(^{12}\) *Re Medicaments*, per Lord Phillips MR at 83

\(^{13}\) The Roman origins of this prohibition are discussed in Chapter 3

\(^{14}\) As Kirby J of the High Court of Australia observed 148 years later in *Ebner v The Official Trustee in Bankruptcy; Clanae Pty Ltd and Ors v Australia and New Zealand Banking Group Ltd* (2000) HCA 63, (2000) 205 CLR 337 at 334-5 ‘*Dimes* was never about actual or apprehended bias for interest. It was about disqualification for interest by a separate and specific rule of law…the law imputes bias in such a case [as *Dimes*] – it is the law that disqualifies the judge and not the opinion of reasonable observers about the propriety of the judge’s participation in the decision’

\(^{15}\) *Ebner* per Kirby J at 334

\(^{16}\) *Ebner* per Kirby J at 449
‘apparent bias’ was cast into doubt by the ‘highly technical’ decision of the House of Lords in *Pinochet Ugarte*.

**Pinochet (1999)**

In October 1998 Spanish judge Baltasar Garzon issued a warrant for the arrest of former Chilean strongman Augusto Pinochet Ugarte. Pinochet was arrested in London on a bench warrant in October 1998. Pleading sovereign immunity he applied to have the English warrant set aside. The application came on before a five peer appellate committee of the House of Lords. The committee dismissed Pinochet’s appeal three to two. Pinochet appealed on the basis that one member of the Appellate Committee (Lord Hoffman) appeared biased. The material facts were that Lord Hoffman was a director of Amnesty International Charity Limited (AICL), a charitable company controlled by Amnesty International (AI). Amnesty International appeared in the proceedings as an intervener. Lord Hoffman was not actually a member of AI or any entity connected with it. His Lordship received no payment for his services on the board of AICL and played no role in the formation of AI policy. Pinochet argued that Lord Hoffman should have recused himself, and that his failure to do so rendered the decision void. In what has been described as a ‘radical departure from precedent’ the House of Lords agreed, holding that Lord Hoffman should have recused himself, not because of the appearance of bias but because he had an interest in the cause. Lord Browne-Wilkinson identified the ‘critical elements’ of the factual matrix in *Pinochet* as (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a Director of a charity closely allied to AI and sharing, in this respect, AI’s objects.

In essence, Lord Hoffman’s ‘interest’ was held to be the same as the intervener (Amnesty International), namely ‘achieving the trial and possible conviction of Senator Pinochet for crimes against humanity’. Although the appeal in *Pinochet (No.2)* was argued on the basis of apparent bias the House of Lords chose instead to apply an extension of the Rule in *Dimes* “incorporating vague notions of ‘interests’, ‘causes’ and the ‘overriding public interest’.” It

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17 per Lord Hope in *Meerabux v AG of Belize* [2005] 2 AC 513
19 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.2) [1999] 2 WLR 272 at 281-2 (HL)
20 *Pinochet (No.2)* per Lord Browne-Wilkinson at 284
21 *Pinochet (No.2)* per Lord Browne-Wilkinson at 282
22 Above note 18, p.22
may be, as Lord Hope would later opine\textsuperscript{23}, that their Lordships took this route because they saw that the Appellant’s argument on apparent bias would not get past the high bar set in \textit{Gough} (which was still in force at the time). The other explanation may be that \textit{Pinochet} was an instance of superior court ‘rule making’; an example of an appeal court encountering what Ronald Dworkin would describe as a ‘hard case’\textsuperscript{24}. Either way the effect of the decision was profound - ever since \textit{Pinochet} English courts have struggled with the task of mapping the limits of the Rule in \textit{Dimes}. The cases of \textit{AWG Group v Morrison} (discussed below in relation to Human Rights Law) and \textit{Locabail (UK) Ltd v Bayfields Properties} show English courts trying to re-chart the channel between \textit{Dimes} and the rule of disqualification for apparent bias.

\textbf{2.2 De Minimis Non Curat Lex}

\textit{Pinochet} is a free standing precedent, perhaps even an anomaly, in the broader jurisprudential history of the Rule in \textit{Dimes}. The case law shows that the rule of automatic disqualification developed around situations of pecuniary interest. Its purpose was to maintain the absolute impartiality of the judiciary. But the Rule in \textit{Dimes} is not itself absolute. In order to be actionable under the Rule in \textit{Dimes} the relevant interest must be more than trifling, more than \textit{de minimis}. It is also clear that the interest of the decision maker be proximate to the cause of one of the parties before them. In \textit{Locabail} the Court of Appeal put the test for proximity as ‘whether the outcome of that cause could, realistically, affect the judge’s interest’\textsuperscript{25}. The question is complicated, requiring consideration of interest, outcome and ‘realistic effect’. Although none of the appeals were against the awards of arbitrators the \textit{Locabail} decision shows how these integers function.

\textit{Locabail (2000)}

\textit{Locabail} involved five separate appeals on the Rule in \textit{Dimes}. The first two matters involved decisions by a duty judge who was in practice as a solicitor. The duty judge’s firm (but not the judge himself) was acting for a company which had claims against the husband of one of

\textsuperscript{23} \textit{Meerabux v AG of Belize} [2005] 2 AC 513 where Lord Hope commented ‘if the House of Lords had felt able to apply [the ‘real possibility’ test in Porter v Magill as opposed to the ‘real danger’ test in \textit{Gough}] in the \textit{Pinochet} (No.2) case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule’.

\textsuperscript{24} Dworkin, R, \textit{Law’s Empire} (Harvard 1986), p.43. Dworkin used the expression ‘hard case’ to describe any situation where the fundamental principles of the law are tested, and there is a genuine argument for either side.

\textsuperscript{25} \textit{Locabail (UK) Ltd & Waldorf Investment Corp. & Ors} [2000] 1 All ER 65 at para 66
the parties to the proceedings over which the duty judge presided. This company was not connected with the case before the judge. In the third appeal the judge had published papers critical of insurance providers. The judge in the fourth matter had worked for the defendant government department at the beginning of his career. In the fifth matter the trial judge was a director of a property company. One of the parties to the proceedings before him was a tenant on land owned by the company. The Court of Appeal prefaced its rulings on the five appeals with the following statements of law:

(1) Bias will be presumed where interest in the outcome is shown – it is interest in the outcome, and not links to the party, that guides the court. The question is whether the outcome could affect the interest. Parties with full knowledge of the interest may waive objection.

(2) Actual bias entitles the litigant to have the judge removed or their judgment set aside. Where there is no actual bias the test is whether there is a real danger of bias. Where a judge does not know of the allegedly disqualifying interest there will be no real danger.

(3) A judge should not usually disqualify himself, or be disqualified for reasons of religion, ethnic or national origin, gender, age, class, means or sexual orientation, the judge's or a member of his family's social or educational background, or employment history. Previous political associations and memberships of social or charitable bodies should not result in disqualification.26

Four out of five appeals were dismissed. Only the third appeal succeeded – the views expressed by the trial judge in previous publications were held to give rise to a real danger that he was biased against insurers. All the other appeals were dismissed on de minimis and lack of proximity. As will be observed below, the obiter in Locabail is the source of the ‘soft’ Common Law rule that judges and arbitrators should disclose circumstances likely to affect their impartiality.

26 Locabail at 480
2.3 Apparent Bias

If we place Pinochet to one side – and we can in this thesis because the ratio does not apply to arbitrators - it seems safe to say that there are in England two separate and distinct principles of law that may be activated when impartiality or independence are put in issue:

(1) The rule of ‘Automatic Disqualification’ (or ‘Presumed Bias’) based upon the maxim nemo debet esse judex in propria causa as applied in Dimes. The Anglo expression of the Rule in Dimes is that ‘no man shall be a judge in his own cause’. This rule was expanded into a limited category of non-pecuniary interests by the decision of the House of Lords in Pinochet (No.2)\(^{27}\). It will be triggered where a decision maker can be identified with a party or is so closely connected to the matter as to make it ‘his cause’\(^{28}\).

(2) The rule of ‘Discretionary Disqualification’ for apparent bias. There has been some divergence (even conflict) of English authority on this rule. At present Porter v Magill prevails and a decision maker will only fall afoul of it where there is a real possibility that they were biased. Gough governed this rule between 1993 and 2002; the rule of Discretionary Disqualification for apparent bias covers situations of ‘unconscious’ or ‘imputed’ bias, as well as ‘antecedent’ bias (ie. bias that becomes apparent after the decision is made)\(^{29}\).

With respect to the second rule, two competing tests for apparent bias developed late in the nineteenth century. The first line stems from the decision in R v Fraser \(^{30}\)(affirmed in Sussex Justices). It is known by the ‘reasonable apprehension’ test that the decisions that comprise it employ\(^{31}\). The writer will refer to it as ‘Sussex Justices’. The two arms of Sussex Justices are:

(1) Assessment of the impugned conduct from the vantage of a ‘reasonable observer’ (the ‘First Arm’),

\(^{27}\) Pinochet (No.2) at 281-2
\(^{28}\) Pinochet (No.2) at 281-2
\(^{29}\) Petrochilos, G, Procedural Law in International Arbitration (Oxford University Press 2004), p.139
\(^{30}\) (1893) 9 TLR 613
\(^{31}\) The Court in Sussex Justices phrased the test as a question of whether the events in question give rise to a ‘reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial’.
(2) A ‘reasonable apprehension’ (or ‘reasonable suspicion’) threshold (the ‘Second Arm’),

This line prevailed in England for much of the twentieth century. Another line, emanating from the decision in *R v Rand* 32 (approved by the Appellate Committee of the House of Lords in *Bath Justices* 33 and revived more recently in *Gough*), required that applicants demonstrate that there was a ‘real danger of bias’ when the decision was made against them34. The full text of the *Gough* test is:

Having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

To reiterate, the *Gough* test has two arms:

(1) Assessment of the impugned conduct through the eyes of the court (the ‘First Arm’)

(2) A ‘real danger’ threshold (‘the Second Arm’)

A ‘real possibility’ tributary of this second Common Law stream prevails today as a result of the House of Lords decision in *Porter v Magill*. The *Porter v Magill* test incorporates the First Arm of *Sussex Justices* and the Second Arm of *Gough*.

### 2.4 Real Differences

A key aspect of the writer’s position in this thesis is that challenges to arbitrators should not be decided by the same principles that guide state courts in deciding challenges to judges. The writer will argue later that the best means of achieving this is by use of a higher standard

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32 (1866) LR 1 QB 230
33 *United Breweries Co Ltd v Bath Justices* [1926] AC 586
34 The ‘real likelihood’ test was applied in *R v Camborne Justices, ex parte Pearce* [1955] 1 QB 41. See also *R v Nailsworth Licensing Justices, ex parte Bird* [1953] 2 All ER 652
for disqualification of arbitrators than that which applies to judges – parties challenging arbitrators should be required to show a *real* and *definite* possibility of bias rather than a suspicion or apprehension of partiality. Courts hearing challenges to arbitrators should apply *Gough* (or *Porter v Magill*, if the reader disagrees with the writer in respect of point (2) below), and refrain from using *Sussex Justices*. It is essential to this thesis that three threshold issues be addressed:

(1) What is the difference between the *Sussex Justices* ‘reasonable apprehension’ test and the ‘real danger’ test laid down by the House in *Gough*?

(2) Is there any difference between the *Gough* ‘real danger’ test and the ‘real possibility’ test that is in force today as a result of the decision in *Porter v Magill*?

(3) Is there any difference between the *Sussex Justices* ‘reasonable apprehension’ test and the ‘real possibility’ test that is in force today as a result of the decision in *Porter v Magill*?

(1) **What is the difference between *Sussex Justices* and *Gough***?

The *Sussex Justices* and *Gough* tests differ in two ways. Firstly, the vantage points they use (their ‘First Arms’) for determination of the appearance of bias. *Sussex Justices* used a notional reasonable person with knowledge of the material facts. Under *Gough*, the vantage point from which the impugned decision maker was to be assessed was that of the *court itself*. In Lord Goff’s mind the notional third person was unnecessary because “the court in most cases...personifies the reasonable man”35. Because *Porter v Magill* dispensed with this aspect of *Gough*36 there is no need to embark on any further consideration of it at this stage.

Secondly, the courts in these cases chose very different words to set the bar (their ‘Second Arms’). On this point commentators disagree on as to whether the *Sussex Justices* and *Gough* tests compete in real terms. The writer is of the opinion that the Second Arms of the two tests diverge considerably. Superior court decisions in Common Law states that rejected *Gough* support this position. In *Webb v The Queen* Justice Deane of the High Court of Australia

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35 *R v Gough*, per Lord Goff
36 *Porter v Magill* [2002] 2 AC 357 per Lord Hope at 494
expressed the opinion that the ‘real danger’ standard replaced ‘Apparent Bias’ with a new form of ‘Actual (but Unconscious) Bias’ focused on evidence rather than perception of the parties. Similar opinions have been given by South African courts.\(^{37}\)

The *ratio* in *Gough* no longer binds English courts. Two decisions are responsible for this: *Re Medicaments* \(^{38}\) and *Porter v Magill* \(^{39}\). The stricter ‘real danger’ test proposed by Lord Goff of Chieveley in *Gough* was considered by the Court of Appeal in *Re Medicaments*. After its review of the authorities the Court of Appeal opted to modify and rephrase the test for apparent bias as a question of ‘whether the relevant circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased’ [emphasis added]. In *Porter v Magill* it was held that the test for apparent bias was that applied by the Court of Appeal in *Re Medicaments*, and not the ‘real danger’ standard set in *R v Gough* \(^{40}\). In *Porter v Magill* Lord Hope formulated the test as ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’. Whether there is any difference between *Gough*’s ‘real danger’ and the ‘real possibility’ formulation in *Porter v Magill* is a question the writer must attempt to answer.

\(\text{(2) Is there any difference between a } Gough \text{ and } Porter v Magill?\)

The House of Lords has repeatedly confirmed the status of *Porter v Magill* as a ‘modification of the Common Law test for bias enunciated in *Gough*’ \(^{41}\). The only difference between *Gough* and *Porter v Magill* is the vantage point from which the impugned decision maker is to be assessed; apart from their vantage points the tests are the same. In *Re Medicaments* Lord Phillips MR agreed\(^{42}\). There is no difference between a ‘real danger’ and a ‘real possibility’; a ‘danger’ is just a possibility of a bad thing - both *ratio* contain the imperative word *real*. For reasons explained at point (3) below this semantic commonality functions to negate any assertion that a court using a ‘real danger’ test would arrive at a different

\(^{37}\) Webb v The Queen [1994] 181 CLR at 71; see for example President of the Republic of South Africa v. South African Rugby Football Union [1999] 4 SA 147; BTR Industries South Africa (Pty)Ltd v Metal and Allied Workers’ Union 1992 (3) SA 673 (A)

\(^{38}\) *Re Medicaments* at 700

\(^{39}\) *Porter v Magill* per Lord Hope at 494

\(^{40}\) *Porter v Magill* per Lord Hope at 494

\(^{41}\) Lawal v Northern Spirit [2003] ICR 856 at para 14

\(^{42}\) This was the view expressed by Lord Phillips MR in *Re Medicaments* where his Lordship said ‘real possibility, or real danger, the two being the same’ (at pp.726-727)
conclusion to a court applying the ‘real possibility’ test preferred under the Second Arm of Porter v Magill.

(3) Is there any difference between Sussex Justices and Porter v Magill?

This is a difficult question. Conflicting judicial opinions have been expressed on whether these two tests produce different results. The writer’s view is that the ‘real possibility’ and ‘reasonable apprehension’ tests are not the same, and do not produce the same result when applied to a bias challenge: a ‘real possibility’ is quite different from a ‘reasonable apprehension’. Whilst a suspicion (or apprehension) may be reasonably founded in so far as it has been formed in the mind of a person as a result of their exercise of the faculty of reason, the facts upon which the suspicion is based may not necessarily interact to produce the result that the apprehended outcome is a real possibility.

Algerian judge Mohammed Bedjaoui said that the problem of arbitrator impartiality ‘acquires a metaphysical quality’. Well, to briefly engage in metaphysics, the word ‘real’ is an adjective that draws on a parent concept of ‘reality’, a term we use to describe a state of affairs arising out of the observable interplay of material elements which are actual and true. Without the word ‘real’ there is harmony between ‘possibility’ and ‘reasonable apprehension’. This is because the coming into fruition of a state of affairs that has been suspected or apprehended by a person due to their use of logic and reason will necessarily be possible – if it was not possible then no logical suspicion or apprehension of it could have been formed ab initio. But the Porter v Magill attachment of the word ‘real’ to the word ‘possibility’ renders this interaction imperfect because the possibility must then satisfy the requirements of reality, which exceed those of logic and reason, and include external component circumstances. The evidentiary burden imposed by the ‘real possibility’ test is, therefore, markedly higher than that which an applicant must discharge to make out a reasonable apprehension under Sussex Justices.

44 See for example the judgment of the High Court of Australia in Webb v The Queen [1994] 181 CLR at 71
3. English Arbitration Law

Under English law the obligations of impartiality and independence flow from different sources; impartiality from statute and independence from Common Law. The Common Law rule is that arbitrators are subject to the same standard of impartiality as judges. English courts have dismissed the view expressed in some other jurisdictions that a more stringent standard should apply to arbitrators. While Gough was in force it was applied to arbitrators. Since Re Medicaments the ‘real possibility’ test has been applied to arbitrators in a number of decisions, most recently Norbrook Laboratories and ASM Shipping. Porter v Magill stands at present.

3.1 Statutory Obligation of Impartiality

The English lex arbitri is comprised of the Arbitration Act 1996 and those rules of Common Law that inform it. The English Arbitration Act is widely recognised as a highly progressive ordinance. Whilst England is not a Model Law seat, it is clear that much of the 1996 Act is based on the UNCITRAL Model Law. According to Section 1(a) of the General Principles ‘the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense’. Section 33 identifies the general duties of the tribunal. Section 33(1) provides ‘The 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’. The effect of this drafting is that any tribunal convened under English law must act fairly and impartially. A breach of this rule (or any other rule of procedural fairness) will entitle the aggrieved party to challenge the award on the basis of ‘serious irregularity’ under section 68. Section 68(2) defines ‘serious irregularity’ as irregularity ‘which the court considers has caused or will cause substantial injustice to the applicant’. Section 68(2)(a) makes failure to comply with the general duty of fairness and impartiality

45 See for example the judgment of Rix J in Laker Airways v FLS Aerospace [1999] 2 Lloyd’s Rep 45.
46 AT&T Corporation v Saudi Cable Company [2000] BLR 29
48 Norbrook Laboratories Ltd v Tank [2006] EWHC 1055 (Comm)
50 Arbitration Act 1996, s.33(1), emphasis added
51 Parliament’s choice of an unconditional, mandatory mode of drafting for section 33 suggests that the parties cannot contract out of procedural fairness and impartiality. It follows that English law recognises Article 18 (Equal Treatment) as a mandatory provision of the Model Law.
52 See also Hussman v Al Ameen [2000] 2 Lloyd’s L Reps 83; Interbulk Ltd v Aiden Shipping Co Ltd (The “Vimeira”) [1984] 2 Lloyd’s L Reps 66.
(s.33(1)) a ground for court ordered remission or *vacatur*. In *Hussman (Europe) Ltd v Pharaon*\(^{53}\), the Applicant (Hussman) sought *vacatur* under s.68, arguing that there was a real possibility of bias on the part of the tribunal because the court had criticized the tribunal and reduced its fees when setting aside a prior award against the Applicant. Deputy High Court Judge Brindle held

> To invoke an apprehension of bias is not to establish serious irregularity. In order for Section 68 to be invoked its seems to me that Hussman would have to show actual bias on the part of the Tribunal....Even if I was otherwise satisfied that the allegation of bias or the appearance of bias could bring Section 68 into play, I should add that I would not have been satisfied that...serious [sic] injustice had been established\(^{54}\)

In reaching this his conclusion, Brindle DHCJ referred to the characterisation of section 68 as a ‘longstop, only available in extreme cases’ at paragraph 280 of the Departmental Advisory Committee (DAC) Report on the Arbitration Bill 1996\(^{55}\). The more recent decision of Justice Morsion in *ASM Shipping* goes against the *dicta* of Brindle DHCJ in *Hussman*: Morison J held that showing a real possibility of bias will satisfy both the ‘serious irregularity’ and ‘substantial injustice arms of section 68. In *Norbrook Laboratories*\(^{56}\), Colman J agreed with Morison J in *ASM Shipping*\(^{57}\); for now, the position is settled. It is notable that the DAC Report confirmed that the arbitrators are bound to follow the procedure agreed by the parties, even if that procedure violates a mandatory provision of the Act\(^{58}\). It follows that, on the history of the law, the parties can agree that the arbitrators may act unfairly or partially, and the arbitrators are bound to comply, regardless of that fact that this agreement may not be enforceable in an English court. As the DAC put it ‘the tribunal has the choice of the court course preferred by the parties or of resigning\(^{59}\).

\(^{53}\) [2002] CLC 1030 (Mr Brindle QC sitting as Deputy High Court Judge)
\(^{54}\) *Hussman* at 1041
\(^{55}\) English Departmental Advisory Committee’s Report on the Arbitration Bill (1996), reprinted in (1997) 13 Arb Int 275; paragraph 280 of the Report states ‘The test for substantial injustice is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action...In short, clause 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected’.
\(^{56}\) *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055
\(^{57}\) *Norbrook Laboratories* per Colman J at 507
\(^{58}\) DAC Report, para 157-9
\(^{59}\) Ibid at para157-9
The year 1996 is a key date in this thesis: it was in 1996 that the current English Arbitration Act came into force and the shift from a *Gough* informed ‘real danger’ test to a ‘justifiable doubts’ statutory threshold friendlier to *Sussex Justices* began. The relevant provision of the Act is section 24(1)(a), which is an imperfect adoption of Model Law Article 12. It allows any party to an arbitral proceeding to apply to the court for removal of an arbitrator during arbitral proceedings on the basis ‘that circumstances exist that give rise to justifiable doubts as to his impartiality’\(^{60}\). The ‘circumstances’ envisaged by section 24(1)(a) capture both pecuniary and non pecuniary interests; *Dimes* and apparent bias. Regardless of the form they take in the pleadings it seems that all allegations of bias in arbitral proceedings will be tested against the revised *Gough* standard laid down in *Porter v Magill*. This test will be applicable regardless of the stage of the proceedings at which they are made\(^{61}\), meaning that a section 68 application for *vacatur* in which the ‘serious irregularity’ is an appearance of bias will be put to the same test as a challenge proper\(^{62}\). The principal difference between s.24 and s.68 proceedings is that the ‘serious irregularity’ must be such as to cause ‘substantial injustice’ to the applicant\(^{63}\). The force of this additional requirement has, however, been rendered less certain since the strong *dicta* of Morison J in *ASM Shipping*\(^{64}\).

### 3.2 ECHR Obligation of Independence

It has been noted that the removal provision of the 1996 Act is only a partial adoption of Model Law Article 12. The 1996 Arbitration Act does not use the word ‘independent’; Model Law Article 12 does. It follows that in England the source of the obligation of independence differs from that of the obligation of impartiality. As V.V. Veeder QC has observed, the English Act’s silence on ‘independence’ is attributable to the London tradition of commodity trade and reinsurance arbitration, where two party-appointed arbitrators (usually

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\(^{60}\) This section of the 1996 statute replaced s.23 of the Arbitration Act 1950.

\(^{61}\) Post award challenges based on bias will be subjected to the same, and not a higher, standard of review as mid-hearing applications.

\(^{62}\) *Rustal Trading v Gill & Duffies* [2001] 1 Lloyd’s L Reps 14 per Moore-Bick J at 18-9

\(^{63}\) *Groundshire v VHQ* [2001] 1 BLR 395

\(^{64}\) *ASM Shipping* at para 39(3), where His Honour wrote ‘I do not accept [the] submission that even if [a ‘serious irregularity’ is found] the court must then inquire as to whether substantial injustice has been caused...I profoundly disagree with HHJ Bowsher’s judgment in the *Groundshire* case. It is contrary to fundamental principles to hold that an arbitral award made by a tribunal which is not impartial is to be enforced unless it can be shown that the bias has caused prejudice’. 

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businessmen) would sit together and, if they could not reach a consensus, then they would become the parties’ representatives before the umpire\textsuperscript{65}.

In English law, the requirement that arbitrators be independent of the parties comes from two sources, the first being Article 6 of the ECHR (and the \textit{Human Rights Act 1998}) and the second being the Common Law. Because the ECHR is in force in all of the seats in this survey, the role of Human Rights law will be discussed more generally below. For now the focus is the municipal law of England and the Common Law obligation of independence.

\subsection*{3.3 Common Law Obligation of Independence}

The Rule in \textit{Dimes} is the source of the Common Law rule of independence. It cancels out the effect of the absence of the term ‘independence’ in the 1996 Arbitration Act. A decision made by an arbitrator who is not independent will be voidable under the Rule in \textit{Dimes}. Although the 1996 Act does not create a rule of automatic disqualification equivalent to \textit{Dimes} there seems little doubt that \textit{Dimes} is covered by section 24(1)(a) as well\textsuperscript{66}.

As we shall see in the survey of the European seats that follows this chapter, the English statutory preference for ‘impartiality’ is to be contrasted to the legislative preferences of France and Switzerland, where judicial and procedural codes focus on ‘independence’. Jurisprudence has accounted for the difference: French and Swiss superior courts tend to read the code term independent as including ‘independence of mind’, the latter being synonymous with ‘impartiality’\textsuperscript{67}. But could the reverse be achieved? Could an English court extend the English Arbitration Act notion of impartiality to impose a requirement of independence? There is \textit{obiter} in the affirmative. In \textit{Saudi Cable} Lord Justice Potter noted that s.24 of the 1996 Act does not refer to ‘independence’. His Lordship’s view was that Parliament’s reason for leaving out the word ‘independence’ in its taking from Article 12 of the Model Law was that ‘the greater includes the less’ - impartiality captures independence\textsuperscript{68}. With respect, the writer’s view is that this is not correct: a decision maker who lacks independence will necessarily lack impartiality, but a decision maker who lacks impartiality will not necessarily

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{65} Veeder, V.V., ‘L’independance et l’impartialite de l’arbitre dans l’arbitrage international’, in Cadiet, L., Clay, T., Jeuland, E. (eds) \textit{Mediation et arbitrage} (Ltec 2005), p.219
\item \textsuperscript{66} Above note 29, p.139
\item \textsuperscript{67} See for example the decision of the Court of Appeal, 13 April 1972, \textit{Ury v Galeries Lafayette} [1975] Rev Arb 235
\item \textsuperscript{68} \textit{Saudi Cable} per Potter LJ at para 70
\end{itemize}
\end{footnotesize}
lack independence. This is because the appearance of party preference flows from party proximity, but the appearance of party proximity does not necessarily flow from party preference\(^{69}\); a decision maker does not forfeit their independence just because they prefer one party (or outcome) over another (which they must ultimately do if they are to render an award). The arbitrator can prefer an outcome without ever relating themselves to it or its beneficiaries. On this basis, it would be more difficult for an English court to manufacture a positional form of impartiality than it was for Swiss and French courts to arrive at a mental form of independence.

3.4 No Disclosure Requirement in the Arbitration Act

All major institutional rules contain rules of disclosure\(^{70}\), and ICA jurisprudence tends to identify disclosure as an important step in the arbitral process. It is generally accepted that disclosure has a ‘cleansing affect’\(^{71}\): the arbitrator might have nothing to tell the parties, but if they do, and the parties elect to go on with the arbitration, then the arbitrator will be immunised against subsequent challenges based upon the circumstances disclosed. US courts treat the duty to investigate potential conflicts of interest and disclose them as a ‘prophylactic’ measure\(^{72}\). As will be observed in Chapter 6, there is a strong argument that, in international arbitration at least, the obligation to disclose is *lex mercatoria*: Alvarez has identified disclosure as a custom or usage of ICA\(^{73}\); Yves Derains, former Secretary General of the ICC Court of Arbitration, has expressed similar opinions\(^{74}\). But the English Arbitration Act does not require that arbitrators give disclosure of circumstances likely to affect their impartiality, and it is clear from *Saudi Cable* that there is no Common Law rule of disclosure: in that matter the Court of Appeal rejected the argument advanced by AT&T that the arbitrator was obliged to give disclosure under both the Common Law and his contract with the parties\(^{75}\).

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\(^{69}\) For a competing view see paragraph 102 of the DAC Report, above note 50; see also the judgment of Kirby J in *Ebner* at 438

\(^{70}\) See for example Article 9 UNCITRAL Rules; Article 7 ICC Rules; Article 10.3 LCIA Rules; Article 9(2)

Swiss Rules


\(^{72}\) *Positive Software Solutions, Inc v New Century Mortgage Corporation* 476 F.3d 278 (5th Cir. 2007) Cert.denied S.Ct., 2007 WL 1090443 (U.S.), para 285


\(^{75}\) *Saudi Cable* per Potter LJ at para 133
As yet there is no binding authority for the proposition that, in an arbitration seated in England, the arbitrator must give disclosure to the parties. There is authority (namely the Locabail appeals) for the proposition that it is ‘desirable’ that a judge disclose any ‘matter of which he becomes aware which could arguably be said to give rise to a real possibility of bias’\textsuperscript{76}, and this soft proscription would seem to apply to arbitrators. In Norbrook Laboratories, for example, Colman J expressed concerns as to the arbitrator’s failure disclose communications with witnesses\textsuperscript{77} (obiter is suggestive of a rule). In institutional arbitrations conducted in England (such as under the LCIA Rules), arbitrators give disclosure in compliance with the institutional rules chosen by the parties, but practitioners report that it is not common for disclosure to be given (or even requested) in ad hoc arbitrations seated in London\textsuperscript{78}. These ambiguities aside, it is clear that English law does not require that judges or arbitrators investigate potential conflicts of interest once the proceedings have started: the limited obligation to investigate accepted by Lord Woolf in Locabail ends when the arbitrator enters onto the reference\textsuperscript{79}.

Whilst, in the event of non-disclosure, there may be a case to be made under section 68, the deliberate exclusion of a disclosure requirement from the 1996 Act\textsuperscript{80}, coupled with the dicta of the Court of Appeal in Saudi Cable, suggest otherwise. If an arbitrator failed to give disclosure of a non de minimis relationship or interest, the aggrieved party would be hard pressed to get the award set aside on the basis of ‘serious irregularity’ under s.68. However, the matter not disclosed would, in its own right, need to give rise to justifiable doubts as to the arbitrator’s impartiality before vacatur would be available. If the proceedings were still on foot, then the remedy would lie in an application for removal under section 24(a) of the Arbitration Act.

4. English Decisions on Arbitrator bias

The historical role of London as place for arbitration has had the effect that English case law is rich in decisions concerning bias challenges to arbitrators. In recent years, the archives have grown. Not surprisingly, actual bias is relatively rare in the record. The leading case on

\textsuperscript{76} Epstein, L., Arbitrator Independence and Bias: The View of a Corporate In-House Counsel’ ICC Bulletin 2007 (Special Supplement), p.55
\textsuperscript{77} Norbrook Laboratories at para 510
\textsuperscript{78} Above note 76, p.62 at FN43
\textsuperscript{79} Locabail at para 481
\textsuperscript{80} Above note 76 at p.63
actual bias is the ‘Catalina’ v ‘Norma’, a case that is today synonymous with racial prejudice on the part of the arbitrator.

‘Catalina’ v ‘Norma’ (1938)

In Re the Owners of the Steamship ‘Catalina’ and the Owners of the Steamship ‘Norma’ the English Baronet Sir William Norman Raeburn KC was appointed arbitrator to decide a dispute that arose out of a collision between Portuguese and Norwegian-owned ships off the English Channel island of Ushant. A witness for the Portuguese applicant swore that he heard the arbitrator say about the Portuguese party’s witnesses:

They are not Italians. The 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 truthful people. In this case I accept the evidence of the master of the [Norwegian vessel] Norma.

The owners of the Portuguese vessel Catalina applied to the Divisional Court of the Court of the King’s Bench for orders removing the arbitrator. The Court found in favour of the applicant, holding that the arbitrator had approached the matter with a bias against the oral evidence of the witnesses from Portugal. The award was set aside for actual bias. This case is valuable for three reasons. Firstly, it is one of the rare instances in which the supervising court found actual bias. Secondly, the case provides a private law example of party preference based upon nationality. Judicial nationalism usually arises in public adjudications, such as the criminal trial in Berger v United States. In Catalina v Norma the dispute was purely private, and the nexus with the United Kingdom was consensual. The parties chose to go to arbitration in London. State involvement was minimal but nationality bias still arose. Finally, the judgment of the Divisional Court shows the primacy of Lord Hewart’s dictum in the period before Gough. Charles J (with whom Du Parcq J agreed) identified the requirement that justice be done and be seen to be done as being of ‘fundamental importance’. Here justice could not be done, nor the appearance achieved, because the arbitrator clearly neither liked nor trusted Portuguese people.

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81 Re the Owners of the Steamship ‘Catalina’ and the Owners of the Steamship ‘Norma’ [1938] 61 LlL Rep 362-3
82 225 US 22 (1921), where post-war bias against German Americans was at issue.
83 Catalina v Norma at 368
Whilst an arbitrator’s visible animosity towards a party will be actionable, dislike for their advocate is harder to plead as a ground of challenge. In *Fletamentos Maritimos* the Court of Appeal held that the fact that an arbitrator holds an uncomplimentary view of the professional ability of a lawyer does not mean that they are biased against the party they represent. In this case a prominent London maritime arbitrator made known his opinion on the competence of the solicitors for one of the parties. Waller LJ and Morritt LJ rejected the challenge on the basis that more was needed to generate the appearance of bias against the party themselves. Morritt LJ observed:

> It is inevitable that Judges and arbitrators will form opinions as to the professional skills and integrity of those who appear before them; they are bound to find some advocates easier to listen to, and likely, therefore, to be more persuasive than others. But the existence of such views, whether held privately or, as in this case, made known to others cannot, without more, be sufficient to constitute bias against that advocate’s client.

These comments of Morritt LJ were cited with approval by Colman J in *Norbrook Laboratories*. In *Norbrook Laboratories* an arbitrator in an engineering dispute who attempted to limit one party’s number of legal representatives and expressed pre-judgmental views on the value of expert evidence proposed by that party was held not to have demonstrated any all pervading bias or want of impartiality. His Honour applied the *Gough* test for apparent bias.

**Modern Engineering (1981)**

Not surprisingly, apparent bias challenges have generated a higher volume of case law than motions in actual bias. In *Modern Engineering* the English Court of Appeal had occasion to consider an allegation of merits prejudgment brought under the misconduct provision (s.23(1)) of the Arbitration Act 1950. The *Modern Engineering* challenge involved a denial of natural justice by breach of the right to be heard *audi alterem partem*. The substantive issue which the arbitrator had failed to hear both sides on was whether an architect’s stage

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84 *Fletamentos Maritimos SA v Effjohn International BV (No.2)* [1997] 2 LIL Rep. 302 per Waller LJ at 307
85 *Fletamentos Maritimos* per Morritt LJ at 310
86 [2006] EWHC 1055 (Comm) per Colman J at 108
87 *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm) per Colman J at 153
88 *Norbrook Laboratories* per Colman J at 153
certificate could be re-opened in a claim for delay. The arbitrator adjourned after hearing only
the Claimant’s submissions on the issue. The next day he issued an ‘interim award’ in which
he held that certificate could be re-opened. The unheard Respondent applied to the
Commercial Court for removal of the arbitrator, and for orders setting aside the interim
award.

In Modern Engineering it was argued that the arbitrator had mis-conducted the proceedings
by failing to hear both sides before determining a key issue. Modern argued further that the
arbitrator should be removed because, if he were now allowed to hear their argument on the
issue of the stage certificate, there would be reasonable grounds for suspecting he had
prejudged it against them. At first instance Goff J (as His Lordship then was) acknowledged
the grave errors made but refused to remove the arbitrator because the conduct complained of
was ‘not so fundamentally wrong and bad as to demonstrate his incompetence to proceed’.
Modern appealed. Lord Denning MR and Lord Justice Dunn upheld the appeal. Lord
Denning held that the key consideration in disqualifying an arbitrator is ‘his ability to come
to a fair and just conclusion’. His Lordship phrased it as a question of ‘whether the way he
conducted himself in the case was such that the parties can no longer have confidence in
him’.

The challenge provision of the 1950 Act was worded in favour of a ‘reasonable suspicion’
test for apparent bias; the equivalent provision of the 1996 Act (being s.24(1)(a)) takes up
the UNCITRAL Model Law notion of ‘justifiable doubts’. In Saudi Cable counsel for AT&T
argued that the ‘justifiable doubts’ referred to in s.24 of the 1996 Act fit more comfortably
with the ‘reasonable suspicion’ test of Sussex Justices than the ‘real danger’ test preferred in
Gough; the Court of Appeal disagreed, citing with approval the ‘same chambers bias’
decision of Rix J (as His Lordship then was) in Laker Airways.

90 Modern Engineering at 139
91 Modern Engineering at 139
92 Section 23 of the Arbitration Act 1950 (UK) allowed competent courts to set aside arbitral award where
‘although the arbitrator has no necessarily acted unfairly, he has allowed himself to get into a position where
unfairness might reasonably be suspected or foreseen’.
93 Saudi Cable per Lord Woolf MR at para 38
**Laker Airways (1999)**

The well known challenge in *Laker Airways*\(^{94}\) came out of a dispute between a US airline (Laker) and its fleet service contractor (FLS). The arbitration clause in the service contract provided for a three member tribunal. FLS appointed Stanley Burnton QC of 1 Essex Court as its arbitrator. When Laker learnt that counsel for FLS had recently joined chambers at 1 Essex Court they asked FLS to appoint a replacement arbitrator for Burnton. FLS refused and Laker’s solicitors wrote to Mr Burnton asking him to stand down. Laker’s stated reason was that Mr Burnton and counsel for FLS were at risk of accidental unilateral communications as a result of their close proximity in chambers. Laker argued that the ‘Chinese Walls’ within the cell might not be enough to prevent the passage of information between counsel and arbitrator. On receipt of this letter Mr Burnton informed the parties that he would only resign if both parties requested it. Laker then filed a section 24 application for his removal.

Despite the fact that the Applicant did not appear at the hearing, the Court gave full consideration to what it considered to be important issues of law. Rix J confirmed the objectivity of the test for bias and distilled from section 24 a two stage test:

1. The Court must determine that circumstances exist, and are not only believed to exist (although Rix J was careful to note that a belief could in itself qualify as a ‘circumstance’), and
2. The Court must find that the circumstances justify doubts as to the arbitrator’s impartiality.

Rix J found that the test under s.24 reflected the Common Law rule of apparent bias. His Honour confirmed the separation of the Rule in *Dimes* from the test for bias, holding that where a decision maker has an interest in a cause before them then their disqualification is automatic and no investigation of the likelihood of bias will be necessary. Where there is no such interest disqualification will turn on whether there is a real danger of bias. Rix J commented in *obiter* that unjustified or unreasonable doubts are not sufficient as ‘it is not enough honestly to say that one has lost confidence in the arbitrator's impartiality’.

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\(^{94}\) *Laker Airways v FLS Aerospace* [1999] 2 Lloyd’s Rep 45
Importantly, in approving *Gough*, Rix J held the ‘real danger’ test to be compatible with the terms of s.24(1)(a). The Rule in *Dimes* was not invoked in the *Laker Airways* application. Neither was there any need to consider actual bias. Laker’s application was brought on the basis of an appearance of partiality generated by the physical proximity of advocate and arbitrator. In finding that no such appearance was made out Rix J referred to the DAC Report\(^{95}\). The drafters of the 1996 DAC Report rejected the inclusion of ‘independence’ in section 24 and, on His Honour’s reading, not intended to make ‘same chambers’ relations actionable. In dismissing pecuniary interest Rix J found that whilst barristers share certain expenses, they do not share fees or profits. Rix J characterised barristers as self employed legal practitioners who are regulated in such a way as to guarantee their capacity to appear against one another without conflict of interest. Barristers know this as the ‘Cab Rank Rule’\(^{96}\). The Applicant bore the onus of proving that there was a real danger of unilateral or improper communication between Mr Burnton and counsel for FLS, and had not discharged this burden. Rix J drew support for his conclusion from other ‘same chambers’ decisions, namely *Pilkington Plc v PPG Industries Inc*\(^{97}\) and *Nye Saunders v Alan E. Bristow*\(^{98}\).

The decision in *Laker Airways* has generally been well received in English superior courts. The most recent expression of approval was *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] APP.L.R. 10/19. *Laker Airways* was approved by the Court of Appeal in *AT&T Corporation and Lucent Technologies Inc v Saudi Cable Company*\(^{99}\).

**Saudi Cable (2000)**

*Saudi Cable* is probably the most widely known of all the challenge decisions referred to in this chapter. It is of high interest to the writer because it was a decision made in the period after *Pinochet*, but before *Re Medicaments*, during which the separation of the Rule in *Dimes* from the principle of disqualification for apparent bias was uncertain. *Saudi Cable* was decided by applying the then-binding *Gough* ‘real danger’ test for apparent bias to section 24 of the Arbitration Act 1996.

\(^{95}\) The DAC Report (above note 50) has been cited and relied upon in a number of cases; see also *Hussman v Al Ameen* [2000] 2 Lloyd’s L Reps 83 and *The PetroRanger* [2001] 2 Lloyd’s L Reps 348.

\(^{96}\) For a lucid summary of the ‘Cab Rank Rule’ see the submissions of Michael Beloff QC in *Celtic Plc v UEFA*, ICAS Decision of 2 October 1998.

\(^{97}\) unreported, High Court Commercial Division, 1 November 1989

\(^{98}\) *Nye Saunders v Alan E. Bristow* (1987) 37 BLR 92

\(^{99}\) [2000] All ER (Comm) 625
A dispute arose. The parties appointed one arbitrator each, and agreed to Montreal-based lawyer Yves Fortier QC as Chair. Mr Fortier and the party arbitrators were required to sign ICC statements of independence before entering onto the reference. The ICC Statement of Independence requires appointees to tick one of two boxes; ticking the first box confirms independence and the absence (to the best of the appointee’s knowledge) of circumstances that may ‘call into question [the arbitrator’s] independence in the eyes of the parties’. Mr Fortier ticked the first box and the Tribunal was formed. During the course of proceedings it emerged that Mr Fortier was a non-executive director and holder of 474 shares in the Canadian outfit Nortel. Nortel were a disappointed bidder for TEP 6. Mr Fortier also held 300 AT&T shares. The Chairman’s failure to disclose was innocent – as a result of a clerical error the curriculum vitae provided by Mr Fortier at the time of his nomination did not mention his directorship of Nortel. When AT&T complained Mr Fortier offered to resign his directorship. AT&T rejected the same and applied to the ICC for his removal on the grounds that he lacked independence. On 24 February 1999 the ICC dismissed AT&T’s challenge. On 15 September 1999 a third partial award was handed down in favour of the SCC under which AT&T were ordered to pay US$30 million (plus interest) as partial compensation for breach of the PBA.

AT&T commenced in England for removal of Mr Fortier and orders vacating the Tribunal’s partial awards. Due to the date of the PBA the application was brought under s.23 of the 1950 Act. AT&T argued that Mr Fortier was not disinterested in the outcome of the dispute, and that they had been deprived of their right to an impartial arbitrator as a result of the accidental failure to disclose. No allegation of actual bias was made. At first instance Longmore J dismissed the application, finding that neither the Rule in Dimes nor the rule of apparent bias was breached. AT&T appealed. The matter was heard by Lord Woolf MR, Lord Justice Potter and Lord Justice May. Their Lordships dismissed the appeal, holding that the fact that the arbitrator was a non-executive director of a competitor company that might

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100 The underlying dispute related to the US$4.6 billion ‘TEP 6’ telecommunications expansion project in Saudi Arabia. Seven international telecommunications companies were invited to bid. AT&T entered into a Pre-Bid Agreement with the Saudi Cable Company (SCC) in which it agreed that if its bid was successful it would purchase all the cable for TEP 6 from the SCC. AT&T won the tender. The Pre-Bid Agreement (PBA) between AT&T and the SCC obliged the parties to ‘negotiate in good faith mutually satisfactory agreements’ for the supply of cable and related services. Negotiations held in August 1994 were unproductive. The parties were unable to agree upon the terms of supply. AT&T then notified the SCC that the PBA was terminated. The PBA provided for ICC rules arbitration in London. AT&T filed a request for arbitration with the ICC, in which it sought a declaration that its act of termination was valid. The SCC answered and sought orders compelling AT&T to negotiate in good faith.
somehow indirectly benefit from a decision against AT&T was not sufficient for disqualification under the Rule in *Dimes* or to create a real danger of bias.

In his leading judgment Lord Woolf MR dealt with the arguments run by AT&T against the application of *Gough* to international arbitral proceedings. Counsel for AT&T, Sir Sydney Kentridge, argued that the test laid down in *Gough* is not binding on arbitrators sitting in international arbitrations. In support of this submission counsel referred to the part of Lord Goff’s judgment in *Gough* where his Lordship said that the ‘real danger’ test should apply to all cases of apparent bias ‘whether concerned with justices or members of other inferior tribunals, or with jurors or with arbitrators’. Lord Goff did not refer to arbitrators in international matters. Counsel contended that, given this silence and the fact that the *Gough* test has been rejected in other jurisdictions\(^{101}\) the reasonable suspicion test should be applied to international arbitrators. The Master of the Rolls answered as follows:

> Lord Goff did not deal separately with international arbitrations, but there is no principle on which it would be right in general to distinguish international arbitrations from the other categories of situations to which Lord Goff referred, when the arbitration is, as here, governed by English law\(^{102}\).

It is respectfully submitted that Lord Woolf’s position is correct. The English Arbitration Act 1996 is monist; a monist *lex arbitri* does not distinguish between domestic and international arbitrations. Monism prevents a different standard being applied to arbitrators in international matters – to do so would be to engage in ‘hidden dualism’ (something English courts do not do). It follows that it was not open to the Court of Appeal to apply a different standard. This begs the question: if the *lex arbitri* had been a dualist Act would the court have responded more favourably to Sir Sydney’s submission? From Lord Woolf’s answer it seems that they might have. His Lordship conceded that *Gough* was silent on international arbitration, and his resistance to the split proposed was based upon the singular shape of English arbitration law\(^{103}\).

\(^{101}\) Counsel cited Scotland, Australia and South Africa as states where *Gough* had been rejected.

\(^{102}\) *Saudi Cable* at para 39

\(^{103}\) Sir Sydney’s argument (whilst pro-*Sussex Justices*) may afford the courts of dualist Common Law states a compromise – apply *Gough* to challenges against international arbitrators and *Sussex Justices* to domestic.
The Saudi Cable decision illustrates the operation of other principles of challenge. The failure to fully disclose was central to the applicant’s case. AT&T unsuccessfully argued that the Chairman’s inadvertent failure to bring his seat to the attention of the parties was a procedural breach constituting misconduct, and that his indirect interest in the outcome might have affected the way he discharged his responsibilities as arbitrator\textsuperscript{104}. This was also at issue in Rustal Trading.


*Rustal Trading* was an application for *vacatur* under the 'serious irregularity' provision at section 68 of the English Arbitration Act 1996. The arbitration was conducted under the rules of the Refined Sugar Association. Rustal discovered that one of the arbitrators had been involved in a commodity arbitration against one of their consultants two years before. Rustal applied on the basis that this previous adversarial association between party representative and arbitrator gave rise to an appearance of bias and constituted a serious irregularity in the proceedings. Moor-Bick J dismissed the application\textsuperscript{105}. His Honour held that where a failure to disclose is pleaded, the rule is that sanction against the arbitrator will not be granted unless the non-disclosed fact was such as to cause, by the fact of its not being disclosed, a real danger of bias\textsuperscript{106}. In reaching this conclusion Moor-Bick J took into account the nature of the dispute and the need for ‘commercial men’ to decide it. His Honour commented in *obiter*

> [it might] fairly be assumed that one of the reasons why the parties have agreed to trade arbitration is that they wish to have their dispute decided by people who are themselves active traders and so have direct knowledge of how the trade works. However, if the arbitrators themselves are to be active traders there is every likelihood that at least one member of the tribunal will at some time have had commercial dealings with one or both parties to the dispute. That is something which the parties must be taken to have had in mind\textsuperscript{107}

These comments echo the earlier *dicta* of Straughton J in *Tracomin*\textsuperscript{108}; they support the proposition that the more specific the subject matter of the commercial dispute, the more

\textsuperscript{104} *Saudi Cable* per Lord Woolf MR at para 44  
\textsuperscript{105} *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd’s Reps 14  
\textsuperscript{106} *Rustal Trading* at 14  
\textsuperscript{107} *Rustal Trading* at 14  
\textsuperscript{108} *Tracomin S.A. v Gibbs Nathaniel (Canada) Ltd* [1985] 1 Lloyd’s Rep 586 per Straughton J at 588-9
party familiarity will be tolerated by English courts. This approach recognises expertise as a key feature of commercial arbitration which, in turn, reflects London’s long experience with commodity trade and reinsurance arbitration. The writer agrees: where the arbitrator has been chosen on the basis of their knowledge and experience in a particular sector of trade and commerce, they should not be expected to be free of opinions and associations. The writer will later argue that applying the Gough standard in challenges to specialist arbitrators ensures that the procedural element of expertise is accounted for.109

**ASM Shipping (2005)**

In *Locabail* the Court of Appeal was required to walk a policy tightrope: on the one hand the Court attached a great deal of importance to the need to avoid wasting time and costs and the injustice arising from inappropriate attempts to abort hearings with bias challenges; on the other the Court acknowledged the universal and fundamental human right to a fair hearing by an impartial tribunal. This characterisation of ECHR Article 6 was cited with approval by Justice Morison in the most recent English challenge case of *ASM Shipping*.112

The *ASM Shipping* arbitration arose out of the charter of the MV *Amer Energy* to carry gas oil from the Gulf to the Red Sea. The Vessel arrived late and the charterers claimed damages for loss of purchase contracts. The vessel owners counter-claimed for unpaid freight and demurrage. The tribunal was formed and a partial award in favour of the owners was handed down on 26 April 2001. In subsequent proceedings the charterers alleged that the owners had not given full and proper discovery. The tribunal made orders against the owners and the matter continued. Oral evidence was taken. When one of the owner’s principal witnesses (a Mr Moustakas) gave evidence the owner became aware that the chairman of the tribunal, Duncan Mathews QC, had been involved in an earlier unrelated arbitration in which the credibility of Mr Moustakas was at issue. The owners said nothing until two hearing days

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109 Applying this to the *Saudi Cable* matter, was the dispute specific to any particular trade field? Probably not – the dispute arose out of an alleged breach of a contractual procedure (ie. ‘the parties shall negotiate in good faith’). It was not an argument about technical aspects of the TEP 6 project. Further proof of the general commercial nature of the dispute lies in the fact that Yves Fortier was appointed. Mr Fortier is a highly respected international arbitrator, but he is not a telecommunications law specialist. If the matter had been a telecommunications ‘trade arbitration’ then, it is submitted, no allegations of undisclosed *de minimis* portfolio bias would have been entertained by the Court of Appeal.

110 *Locabail* at 479

111 *Locabail* at para 2

112 *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] APP.L.R.10/19 at para 39

113 *ASM Shipping* at para 2
later, at which time they asked the chairman to recuse himself. He declined to do so and application was made to the Commercial Court under section 68 of the Arbitration Act 1996.

In a judgment that has been described as ‘controversial’, Morison J upheld ASM’s challenge\(^\text{114}\). Because ASM continued for two hearing days Morison J was required to deal with the question of waiver of the right to object. Under section 73(1) of the 1996 Act, a party who becomes aware that the proceedings have been conducted improperly\(^\text{115}\) (or have been affected by an irregularity\(^\text{116}\)) but continues to take part in the proceedings forfeits their right to object. Justice Morison summarised the applicant’s position as follows:

\[
\text{[ASM] were faced with a straight choice: come to the court and complain and seek [the challenged arbitrator’s] removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A ‘heads we win and tails you lose’ position is not permissible in the law as section 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them.}
\]

Justice Morison applied the test laid down in *Porter v Magill* to hold that, although the Owners had waived their right to object by continuing for two days, the chairman should recuse himself because ‘an independent observer would share the feeling of discomfort expressed by Mr Moustakas and concluded that there was a real possibility that the tribunal was biased\(^\text{117}\).

The chairman complied. The owners then challenged the remaining two arbitrators. The concurrent challenges to arbitrators Harris and Scott were heard by Smith J. Counsel for the owners cited *Sussex Justices, Pinochet* and *Re Medicaments* in support of their argument that because the chairman appeared to be biased his co-arbitrators should be removed. Judgment was handed down in June 2007. In dismissing the section 24 applications Smith J held that


\(^{115}\)See section 73(1)(b) of the 1996 Arbitration Act

\(^{116}\)See section 73(1)(b) of the 1996 Arbitration Act

\(^{117}\)ASM Shipping at para 42
there is no general rule of removal for ‘contamination’. His Honour distinguished the authorities cited (notably Pinochet) on the basis that because the tribunals in these cases had already made their respective decisions it was only natural that the decision makers should not participate in their review. These decision makers were standing aside for reasons other than contamination. His Honour confirmed the position that an allegation of bias must be evaluated in its own context – the only basis on which the remaining members could have been challenged was if there was good evidence of their being influenced by discussions with the recused chairman. As there was no such evidence the applications failed.

5. Human Rights Law in England

The UK ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1953. English courts have been finding breaches of its terms since 1975. The principal effect of the 1998 Human Rights Act was that it enabled individuals to invoke certain Convention rights before domestic tribunals. It is settled that the requirements of ECHR Article 6 extend to arbitral proceedings, with the effect that arbitrators are subject to separate and additional obligations of impartiality and independence under the ECHR.

It will be observed in the survey of European seats that follows that the European Court of Human Rights applies a ‘reasonable apprehension’ test for bias, and that the ECHR member states have generally followed Strasbourg in this regard. This raises the question: can the ‘real possibility’ test co-exist with the ECHR? The answer is clearly in the affirmative. Despite the passage of the Human Rights Act 1998 and the dicta of the Court of Appeal in Director General of Fair Trading v Proprietary Association of Great Britain where the Court of Appeal preferred those authorities in which the ‘reasonable apprehension’ test was applied.

Two decisions demonstrate this. The first is that of the House of

119 Decision of EHR Com of 12 December 1983 in Bramelid & Malmstrom v Sweden
120 Mousaka v Golden Seagull Maritime [2001] 2 Lloyd’s Reps 657 QBD (Comm)
121 Director General of Fair Trading v Proprietary Association of Great Britain & Ors (2000) EWCA (unreported December 2000) where the Court of Appeal preferred those authorities in which the ‘reasonable apprehension’ test was applied.
122 AWG Group Ltd (formerly Anglian Water Plc) v Morrison [2006] EWCA Civ 6
Lords in *Lawal*. The second is the decision of the Court of Appeal of England and Wales in *AWG Group Ltd*.

**Lawal (2003)**

The appeal point in *Lawal* was whether the practice of using senior barristers as part time members of statutory tribunals conflicted with the requirements of ECHR Article 6. The facts were that, in an appeal before the Employment Appeal Tribunal (EAT), the QC who appeared for the Respondent was a part time member of the EAT and had in that capacity sat alongside two of the members of the EAT panel before which he appeared in the instant matter. The real possibility pleaded was that these members might unconsciously favour submissions of their colleague (senior counsel for the Respondent) over those of the Appellant. The House of Lords allowed the appeal, holding that the EAT’s practice of using members of the inner Bar as part time judges and also allowing them to appear before members with whom they have sat must be discontinued. Importantly, the Law Lords held that there was no difference between the Common Law test for bias laid down in *Porter v Magill* and the requirement of impartiality contained in ECHR Article 6. The decision in *Lawal* also reinforced the primacy of Lord Hewart’s dictum that ‘justice must be done and be seen to be done’\(^{123}\). Lord Steyn said that ‘the public perception of the possibility of unconscious bias is the key’\(^{124}\).

**AWG (2006)**

This decision of the English Court of Appeal directly addresses the effect of the 1999 Human Rights Act upon the Common Law test for apparent bias. The matter involved a takeover agreement between AWG and Morrison. A dispute arose in which AWG alleged that Morrison made ‘unconditional representations’ and fraudulently concealed information regarding its profits for the 2001 financial year. The matter came on before Evans-Lombe J of the Chancery Division of the English High Court of Justice. In the pre-trial phase His Honour became aware that AWG intended to call a witness called Richard Jewson. Mr Jewson was a well-known acquaintance of Evans-Lombe J. Despite the Appellant’s request, after disclosing his relationship with the witness Justice Evans-Lombe decided not to recuse himself. The material facts of His Honour’s decision not to stand down were that in the week before the trial Justice Evans-Lombe stated that, when he notified the parties of his being acquainted with Jewson, AWG indicated that because of his marginal importance and potential to cause

\(^{123}\) *Lawal v Northern Spirit* [2003] ICR 856 per Lord Steyn at para 14

\(^{124}\) *Lawal* per Lord Steyn at para 14
delay Jewson would not be called. Morrison requested that Justice Evans-Lombe withdraw as a result of his disclosure. Upon learning of Morrison’s request Justice Evans-Lombe proceeded to disclose the fact that his family were landowners in the area where AWG’s water supply business was focused, adding that his relations with AWG were ‘not always harmonious’ 125. His Honour went on to state that Jewson lived only a mile from him and his family, and that their families had known each other for over 30 years. Evans Lombe J stated in the opening paragraphs of his judgment that he ‘would have the greatest difficulty in dealing with a case in which Mr Jewson was a witness where a challenge was to be made as to the truthfulness of his evidence’ 126.

In the appeal that followed Morrison’s sole objection to Justice Evans-Lombe continuing to try the case was that there was a ‘real possibility of apparent bias’ 127. Morrison made no allegation of actual bias or personal interest. The Court of Appeal weighed the risks of inconvenience, costs, and delay against fundamental principles of justice (both under the Common Law and under Article 6 ECHR). In his leading judgment, Lord Justice Mummery of the Court of Appeal concluded that convenience, cost and delay are subordinate considerations where concerns as to judicial impartiality are properly invoked. The Court of Appeal found that Evans-Lombe J should have recused himself because, even if Jewson was not called, it was in the interests of justice and all the parties involved that another judge try the case. In reaching this conclusion Mummery LJ held (at 7) that

the test for apparent bias now settled by a line of recent decisions of this court and of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was or ‘would be’ biased the court must ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased [emphasis added] 128

The next paragraph of the judgment of Mummery J identifies this ‘line of recent decisions’ as being comprised of Taylor v Laurence, Gough, Re Medicaments, Porter v Magill and Lawal. All of these decisions were made employing approximations of the ‘real danger’ test. In contrast, the ‘true’ ECHR test for apparent bias (or at least that applied on the Continent)

125 Morrison v AWG Group Ltd (20 January 2006) Adj.L.R. 01/20, sub-paragraph 3.3
126 Morrison v AWG sub-paragraph 3.3
127 Morrison v AWG at para 4
128 Morrison v AWG at para 7
corresponds with the ‘reasonable apprehension’ test applied in Sussex Justices. The key feature of the AWG Group decision is that the ‘real danger’ Common Law bloodline is cited immediately after the description of the guarantee of judicial impartiality in ECHR Article 6 as ‘the fundamental principle of justice’\textsuperscript{129}. From their silence on the matter it is apparent that the members of the Court of Appeal saw no friction between the ‘real possibility’ test and the terms of ECHR Article 6.

6. London Court of International Arbitration

Established in 1893, the London Court of International Arbitration (LCIA) is the world’s oldest international arbitration institution. Until very recently the LCIA observed a flat prohibition against the publication of its decisions, and this bar extended to rulings on challenges to arbitrators. Much like the ICC, during the twentieth century the Court took the view that it would be inconsistent with the confidentiality of proceedings to publish decisions on challenges. But this rule was overturned in June 2006 when the LCIA voted to commence publication of decisions on challenges\textsuperscript{130}. The driving force behind this reversal was the perceived institutional obligation of the LCIA to provide guidance on challenges, especially in circumstances not covered by the IBA Guidelines\textsuperscript{131}.

The LCIA Rules require that arbitrators remain impartial and independent for the full period of the arbitration. No allowance is made for the gradual erosion of impartiality (as envisaged by Sir Robert Jennings in Re Judge Broms\textsuperscript{132}). LCIA Rules Article 5(2) provides:

\begin{quote}
All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party. No arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute [emphasis added]
\end{quote}

\begin{flushright}
\textsuperscript{129} Morrison v AWG at para 6
\textsuperscript{130} Nicholas, G, Partasides, C, ‘LCIA to publish challenge decisions’ (June 2006), at www.lcia.org/NEWS_folder/news_archive3.htm, p.1
\textsuperscript{131} Ibid at p.1
\textsuperscript{132} Decision of Appointing Authority to the Iran-United States Claims Tribunal (May 7, 2001) at 5-6, in ‘Challenge of Iran-U.S. Claims Tribunal Judge Bengt Broms’, American Journal of International Law, Vol. 95, No.4 (October 2001), p.896
\end{flushright}
The LCIA rules are, therefore, direct and unconditional in their imposition of the dual obligations of impartiality and independence. The Rules do not acknowledge any Sunkist distinction, and make no room for party-arbitrators. Where an arbitrator is disqualified, LCIA Rules Article 11(1) gives the Court ‘complete discretion’ to determine whether or not the process for their replacement will be the same as the process by which they were appointed. Lew, Mistelis and Kroll notes that the LCIA Rules do, in theory, allow arbitrators to request replacement of arbitrators. The writer is not aware of any arbitration in which this has occurred, but given that the LCIA has only recently started publishing its challenge decisions it is possible that the situation has arisen in the past. Despite the fact that the LCIA Rules Article 29(1) identifies challenge decisions as administrative in nature, the practice of the Court has always been to provide reasons for its challenge decisions.

**National Grid (2007)**

National Grid went to UNCITRAL Rules arbitration with Argentina over the alleged breach of its rights under the UK-Argentina BIT. The damage was done when, following its currency crisis of 1999, Argentina passed the 2001 Public Emergency and Exchange Rate Reform Law (PEERRL). The passage of PEERRL resulted in a number of ICSID claims against the Argentine Republic. The hearing was held between 9 and 20 July 2007 in Washington DC. One week later Argentina filed a challenge to American arbitrator Judd L. Kessler. The basis of Argentina’s challenge was that Kessler had caused Argentina to apprehend prejudgment when he intervened during the cross-examination of an expert witness. The witness (Dr Juan Carlos Cassagne) was giving evidence on Argentine law. Counsel for Argentina was putting questions to Dr Cassagne based around hypothetical scenarios. Whilst the witness was responding, Arbitrator Kessler interjected (in Spanish)

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134 National Grid said that Argentina expropriated their investments in the Argentine electricity sector without compensation, treated National Grid unfairly and inequitably, and breached the other standards of treatment required under the BIT.
135 Under the PEERRL, all contracts with a connection to a foreign currency were converted into Argentina pesos, and the parties to those contracts were prevented from suspending or modifying the performance of their obligations
136 Argentina used challenge tactics in many of these ICSID arbitrations, including *Compania de Aguas de Aconquija S.A. & Vivendi Universal v Argentine Republic*, ICSID Case ARB/97/3; and *Suez Sociedad General de Aguas de Barcelona S.A. & InterAgus Servicios Integrales del Agua S.A. v Argentine Republic*, ICSID Case ARB/03/17. These challenges are examined in Chapter 7
137 *National Grid PLC v The Argentine Republic*, LCIA Case No. UN7949, para 11
It is now clear that there are certain facts that the witness is not familiar with, but I suppose that the basis of his testimony has to do with the hypothetical situation and that it’s not hypothetical because we are all here. We know the facts generally speaking that there was major harm or major change in the expectation of the investment\textsuperscript{138}

Whether or not National Grid had suffered ‘major harm’ as a result of the passage of the PEERRL was at the heart of merits of the dispute. Argentina challenged Arbitrator Kessler for apparent outcome preference. The challenge was brought under UNCITRAL Rule 10 on the basis that his comment that ‘there was major harm or major change in the expectation of the investment’ showed that he had prejudged the final result\textsuperscript{139}, and that Arbitrator Kessler ‘completely identified’ with the Claimant’s allegations\textsuperscript{140}. The parties agreed to submit the challenge to the LCIA.

On 26 September 2007 the LCIA convened a division of the Court for the matter. The members were Mr Yves Fortier CC QC (as President), Dr Klaus Sachs and Dr Hassan Ali Rahdi. Argentina quickly objected to the President – whether or not the objection was related to the Republic’s challenge to Mr Fortier six years prior in \textit{Vivendi v Argentina}\textsuperscript{141} is not clear in the judgment. In any event, Mr Fortier withdrew\textsuperscript{142}. Irish arbitrator Paul B Hannon replaced him as President. The oral hearing of the challenge was held on 22 November 2007 in London. In addition to the UNCITRAL Rules, Argentina relied on a number of authorities in support of its submission that an objective test was applicable, including \textit{Sussex Justices, Porter v Magill, Commonwealth Coatings}, the IBA Guidelines on Conflicts of Interest in International Arbitration (namely item 3.5.2 on the Orange List) and a report of the United Nations Conference on Trade and Development (UNCTAD). National Grid agreed that the question was one of appearance\textsuperscript{143}, but denied that Arbitrator Kessler’s intervention betrayed prejudgment of the merits\textsuperscript{144}. National Grid also noted that the Argentine challenge did not go to Arbitrator Kessler’s independence, only his impartiality. National Grid said that the arbitrator was only performing his normal duties as an arbitrator when he interjected as he

\textsuperscript{138} National Grid, para 32
\textsuperscript{139} National Grid, para 36
\textsuperscript{140} National Grid, para 39
\textsuperscript{141} See decision on the Challenge to the President of the Committee in \textit{Compania de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic} (ICSID Case ARB/97/3) 3 October 2000
\textsuperscript{142} National Grid, para 21
\textsuperscript{143} National Grid, para 80
\textsuperscript{144} National Grid, para 59
did. Counsel for National Grid relied upon the *dicta* of Sir Robert Jennings in *Re Judge Broms* as authority for the proposition that an arbitrator is required to become partial as a matter of ‘judicial duty’^{145}. Because the challenge to Arbitrator Kessler was governed by the UNCITRAL Rules, it was open to National Grid to rely on the dicta in *Re Judge Broms*: if the challenge had been subject to the LCIA Rules, National Grid would have been barred from relying on the principle of ‘eroding impartiality’ by virtue of LCIA Rules Article 5(2).

The tribunal applied an objective test to the challenge^{146}. Considering the broader hypothetical context of Arbitrator Kessler’s comments^{147}, the members concluded that Arbitrator Kessler had not caused an appearance of prejudgment to arise. It was material that, immediately after he interjected, Arbitrator Kessler was asked by Counsel for Argentina ‘you state that at this stage we already know that there was hard?’ In his answer Arbitrator Kessler said ‘I merely say that we are here because there is an allegation of harm or a change in the contract that caused problems to the investor’. The members held that the use of the word ‘allegation’ was incompatible with the assertion that Arbitrator Kessler was prejudiced. The tribunal also noted that some confusion was caused by the comments being made in Spanish (rather than English, Mr Kessler’s mother tongue). The challenge was dismissed^{148}.

**LCIA Challenge Decision 18 (2005)**

This challenge arose out of an *ex parte* communication between the sole arbitrator and counsel for the Claimant^{149}. The arbitrator and counsel met for fifteen minutes behind closed doors, and in the course of their meeting live issues in the arbitration were discussed. Subsequently, in an exchange concerning the meeting the arbitrator made comments casting aspersions on the integrity of counsel for the Respondent, and required that an exchange between counsel regarding the meeting be deleted from the transcript^{150}.

Following the jurisprudence of English courts under s.24 of the Arbitration Act, the LCIA Division applied the *Porter v Magill* ‘real possibility’ test to the challenge. The Division

^{145} *National Grid*, para 63  
^{146} *National Grid*, para 87  
^{147} *National Grid*, para 93  
^{148} *National Grid*, para 103  
^{149} Nicholas, G., Partasides, C., ‘LCIA Decisions on Challenges to Arbitrators: A Proposal to Publish’ (2007) 23 Arb Int 1 at p.13  
^{150} Ibid at p.14
concluded that the sole arbitrator should be removed, commenting that ‘such private meetings are not recommendable, as they may lead the other party or even an external observer, in certain circumstances, to suspect a lack of impartiality on the part of the arbitrator’\textsuperscript{151}. The Division was careful to note that ‘the mere fact that such a meeting takes place does not, in itself, always lead to the conclusion of a real possibility that the arbitrator is biased’\textsuperscript{152}. It was the fact that the \textit{ex parte} communication included live issues in the dispute that made it improper, and caused the real possibility of bias to arise – if there had been no discussion of the merits, it is unlikely that the challenge would have succeeded.

7. Conclusions

The prohibition against ‘actual bias’ is well established in English law. The 1938 decision ‘\textit{Catalina}’ v ‘\textit{Norma}’ shows it is applicable to arbitrators. As a rule it has enjoyed a consistency of application not shared by its normative counterpart, the rule of disqualification for ‘apparent bias’. In 1993 the body of Common Law surrounding this rule changed as a result of the decision of the House of Lords in \textit{Gough}, in which the \textit{Sussex Justices} ‘reasonable apprehension’ test gave way to a new requirement that a ‘real danger’ be shown to exist in the eyes of the court (as opposed to the ‘fair minded observer’ favoured in the \textit{Sussex Justices} line). The policy imperative that ‘justice be seen to be done’ was seen by many as shelved. As shall be observed in Chapter 5, this new test did not command universal acceptance. Whilst it was taken up in Hong Kong and Malaysia, courts in Australia, South Africa, Canada and Scotland retained the rule in \textit{Sussex Justices}. The English law of bias then underwent two further shocks, the first being the passage of the 1998 Human Rights Act and the second being the controversial 1999 decision of the House of Lords in \textit{Pinochet} (No.2). In \textit{Re Medicaments} in 2001 the \textit{Gough} ‘real danger’ test was modified and rephrased as ‘real possibility’. In 2002 the revision of \textit{Gough} was completed by the House of Lords in \textit{Porter v Magill}. The \textit{Re Medicaments} phrasing was approved and the fair minded observer was returned to the equation, hand in hand with Lord Hewart’s ghost. This test is in force today in English courts, and at the LCIA.

\footnote{\textsuperscript{151} Report of LCIA Challenge Decision 18 (dated 21 October 2005), in Nicholas, G., Partasides, C., above note 149 at p.37}

\footnote{\textsuperscript{152} Above note 149 at p.15}
Arbitrators have ridden alongside judges on this bumpy Common Law road. In *Saudi Cable* the *Gough* ‘real danger’ test was applied and the pecuniary interest challenge dismissed. The same test was applied in *Rustal Trading*, with a similar result. The next case on point is *ASM Shipping*, in which the *Porter v Magill* revision of *Gough* was applied to the arbitrator with very different results. Justice Morison of the Commercial Court ordered that the arbitrator should have recused himself because ‘an independent observer would share the feeling...that there was a real possibility that the tribunal was biased’. In *Porter v Magill* the ghost of Lord Hewart CJ opened the door for this notional third person, and *ASM Shipping* shows how powerful their presence is. *ASM Shipping* would have failed in the days of *Gough*. *Rustal Trading* was based on similar ‘prior adversarial association’ grounds to *ASM Shipping*. The challenge in *ASM Shipping* only succeeded because the vantage point Morison J was bound to use was that of the notional third person, whose hypothetical assessment imports *Sussex Justices*-type considerations of public confidence that have no role to play in private commercial dispute resolution proceedings. The writer will argue in Chapter 8 that English courts were right to apply *Gough* to arbitrators, and that they should return to *Gough* (both arms: ‘real danger’ and court vantage) in deciding challenges to arbitrators in future.
CHAPTER 3

Varying Approaches in Europe

…the tentacles of the Human Rights Act 1998 reach some unexpected places.

- Steel J in Mousaka v Golden Seagull Maritime (2001)¹

1. Introduction

This chapter is concerned with procedural fairness in ICA in certain European states. The purpose is to show how the laws of the seven leading European seats – France, Belgium, The Netherlands, Germany, Austria, Switzerland and Sweden – diverge in their treatment of bias challenges to arbitrators. This chapter commences with a short discussion of the sources of the rule against bias in Europe. It then turns to the European Human Rights Law and assesses the affect of Strasbourg jurisprudence on the domestic laws of arbitrator bias in ECHR member states. It will be observed that, although all the leading arbitral seats of Europe are party to the ECHR and decisions of the European Court of Human Rights employ the ‘reasonable apprehension’ test for bias akin to Sussex Justices, the courts of the European seats still vary in the way they approach bias challenges to arbitrators and arbitral awards. To make this observation the writer will examine the municipal laws of a number of jurisdictions. Key arbitral institutions and permanent tribunals will also be examined. In Chapter 8 the writer will return to the laws of these seats in assessing their tolerance for the contractual adoption of the Gough ‘real danger’ test.

2. Sources of the Rules of Bias in Europe

The European legal rule that a decision maker must not be biased is derived from three main sources: custom, Roman law and modern municipal law. The last of these sources is covered

¹ [2001] 2 Lloyd’s Reps 657 QBD (Comm)
‘seat-by-seat’ below. In this preface the writer’s concern is historical; the focus here will be on custom and Roman law. The intention of the writer is two-fold: (1) to show the origins of the notion that to be valid a decision must not have been made in circumstances of bias, and (2) to illustrate the evolution of this notion from its emergence as a relative customary proscription to its modern form as an absolute rule of posited law.

2.1 Customary Law

In the discussion of lex mercatoria that follows this chapter, the writer will provide a theoretical explanation for how social rules obtain the force of customary laws. Rather than double-up here, in this chapter the reader is for argument’s sake asked to accept the Natural Law proposition that there is such a thing as customary law, and that the communities of early Europe – at some time in the first millennium AD – developed customs to guide them in their daily lives. A custom is a non-binding prescription of how to act in a certain situation. Derek Roebuck describes the essentiality of customary law as follows:

Every community must have some system of dealing with disputes if it is to be a community. It has its own law, which is customary until its ideology insists that nothing is law which is not set by the state.\(^2\)

It is difficult to say to what extent the exclusively customary laws of the ancient Germanic, Celtic and Basque peoples of Europe dealt with decision making processes. But some things can be said with certainty. Violence is destructive. Experience shows that community survival depends upon the prevention of violence by the peaceful settlement of feuds and the maintenance of order.\(^3\) But this does not mean law follows. Positivists and Natural Law adherents continue to disagree on the degree of legal complexity that simple societies require (let alone exhibit). The safest proposition is that human groups of any significant size require basic notions of right and wrong, and that these notions manifest as do and don’t rules. Substantive prohibitions against murder, rape and theft are therefore likely to have developed early. But what about secondary rules, like rules to govern how a person is accused of killing: in pre-modern European societies, was there such thing as customary procedural law?

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\(^2\) Roebuck, D, *Early English Arbitration* (Holo, 2008), p.81

\(^3\) Ibid, p.84
The kinds of tribal assemblies (described by Roebuck as ‘folk-moots’\(^4\)) that were used to resolve feuds in Iron Age European communities – the legacy of which is the modern jury - must have adhered to basic procedural patterns such as consistent meeting places and times (probably structured around key dates of the agricultural calendar), ceremonial rules for the right to speak (the so-called ‘Speaking Stick’ phenomena\(^5\)) and signals for the start and finish of proceedings\(^6\). According to Roebuck ‘the processes in the assemblies were clearly accompanied by acts which were customary and replicated and intended to have some consequence’\(^7\) - if they were not then they would have drastically underperformed as social processes. This is because a ceremony is an exhibition of power, a power that is maximised by knowledge of ceremonial rules. It follows that knowledge of the rules of the assembly would have been a key means of wielding and reinforcing power within the group, with the outcome that those in control of the assembly (including the priests who would later play the role of lawyers) stood to benefit from the development of secondary procedural rules.

If even the most basic procedural rules were observed in these types of meetings, they must have included a rule that the decision could not be made by a party who stood to gain or suffer as a result of it. Continental scholars have agreed. Writing in 1861, H. A. Zacharia suggested that the rule that ‘no man may be a judge in a matter in which he has an interest’ had a considerable history in German customary law\(^8\). Rules usually take a long time to migrate from the periphery of a society to the centre. Whilst we should never project the present onto the past, it might not be too much to say that the centrality of the rule against bias in modern European legal principles of ‘fairness’ and ‘rights’ suggests that the origins of the rule are ancient, customary and cultural. But this is theory and conjecture. There is no hard evidence for how the peoples of ancient Europe managed and resolved their disputes. The record only begins in Roman times.

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\(^4\) Ibid, p.94  
\(^5\) Ibid, p.28  
\(^6\) Ibid, p.93-95  
\(^7\) Ibid, p.25  
\(^8\) Roebuck, D, *Roman Arbitration* (Holo 2004), p.30 (FN 44)
2.2 Roman Law

With the exception of Sweden, all of the states surveyed in this chapter were Roman possessions at one time or another. Roman law was in force throughout the Empire, though the modern historical consensus is that Germanic and Celtic customary laws governed most aspects of the day to day lives of people in Rome’s European provinces. But the more formal dealings were, and the higher the status of the actors, the more likely they were to be governed by the Roman rules and codes. It seems market forces Romanised commerce faster than other branches of social activity, and where there are deals there are disputes. Roman commercial law quickly adapted. Courts and full time judges were relatively late additions to the Roman provincial structure. Ad hoc dispute resolution methods were favoured as a matter of necessity rather than policy. For this reason the practice of arbitration was well developed in Roman law, especially in commercial contexts. The Roman lex arbitri was made up of a detailed body of procedural rules, many of which are familiar to the modern day practitioner. Much like their modern equivalents Roman arbitrators were under a general duty to act fairly and in good faith. The origins of this duty appear to be Greek. For the purposes of this thesis the most important element of Roman arbitration law was the general rule that no one could adjudicate in their own cause (nemo debet esse judex in propria causa). Under Justinian’s Code (stating the lex lata in AD 524) arbitral awards made in circumstances of ‘corruption or obvious bias’ were unenforceable. In contrast to modern judicial practice, which generally treats the prohibition against bias as being subject only to de minimis, the Roman form of the rule was far from absolute. As Roebuck put it

Romans saw nothing outlandish in allowing one of the parties in some circumstances to act as arbitrator in a matter in which he (or indeed she) had an interest.

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9 France, Belgium and The Netherlands fell under the province Gallia Belgica. The southern regions of the modern German federation were under Roman control as Germania Superior, a province which also included the western cantons of Switzerland. Western Austria and the eastern Swiss cantons were part of the alpine province of Raetia.
10 Above note 8, where the author paints a detailed picture of the Roman dispute resolution laws and practices.
11 Above note 8, p.53-8
12 Socrates is quoted as saying ‘Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially’.
13 Above note 8, p.57; this maxim is often cited short form as ‘nemo judex’.
14 Code, 2.55.3
15 Above note 8, p.57
When the arbitrator had an interest in the cause before them they remained bound by fairness and good faith. Professor Roebuck’s research has revealed a number of instances in which Roman arbitration law tolerated breaches of the *nemo judex* rule. In his treatise *On Agriculture* Cato the Elder described dispute resolution methods for harvest contracts in which one of the *parties* was given the role of arbitrator. Similar arrangements were recommended by Cato in disagreements relating to the milling of olives. In *Letters* (written in the period AD 104-107), Pliny describes how he acted as arbitrator in a substantial inheritance dispute in which he was a potential beneficiary. Justinian’s *Digest* (AD 533) recalled a situation where the arbitrator in a dispute over payment of a dowry was the debtor himself. The *Digest* also describes a dispute regarding the obligations of a freed slave to his former master in which the former master was decision maker. It is clear, therefore, that the Roman *lex arbitri* did not expect total or perfect impartiality and independence from arbitrators. The *Digest* shows that *nemo judex* could be broken in circumstances that today we would perhaps equate with ‘trade arbitration’ (or expert determination). The Roman bar for *vacatur* was set high as a requirement that the bias be ‘obvious’.

### 2.3 Becoming an ‘Absolute Rule’

How then did the rule against bias become *absolute* and ‘fundamental’ in Europe? Was it the advent of Christianity, and the dissemination of notions of divine authority? Probably not – Rome was well into its third century of Christianity when Justinian’s *Code* and *Digest* were promulgated, and we have seen that those instruments were not so strict in their prescription of *nemo judex*. The feudal kingdoms and principalities of Europe in the Middle Ages, where social hierarchy alone determined the validity of an exercise of power, are even more unlikely contexts for the transition to fundamentality. The Separation of Powers Doctrine was born in the Enlightenment, so we might properly stop at 1789, the year of the French Revolution, when ‘liberty, equality and fraternity’ ushered out the *ancien regime* and laid the foundations of the first French Republic with ideological blocks fashioned by Rousseau and Montesquieu et al. In *The Spirit of the Laws* (1748) Montesquieu – who had served as a judge for a time - expressed the view that judges are ‘only the mouth that pronounces the words of

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16 Above note 8, p.57  
17 Cato, *On Agriculture*, 144.2, in Roebuck, above note 8, p.58  
18 Cato, *On Agriculture*, 144.2, in Roebuck, above note 8, p.58  
19 Above note 2, p56  
20 *Digest* 23.3.69.4 in Roebuck, above note 8, p.58  
21 *Digest* 38.1.30 in Roebuck, above note 8, p.58
the law, inanimate beings who cannot moderate its force nor its rigour. This idea was central to the Revolutionary theory of judicial function; inherent in it is the vision of the judge as a neutral, benign processor untrammeled by inputs other than law and fact. Guaranteeing judicial ‘neutrality’ was a key task of the procedural reforms that followed the French Revolution. The legislative record shows that the main rights-based reforms took place in criminal procedure law. For example, the 1808 French Code of Criminal Examination separated the roles of prosecutor and investigating judge. But these developments were short lived and localised, knots undone by counter-revolution and war. Although the theories and happenings of the High Enlightenment certainly set the stage, they alone do not explain the elevation of the rule against bias to the status of the absolute prohibition which it holds in Europe today. No, we are looking in the wrong place.

The true event was World War Two, in the aftermath of which two things happened: the law of nations settled into its modern, posited form; and Human Rights Law was borne. With respect to the former, modern Public International Law exhaustively deals with the rights and duties of states in times of war, which include the right to be ‘neutral’. In Chapter 1 the writer objected to the personal aspect of the term ‘neutrality’ in ICA: the word ‘neutral’ might be appropriate as a description of a seat (the ‘jurisdictional aspect’ of the term) but using it to describe an arbitrator ignores his function, which is to render a binding award - to ‘take a side’ (a distinctly belligerent act). Despite this logical flaw the word ‘neutral’ is widely used today (especially amongst American lawyers) as a summary expression for a decision maker that is impartial and independent. It will be observed that French courts also toy with an additional requirement of ‘neutrality’. This helps explain how the notions of impartiality and independence became absolute - they are associated with neutrality, which is an absolute standard derived from Public International Law. In private international law (which includes ICA) ‘neutrality’ is a risky colloquialism, a usage that has elevated impartiality and independence to the level of absolutes. The analogy between the arbitrator and a neutral state is fundamentally flawed, and is at least partly to blame for the global prevalence of the Second Arm of the Sussex Justices test. The writer will return to this point later. The latter

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24 Above note 23, p.33
25 The writer has defined neutrality as the status of a sovereign entity that refrains from participation in an armed conflict and neither materially assists nor obstructs the belligerents involved in it.
post-war source - Human Rights Law - must now be considered in some detail. But before
dong so the writer must give disclosure: first, the writer is not a scholar of Human Rights
Law and is, in the discussion that follows, crossing into an area in which he has limited
expertise.

3. European Human Rights Law

The most significant modern source of the modern European legal rule against bias is Human
Rights Law, the codified body of fundamental rights and freedoms formed amidst the
dramatic revision of Public International Law after World War Two. Summers describes the
birth as follows:

Principles expressed as rights have more protection from the interference from politicians and the electorate than norms expressed as mere laws. Indeed this would seem to be precisely the reason for the creation of the European Convention on Human Rights. In the aftermath of the Second World War, there was a desire to find legal means to try and prevent the types of atrocities that took place in Europe in the first half of the twentieth century. The Convention can therefore be seen in the context of an international attempt to set standards which could not be overridden by the competing aims of the various legislatures.  

In 1950 the forty seven states of the Council of Europe signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). All the members of the European Community (EC) are signatories to the ECHR, meaning that all of the states presently grouped as the European Union (EU) are party to the ECHR.

Two bodies originally administered the ECHR – the European Commission on Human Rights (EHR Com) and the European Court of Human Rights (EHR Court). Both bodies were seated in the French city of Strasbourg. The European Commission on Human Rights was dissolved in 2001. Its function and case load has been assumed by the European Court of Human Rights. All the signatories to the ECHR have incorporated decisions of the EHR Court into their municipal laws. The EHR Court and Commission rely on the ‘common core’ of the law

26 Above note 23, p.170
27 Settled at Rome on 4 November 1950; the United Kingdom signed in 1953.
of the ECHR member states in reading the Convention. There is no doctrine of precedent in European Human Rights Law. But although decisions of the European Court of Human Rights are not strictu sensu binding on Council of Europe states, because they interpret the ECHR (which is binding) they are highly persuasive.

Article 6 of the ECHR guarantees the right of every person to a fair trial before an impartial and independent tribunal. Although overtly public in its phraseology, Article 6 applies to proceedings in which private rights and remedies are at issue. There is, however, good authority for the proposition that ECHR Article 6 does not apply telle quelle to civil cases. The European Human Rights Commission has held that where Article 6 rights are invoked in private contexts municipal courts have ‘greater latitude’ than they would in their application to a matter of public law.

3.1 The ECHR and Arbitral Proceedings

Notwithstanding the fact that they often fail the element of ‘publicity’ the Human Rights Court has held that ECHR extends to arbitral proceedings. Arbitral panels qualify as ‘tribunals’ for the purposes of the ECHR because their functions are decisive of the private rights and obligations of individuals. The issue is then what must be shown for ECHR Article 6 to apply. The jurisprudence of the ECHR Court and Commission provides guidance on this jurisdictional question.

Andersson v Sweden (1997)

From the decision of the EHR Court in Andersson v Sweden we can conclude that the following elements must be satisfied in order for ECHR Article 6 to apply:

1. There must be a dispute (a ‘contestation’), and

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28 Petrochilos, G, Procedural Law in International Arbitration (Oxford University Press 2004), p.113
30 Van Dijk, EHR Com 7 January 1991, see also Jensen v Denmark, DR 68, 177 at 182, cited in Liebscher, above note 29, p.62
The dispute must relate to the existence, scope or manner of exercise of a civil right recognised under the municipal law of the relevant member state, and

(3) The dispute must be ‘genuine and serious’\(^{35}\), and

(4) The outcome of the proceedings in question must be ‘directly decisive’\(^{36}\).

The EHR Court and Commission have defined ‘civil rights’ broadly\(^{37}\). Contractual\(^{38}\) and proprietary\(^{39}\) obligations and rights have been held to be within the meaning of ‘civil rights’. It seems safe to say that the kinds of rights most often pressed in ICA fall within the scope of the ‘civil rights’ contemplated by ECHR Article 6\(^{40}\).

**Mousaka v Golden Seagull Maritime (2001)**

The cross-pollination of arbitration law with principles of Strasbourg Jurisprudence in the late 1990’s imposed new obligations on arbitrators. This caused a good deal of alarm amongst judges and arbitrators, especially in England, where the ECHR was widely seen as ‘Frenchmen telling Englishmen how to run their courts’. Lord McClusky wrote that the ECHR would be ‘a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers’\(^{41}\). Whilst this may be an overstatement, the ECHR does burden the arbitral process. In *Mousaka v Golden Seagull Maritime* Steel J of the English Commercial Court commented that

> the tentacles of the Human Rights Act 1998 [by which the UK gave effect to its obligations under the ECHR] reach some unexpected places. The Commercial Court, even, when exercising its supervisory role as regards arbitrations, is not immune\(^{42}\)

The tenets of the ECHR have filtered into arbitration so thoroughly that eminent commentators, including Lord Mustill, have expressed the view that international arbitrators

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34 *Andersson* at para 33, above note 29, p.63  
35 *Andersson* at para 33, above note 29, p.63  
36 *Andersson v Sweden* at para 33  
37 Above note 29, p.63  
38 See EHR Court decision of 22 October 1984 in *Sramek v Austria*.  
39 See for example the decision of EHR Court of 22 October 1984 in *Ruiz Mateos v Spain*. See also the decision of EHR Court of 16 December 1992 in *Zander v Sweden*.  
40 Above note 29 at p.64, where the author cites the opinion of Petrochilos that ‘it can be assumed that matters subject to an international commercial arbitration will in all likelihood qualify as ‘civil matters’ under art.6’  
41 *Van Rijs v HM Advocate* [2000] UKHRR 578  
42 *Mousaka v Golden Seagull Maritime* [2001] 2 Lloyd’s Reps 657 QBD (Comm)
are now under a duty to ensure that they are familiar with the principles of Human Rights Law.\footnote{Mustill, Sir Michael J, Boyd, S.C, *Commercial Arbitration 2001 Companion Volume to the Second Edition* (Butterworths, London 2001)}

**Bramelid & Malmstrom v Sweden (1983)**

In this matter the EHR Commission was required to determine whether ECHR Article 6 was applicable to compulsory arbitration under the *Swedish Joint Stock Companies Act*. The Commission ruled that statutory arbitrations must be conducted in a manner consistent with the procedural guarantees contained in ECHR Article 6.\footnote{Decision of EHR Com of 12 December 1983 in *Bramelid & Malmstrom v Sweden*} In its 1995 decision in *Cantafio v Italy*, No.14667/89 at para 44, cited in Liebscher, above note 29, p.70\footnote{Decision of EHR Com of 16 May 1995 in *Cantafio v Italy*, No.14667/89 at para 44, cited in Liebscher, above note 29, p.70} the Commission reached a similar conclusion in relation to compulsory arbitration under Italian law.\footnote{See for example Paris Court of Appeal decision 15 September 1998 in *Cubic Defence Systems v ICC* [2001] Rev Arb 511}

The purpose of this short list of decisions is to establish the general application of ECHR Article 6 to arbitral proceedings. There are many other judgments on this interesting question, including decisions in the negative.\footnote{See for example Paris Court of Appeal decision 15 September 1998 in *Cubic Defence Systems v ICC* [2001] Rev Arb 511} We are, however, concerned in this survey with a specific element of Article 6: the right to ‘an independent and impartial tribunal’.

### 3.2 Fair Trial under the ECHR

For the purposes of this study the most important provision of the ECHR is the ‘fair trial’ guarantee at Article 6 (‘Right to a Fair Trial’). The full text of ECHR 6(1) is as follows:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in

\footnote{See for example Paris Court of Appeal decision 15 September 1998 in *Cubic Defence Systems v ICC* [2001] Rev Arb 511}
special circumstances where publicity would prejudice the interests of justice
[emphasis added]

The provisions on the right to a ‘fair hearing’ in the various regional and universal human rights instruments are, in substance, identical47. For example, ECHR Article 6 is mirrored by Article 10 of the Universal Declaration on Human Rights (UDHR)48. But because the EU is a federation, the ECHR requirement that member states observe principles of Human Rights law is able to be centrally policed49. International Human Rights Law recognises both actual (subjective) and apparent (objective) bias as actionable: in Prosecutor v Fundzijia the Appeals Tribunal for the International Court for the Former Yugoslavia held that ‘an adjudicator should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias’50. ECHR case law confirms the dicta in Fundzijia: where independence is concerned, appearances are everything.

ECHR Article 6 has mixed vertical and horizontal force, meaning it can be invoked \textit{vertically} by public bodies (such as member state courts in supervisory proceedings)\textsuperscript{51} and \textit{horizontally} (by private parties against a private parties in private proceedings)\textsuperscript{52}. It is important to note that the ECHR does not expressly provide for the horizontal effect of Article 6. Rather, the horizontal force of Article 6 is derived from the jurisprudence that has developed in the courts of states bound by the Convention\textsuperscript{53}.

\textbf{3.3 EHR Court Principles of Arbitrator Impartiality}

The jurisprudence of the EHR Court is quite well developed in the area of arbitrator impartiality. Strasbourg uses both elements of the \textit{Sussex Justices} test (‘reasonable apprehension’ and third party vantage). The following further principles stand out:

\begin{itemize}
\item \textsuperscript{47} Above note 28, p.110
\item \textsuperscript{48} See also Article 8 of the American Convention on Human Rights.
\item \textsuperscript{49} This regional force is stark in contrast to the operation of the UDHR, which is a non-binding declaration of the UN General Assembly.
\item \textsuperscript{50} \textit{Prosecutor v Fundzijia}, IT-95-17/1-A(ICTY Appeals Chamber, 21 July 2000) at para 189
\item \textsuperscript{51} See for example the decision of the EHR Court of 23 February 1999 in \textit{Osmo Suovaniemi & Ors v Finland}
\item \textsuperscript{52} Above note 29, p.67
\item \textsuperscript{53} Above note 29, p.74
\end{itemize}
(1) Subjective impartiality (which when lacking equates to actual bias in Common Law parlance) and Objective impartiality (which when lacking equates to apparent bias) are to be distinguished (Craxi III v Italy)\textsuperscript{54}

(2) An arbitrator is entitled to a presumption of impartiality which must be rebutted by proof to the contrary if the challenge is to succeed (Craxi III v Italy)\textsuperscript{55}

(3) In determining a challenge based on objective impartiality the decisive question is whether the apprehension can be objectively justified. The subjective opinion of the challenging party is relevant but not decisive (Craxi v Italy; Morel v France)\textsuperscript{56}

(4) The fact that an arbitrator and a party are both members of the same professional body does cause a lack of objective impartiality (H.A.R. v Austria; H v Belgium)\textsuperscript{57}

(5) So long as they have not taken a final position on the matter the fact that an arbitrator expresses a preliminary view on a case does not mean they then lack objective impartiality to decide it (Buscemi v Italy; Jensen v Denmark)\textsuperscript{58}

(6) Arbitrators who have even an indirect material interest in the outcome of the case lack objective impartiality (Langborger v Sweden)\textsuperscript{59}

(7) Indirect personal interests are generally not sufficient to give rise to a lack of objective impartiality (Academy Training & Ors v Greece)\textsuperscript{60}

(8) An arbitrator may not be counsel in the matter over which he presides, or counsel in a related matter (Procola v Luxembourg)\textsuperscript{61}

3.4 Could Sussex Justices be waived?

Where the impartiality of arbitrators is concerned, Strasbourg jurisprudence is not so different to the municipal laws of most of the leading European seats. The treatment of nemo judex may be different in that even ‘indirect’ interests seem to be objectionable (suggesting a situation like Saudi Cable might go the other way). But that there is still a place for de minimis - Langborger v Sweden shows the arbitrator’s interest must be ‘material’ in order to

\textsuperscript{54} EHR Court decision of 14 June 2001(No.63226/00 at 11) in Liebscher, above note 29, p.106
\textsuperscript{55} Craxi III v Italy EHR Court decision of 14 June 2001(No.63226/00 at 11)
\textsuperscript{56} Craxi III v Italy at 11; Morel v France EHR Court decision of 6 June 2000 (No.34130/96 at 42)
\textsuperscript{57} H.A.R. v Austria EHR Com decision of 10 September 1998 (No.40021/98); H v Belgium EHR Court decision 30 November 1987.
\textsuperscript{58} Buscemi v Italy EHR Court decision of 16 September 1999 (No.29569/95); Jensen v Denmark EHR Com decision 7 January 1991
\textsuperscript{59} Langborger v Sweden EHR Court decision of 22 June 1989 (see paras 32-5)
\textsuperscript{60} Academy Training & Ors v Greece EHR Court decision of 4 April 2000 (No.30342/96)
\textsuperscript{61} Procola v Luxembourg EHR Court decision of 28 September 1995
be actionable. The writer’s principal objection to the Strasbourg approach is its insistence on the *Sussex Justices* test for arbitrators. The question is then whether the parties could waive the benefit of this public adjudicatory standard. The majority view is that, whilst the Article 6 right to an independent tribunal may be waived, the right to an impartial decision maker cannot be waived. Professor Georgios Petrochilos has opposed this interpretation; Petrochilos is of the view that the ECHR Article 6 requirements of impartiality and independence are equally waivable:

the fact that independence and impartiality, as well as party equality, are doubtless part of procedural public policy does not make them absolute standards. A court controlling an arbitral award should be careful neither to upset the procedural arrangements of the parties nor to allow the parties to benefit from their own negligence properly to police those arrangements

In light of this doctrine, could the parties make ‘procedural arrangements’ with the effect that any challenges are which ensue are decided by the *Gough* test (ie. ‘real danger’ and *court vantage*)? Would the following clause be enforced by the Strasbourg Court?

**Challenges (‘Gough Clause’)**

The Parties agree that any allegations that an arbitrator appears to lack impartiality or independence will, at whatever stage and in whatever jurisdiction they are made, be finally determined by the relevant authority asking itself whether there was (or is), in the relevant authority’s eyes, a real danger that the arbitrator was (or is) biased.

As a threshold issue it is important to consider if a ‘Gough Clause’ would even be considered ‘waiver of a Convention right’. It is submitted that it would. Whilst the *Sussex Justices* test is not a ‘Convention right’ *per se* (ie. it is not part of the written body of the ECHR) it is a principle of ECHR jurisprudence that functions to guarantee observance of a universally accepted and ‘fundamental’ Convention right. It is a Convention right derived from jurisprudence rather than the text of the ECHR, but for the purpose of waiver a Convention right nonetheless.

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62 Above note 28, p.122
Suovaniemi (1999)

This case was an appeal against the decision of a Finnish court which had held that the challenger had waived their right to object to an arbitrator ‘M’ by remaining silent in the proceedings. The material facts of the appeal were that one of the members of the tribunal was a lawyer who had acted for a third party in negotiations on the termination of a joint venture; the dispute the subject of the arbitration concerned the ownership of a company that owned the joint venture vehicle. The Human Rights Court agreed with the Finnish court, holding that the appellants, who were aware of these facts, had waived their right to an independent arbitrator and that their act of waiver had been accompanied by the guarantee of fairness derived from representation by counsel.

In Suovaniemi the European Court of Human Rights did not directly address the question of whether the Sussex Justices standard could be waived in favour of Gough. Rather, the case is valuable because it illustrates the more general tolerance of the Strasbourg court for the idea that ECHR procedural rights can be waived. In finding the Finnish court’s decision acceptable for ECHR purposes, the Strasbourg court held that waiver of a procedural right under the Convention will only be effective if:

(i) waiver of the relevant right is ‘permissible’ under the Convention, and  
(ii) the waiver is ‘unequivocal’, and  
(iii) the waiver is accompanied by ‘minimum guarantees commensurate with its importance’.

These three elements were found to be satisfied; the waiver was effective. The Applicant had approved M as arbitrator despite having doubts about his impartiality, making his waiver unequivocal for element (ii). The Applicant was accompanied by counsel for all of the arbitral proceedings, which satisfied the ‘minimum guarantee’ requirement at element (iii) because it ensured that the Applicant had been afforded the opportunity to argue their case.

What is the outcome if we apply the reasoning of the EHR Court in Suovaniemi to the ‘Gough Clause’? It appears from Suovaniemi that the waiver of the right to an impartiality...
judge is ‘permissible’, so element (i) would seem safe. As for element (ii) the wording of the
Gough clause would seem to be express and unequivocal. It might be arguable that a mere reference to the case (eg. ‘the parties agree to use the test in R v Gough’) would fail element (ii), but that is not what the writer has done. The Gough test, complete with its vantage point, is fully elucidated in the clause. Suovaniemi element (ii) is satisfied. Finally, does implementation of the Gough test (in place of the Strasbourg Sussex Justices test) constitute a ‘minimum guarantee’ for the purpose of Suovaniemi element (iii)? Gough does not abandon the parties to the wilds of prejudice and corruption; far from it. Firstly, if we accept that Gough deals with apparent (or ‘objective’) bias only, then nemo judex still stands to disqualify any arbitrator with an interest in the cause. Secondly, actual bias will always pass the Gough test so there is a minimum guarantee in place in this sense. It is submitted that the third Suovaniemi element is satisfied. On this basis the writer’s conclusion is that the ‘Gough Clause’ would survive Strasbourg review.

3.5 Conclusions on the ECHR

The record shows that, with some linguistic variance, decisions of the European Court of Human Rights employ the ‘reasonable apprehension’ test for bias. The most recent illustration of this is Eureko v Poland. Due to the multiplicity of jurisdictions and the necessarily infinite variation in the outcomes of their interaction with the rules chosen by the parties, we cannot say for certain how the ECHR has affected the law of impartiality and independence in ICA. But we can make observations as to how Strasbourg jurisprudence is affecting the practice of challenging arbitrators in European seats.

Challenges are increasingly common in Europe. Whilst the confidentiality of international arbitral proceedings (and resulting invisibility of ad hoc arbitrations) functions to limit the availability of empirical evidence to support this contention, there is ample institutional data to back it up. The leading recorder is the ICC. Until the 1980’s the Arbitration Court of the International Chamber of Commerce handled no more than a handful of challenges each year. By the early 1990’s the rate of challenge had increased significantly, such that the ICC

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64 Observations to this effect were made by the English Court of Appeal in Locabail (at para 74)
was often considering multiple challenges at any one of its monthly plenary sessions\textsuperscript{66}. At the 1990 ICCA Congress in Stockholm lengthy discussions were held on how to respond to and minimise the effectiveness of these dilatory and disruptive tactics\textsuperscript{67}. Where there were six challenges run in the ICC Court in 1996, the figure rose to 33 in 2000\textsuperscript{68}. Between 1998 and 2006 there were 4,950 new cases filed at the ICC, and a total of 270 arbitrators were formally challenged in this period.\textsuperscript{69} Anecdotally, arbitrators report that the practice of challenging arbitrators is on the rise in Europe, and that arbitration is suffering as a result. Recently, Ahmed El-Kosheri and Karim Youssef said

\begin{quotation}
The increasing use of strategic challenges to arbitrators’ independence is a blight on arbitration today. Deliberate attempts to compromise arbitrators’ independence are frequent and come in various forms\textsuperscript{70}.
\end{quotation}

The lawyers agree. In their 2008 European regional overview English practitioners Foster and Edwards observed:

\begin{quotation}
the frequency of challenges in European arbitration seems to be increasing. Parties (or their legal advisors) have become highly adept at identifying a perceived flaw in the arbitral process or an extraneous factor affecting the partiality of an arbitrator, and are increasingly willing to make a formal objection when the opportunity arises\textsuperscript{71}.
\end{quotation}

It is true that at the ICC the success rate is low – something like ten percent\textsuperscript{72}. In the period 1995 – 2002 only seven ICC challenges succeeded\textsuperscript{73}; in 2003 the ICC Court received twenty challenges, of which only one got up\textsuperscript{74}. The highest annual rate of success was in 2002, when 4 out of 15 ICC challenges succeeded\textsuperscript{75}. But the rate of withdrawal is high: in his study of

\begin{footnotes}
\item[\textsuperscript{66}]Ibid
\item[\textsuperscript{67}]‘Preventing Delay or Disruption of Arbitration’, ICCA Congress Series No.5 (Kluwer 1991), pp.131-159, cited in Redfern \textit{et al}, above note 65, p.245
\item[\textsuperscript{68}]‘2002 Statistical Report’ (2003) 14(1) \textit{ICC Int Ct Arb Bull} 11
\item[\textsuperscript{69}]‘Independence of Arbitrators’, \textit{ICC Int Ct Arb Bull} (Special Supplement) , p.27
\item[\textsuperscript{70}]El-Kosheri, M., Youssef, K., ‘The Independence of International Arbitrators: An Arbitrator’s Perspective’, \textit{ICC Bulletin 2007} (Special Supplement) at p.48
\item[\textsuperscript{71}]Foster, D, and Edwards, D., ‘Challenges to Arbitrators’, The European and Middle Eastern Arbitration Review 2008, pp.2-3, available at \url{www.globalarbitrationreview.com}
\item[\textsuperscript{72}]Bond, S.R., ‘The International Arbitrator: From the Perspective of the ICC Court of Arbitration’ (1991) 12 \textit{NW J Int L & Bus} 1 at 16
\item[\textsuperscript{73}]Ibid p.20
\item[\textsuperscript{74}]Above note 65, p.245
\item[\textsuperscript{75}]Above note 69, p.27
\end{footnotes}
ICC arbitrations, Michael Bond found that, in challenges at the appointment stage, 72% of prospective arbitrators withdrew or were not confirmed by the ICC Court. The tactical objectives of procedural disruption, delay and ‘changing the bench’ are therefore achieved more often than not when a challenge is filed. This begs the question: what is the cause of this effect?

In the opinion of the writer, the cause is the prevalence of the Sussex Justices test in the body of Strasbourg jurisprudence that surrounds tribunals sitting in Europe. From counsel’s perspective, the viability of a challenge is dependent upon the law under which it is brought. The outcome of a challenge will also depend upon the facts of the case. So whilst the Sussex Justices standard (or its close Strasbourg equivalent) certainly does not guarantee the success of challenges, it must be seen as promoting attempts. From the arbitrator’s perspective, being subjected to a test for bias that is framed in terms of appearances presents a risk to reputation that is often simply not worth taking: better to stand down than have your name dragged through court in a drawn out challenge proceeding.

The question the writer has tried to address is whether the parties are stuck with the Strasbourg Sussex Justices test. The answer is that they are not. Following the reasoning of the European Court of Human Rights in Suovaniemi and the doctrine of eminent scholars the writer has argued that the Strasbourg equivalent of the Sussex Justices test could be excluded by use of a ‘Gough Clause’.

4. Municipal Laws

In order to make the point that the inclusion of a ‘Gough Clause’ would be beneficial for parties arbitrating in Europe, the writer must examine how the courts of the leading European seats evaluate and decide allegations of arbitrator bias.

4.1 FRANCE

Since the storming of the Bastille the notion of equalité has held a high seat in the national consciousness of the people of France; the independence of the judiciary is central to patrie.

76 Ibid p.16
The 1789 Declaration of the Rights of Man and of the Citizen stated that all citizens were equal in the eyes of the law. More recently, the advent of the ECHR has reinforced the primacy of equalité in French law. Consistent with the Republic’s obligations as a signatory to the ECHR and other international Human Rights agreements, French law guarantees fair and equal treatment in legal proceedings. French courts have repeatedly identified due process as a ‘superior and indispensable principle of the law’\textsuperscript{77} that is applicable without exception\textsuperscript{78}. In recent years, the geographic and jurisprudential proximity of the European Court of Human Rights has lowered the tolerance of Paris courts for breaches of procedural fairness.

The grounds upon which a municipal judge may be challenged for lack of independence are found in the New Code of Civil Procedure (NCCP). It has been observed that France is one of a handful of states where the dual requirement of independence and impartiality is not imposed in black letters. Article 341 of the NCCP describes situations of impermissible social proximity rather than state of mind. Although earlier court decisions used to refer only to ‘independence’, treating matters of attitude as ‘independence of mind’, more recent decisions refer to impartiality expressly\textsuperscript{79}. Article 341 exhaustively lists the factual bases upon which a judge may be challenged for wont of independence:

(a) the judge or their spouse have a personal interest in the dispute;
(b) the judge or their spouse are a creditor, debtor, possible heir or gift recipient of one of the parties;
(c) the judge or their spouse have certain family ties with one of the parties or their spouses;
(d) there were or still are ongoing legal proceedings between the judge or their spouse and one of the parties or their spouse;
(e) the judge was already involved in the case as a judge or arbitrator or has been counsel to one of the parties;
(f) the judge or their spouse are in charge of administering one of the parties;
(g) there is subordination between the judge or their spouse and one of the parties;

\textsuperscript{77} Above note 29, p.255
\textsuperscript{78} This is the case even where the arbitrator is appointed as amiables compositeur. See for example the decision of the Court of Cassation in Pakistan Atomic Energy Commission v Societe Generale pour les techniques nouvelles [1992] Rev Arb 659 (7 January 1992), cited in Liebscher, above note 29 at p.255
\textsuperscript{79} Above note 29, p.284
(h) there is friendship or known resentment between the judge and one of the parties.

The circumstances listed in Article 341 are of interest for their attention to personal and familial relations. This reflects the bureaucratic Civil Law tradition of the judge as a career public servant. The situations of dependence listed at Article 341 reflect the Napoleonic tradition of ‘professional judging’ – absolute rules in the terms of items (e) and (h) above would be unworkable in a Common Law system where judges are appointed from the independent Bar, effectively by peer selection80. The NCCP takes a broad view on the parameters of the family unit. Article 341 deploys a more abstract concept of familial proximity than the procedural laws of other code states, using the words ‘certain family ties’ rather than terms that reference permissible degrees of consanguinity81. It is notable that seven out of eight criteria extend to the spouses of the judge and the parties (the exception being the ‘friendship or known resentment’ criterion).

France is one of the most highly developed arbitral jurisdiction in the world; the Paris Court of Appeal is seen by many practitioners as the most world’s experienced court in matters of arbitration. French arbitration law is dualist, and France is not a Model Law state. The provisions of Book IV of the NCCP form the basis of the French lex arbitri. The NCCP is applicable to international arbitrations seated in France82. The NCCP pays comparatively little attention to the requirement that an arbitrator be independent; this is consistent with the broader French approach to due process, which Redfern and Hunter label ‘minimalist’83. Under Article 1452(2) arbitrators must disclose potential grounds for challenge of which they are aware84; Article 1463 alludes to ‘grounds for challenge’. Other than in these provisions, the NCCP does not take the matter of arbitrator independence much further. But the NCCP is

80 On this point it is notable that the Common Law model of judicial appointment is closer to the Civil in the way arbitrators are chosen. In sharp contrast to litigation in Civil Code states, there is a high degree of role reversibility amongst actors in arbitral proceedings. Senior practitioners of arbitration ‘change hats’ regularly; counsel one day and arbitrator the next. It follows that the application of item (h) of Article 341 NCCP to arbitrators is somewhat problematic. Friendship and animosity are realities of human group dynamics, and the international arbitration community is no exception. It is with this reality in mind that French courts have acknowledged that professional contacts, rather than family ties, are the more common cause of bias in arbitrators.
81 See for example Article 768 of the Arbitration Act of Argentina; Article 12 of the Indonesian Arbitration law.
82 Court of Appeal of Paris, 9 April 1990, Philipp Brothers v Icco & Ors [1990] Rev Arb 880
83 Above note 65, p.490, where the authors observe ‘In practice, it is left to national courts to determine, from case to case, exactly what is required to constitute a ‘fair hearing’
84 NCCP Article 1452(2) reads ‘An arbitrator who is aware of a ground for challenge regarding his or her person shall so inform the parties. In such a case, he or she may accept his or her mission only with the agreement of the parties’.
much more thorough in its treatment of judicial independence, and arbitrators are subject to
standards of independence very similar to those which apply to judges. In an *arête de
principe* handed down in 1973 the Court of Cassation held

> Intellectual independence is essential for the exercise of jurisdictional powers arising
> from whatsoever source, and is one of the essential attributes of arbitrators.

The Paris Court of Appeal has held that arbitration finds its jurisdictional value in the
independence of arbitrators and the respect of fundamental guarantees. French jurisprudence has it that partiality, in the form of either party or outcome preference, will be
actionable where ‘reasonable doubts’ are made out by the aggrieved party. French courts
take allegations of bias very seriously. The evidentiary burden is, however, set relatively
high. Whilst the test for a lack of independence stands as one of reasonable doubt, French
courts apply this test objectively and, it seems, pragmatically: the challenge will normally
fail if the evidence does not reveal a ‘definite risk’ of hostility or prejudgment on the part of
the arbitrator.

As a general rule, French law requires the same standard of independence from arbitrators as
it does from judges. When an arbitrator is appointed, they acquire the status of a judge.
The impermissible circumstances envisaged by NCCP Article 341 then apply to them in
full. French superior courts initially took the view that the criteria for an arbitrator to be
deemed independent were limited and identical to those listed under Article 341 NCCP.
French appeal courts have read Article 341 exhaustively. In *Graine d'élite Clause v. Gérin*
the Court of Cassation held that the Article 341 grounds for challenging a judge are all that

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86 Decision of the Court of Cassation, 13 April 1972
87 Decision of Paris Court of Appeal, 5 May 1989
89 Court of Cassation, 16 March, *Qatar v Creighton* [1999] Rev Arb 308
90 Above note 29, p.284
92 Court of First Instance decision of 1 April 1993 in *Dubai & Anor v Nalcrow & Anor* [1993] Rev Arb 455
93 NCCP Article 341, as amended by Law No. 76-626 of 5 July 1972.
95 See decision of the Court of Cassation of 14 November 1990 in *Graine d'élite Clause v. Gérin* [1991] Rev Arb 230
96 Above note 29, p.283
are available to parties challenging arbitrators. The current position is, however, that in their application to arbitrators these criteria are listed inclusively. The preference of the Paris Court of Appeal is to apply a more general expression of the standard of independence for arbitrators than that voiced in the NCCP. It follows that arbitrators may be challenged for reasons other than those enunciated in the NCCP, including, it would seem, a lack of impartiality (or ‘independence of mind’). It is also clear that French law recognises what the writer has termed Saudi Cable and ASM Shipping Familiarity - the parties may object to relationships with counsel and not just the party they represent. The Paris Bar Rules impose an obligation of independence upon any avocat who acts as an arbitrator. There is no Sunkist distinction in French law: in proceedings before a panel, the standard of independence is the same for party appointed arbitrators and ‘neutral’ chairpersons.

In arbitrations where French law is lex arbitri arbitrators can be challenged during or after the proceedings. There is no American-style bar to prevent the parties from going to court with their challenge in the middle of the arbitration. French courts apply the same test to post-award applications as is applicable to mid-hearing challenges. When the award has been made, French law allows appeals against the recognition or enforcement of arbitral awards in five circumstances only, one of which is where the recognition or enforcement would be contrary to ‘international public order’ (ordre public attenue). Ordre public attenue has procedural and substantive arms; the Paris Court of Appeal has made it clear that compliance with the fundamental notions of due process is part of the French procedural aspect of ordre public attenue. In the Dutco case the Court of Cassation held that any unequal treatment of the parties in the constitution of the arbitral tribunal will offend French domestic public policy. Similarly, the Court of Cassation has held that international procedural public policy will also be offended where bias is made out, and that a lack of independence will be

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97 See for example the decision of the Court of Cassation of 14 November 1990 in Graine d’élite Clause v. Gérin [1991] Rev Arb 230
99 Decision of Court of Cassation, 16 March, Qatar v Creighton [1999] Rev Arb 308
101 Above note 29, p.286
102 Societe Annahold BV et al v L’Oreal, Rev Arb 483 (1986); this approach is to be compared with that taken by German superior courts.
103 NCCP Article 1502(5)
actionable under international public policy without the need to refer to any particular legal text\textsuperscript{106}.

Article 1592(4) of the New Code of Civil Procedure requires that French courts set aside judgments and awards rendered in circumstances where due process has not been observed. For awards rendered outside France, the public policy exception at NCCP Article 1592(5) will entitle the aggrieved party to resist enforcement where there has been a denial of due process.

\textit{Galeries Lafayette (1972)}

\textit{Galeries Lafayette} was a domestic arbitration in 1972\textsuperscript{107}. In French arbitral jurisprudence the \textit{Galeries Lafayette} decision marks the beginning of French judicial opposition to the idea that a lower standard of impartiality and independence should apply to party-appointed arbitrators. The Court of Cassation took the view that the appointment of each arbitrator is not a unilateral act at all, even when initiated by one party alone. The Court said that the power to appoint results from the common intention of the parties\textsuperscript{108}. Part of this meeting of the minds is that the parties together take into account the qualities of the persons they might call upon to decide their dispute. The power conferred on these prospective judges is judicial. The Court of Cassation went on to hold that ‘an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be [and it is] one of the essential qualities of an arbitrator’\textsuperscript{109}.

In contrast to American and Swiss courts, French tribunals follow \textit{Galeries Lafayette} and roundly reject the \textit{Sunkist} distinction between ‘neutral’ and party-appointed arbitrators. Notwithstanding the fact that French arbitration law is dualist, French superior courts have applied the reasoning in \textit{Galeries Lafayette} to international arbitrations as well\textsuperscript{110}. French courts are, however, more likely to consider the issue of impartiality (either as ‘independence

\textsuperscript{106} Decision of the Court of Cassation, 3 December 1996, Bull. Civ. 1 No.427
\textsuperscript{107} Decision of the Court of Cassation 13 April 1972 (1975) Rev Arb 235
\textsuperscript{108} Similar reasoning was employed by the Paris Court of First Instance on 28 March 1984 in \textit{Raffineries de pétrole d'Homs et de Banias v. Chambre de Commerce Internationale} [1985] Rev Arb141
\textsuperscript{109} Decision of Court of Cassation 13 April 1972 (1975) Rev Arb 235
of mind’ or a separate requirement in addition to independence) in international contexts\textsuperscript{111}. It is notable that French courts have occasionally referred to an additional requirement of ‘neutrality’ in international arbitrations\textsuperscript{112}.

\textbf{TAI (1991)}

\textit{TAI} is most commonly cited in support of the proposition that, in hearing challenges, French courts require that the applicant discharge a heavy burden of proof. In \textit{TAI} the Paris Court of Appeal defined the independence required of an arbitrator as follows:

\begin{quote}
the independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes any relation of dependence, particularly with the parties. Further, the circumstances relied on to challenge that independence must constitute, through the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a \textit{definite risk} of bias in favour of a party to the arbitration [emphasis added]\textsuperscript{113}
\end{quote}

The rule in \textit{TAI} is similar to the position in English law prior to the introduction of the Arbitration Act 1996\textsuperscript{114} (at which time the shift from ‘real danger’ to ‘justifiable doubts’ occurred). Whilst the threshold applied in \textit{TAI} is \textit{ex facie} close to the Second Arm of \textit{Gough}, and the learned author’s observation is certainly good, it is submitted that the broader pattern of French jurisprudence favours \textit{Sussex Justices}. The 1999 decision of the Court of Cassation in \textit{Qatar v Creighton} supports the writer’s conclusion in this regard.

\textbf{Philipp Brothers (1990)}

French courts have shown themselves willing to make special allowance for party familiarity in trade arbitrations where the parties and the arbitrators are professionals in a common commercial field. In the first challenge in \textit{Philipp Brothers}\textsuperscript{115} the court held that the mere fact

\begin{footnotes}
\item\textsuperscript{111} See decision of the Court of Cassation of 20 February 1974 in \textit{Forges et Ateliers de Commentry Oissel v Hydrocarbon Engineering}, [1975] Rev Arb 238
\item\textsuperscript{112} See for example the decision of the Paris Court of First Instance in \textit{Société des Equipements Industriels Stolz S.A. v Ets. Letieric}, [1988] Rev Arb 316. As explained in Chapter 1, the writer finds the personal aspect of the term ‘neutrality’ problematic.
\item\textsuperscript{114} Above note 28, p.139
\item\textsuperscript{115} \textit{Drexel Burnham Lambert Ltd v Philipp Brothers} [1990] Rev Arb 497
\end{footnotes}
that the arbitrator has had commercial dealing with or even adverse to a party does not deprive them of independence of mind. The challenge was to all members of the tribunal, and after examination of the individual relationships and dealings advanced by the applicant, the court found no evidentiary basis for removing the arbitrators.

It seems that if the applicant could have shown enmity or friendship then they may have succeeded. It is notable that the applicant in Philipp Brothers was successful in a later challenge brought on the basis of the structural subordination. The Paris Tribunal de Grand Instance held that the list of arbitrators at the relevant institution was too small for that institution to be able to conduct a review of the first instance decision with ‘sufficient independence of mind and the necessary impartiality’.

**Annahold (1992)**

In Annahold BV et al v L'Oreal et al the Paris Court of Appeal was faced with a situation where, after the handing down of the award, a replacement arbitrator began consulting to a company of the same group as a party to the proceedings in which he had just become functus officio. The Court of Appeal held that the same ‘reasonable doubt’ test for a lack of independence was to be applied to post-award applications as that applied to mid-hearing challenges and that, on this test, reasonable doubts arose because the consultancy contract signed by the arbitrator implied that he had prior undisclosed relations with the party which subsequently became his employer.

The situation in Annahold BV was similar to that in Société des Equipements Industriels Stolz, where an arbitrator was found to lack independence because he was concurrently retained to provide technical assistance to one of the parties to the arbitration. These cases make it clear that Rustal Trading Familiarity is actionable under French law. Annahold is also cited as authority for the proposition that the obligation to disclose is on the arbitrator alone: the Court of Appeal took the view that if the parties were bound to disclose their relationship with the arbitrator, the disclosure obligation would be weakened.

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116 Philipp at 497  
117 Annahold at 483  
KFTCIC (1992)

*Kuwait Foreign Trading Contract & Investment Co v Icori Estero* involved a challenge for *Laker Airways* Familiarity. The Paris Court of Appeal accepted that relationships between arbitrators and counsel are hard to avoid because the international arbitration community is small\(^{119}\). The Court held that two barristers from the same chambers were able to act in the same arbitration; one as arbitrator and the other as counsel\(^{120}\). In reaching this conclusion, the Court of Appeal accepted expert evidence from Sir Michael Kerr about an LCIA arbitration in which an English barrister was challenged on the basis that he was a member of the same chambers as counsel for one of the parties. The three-member LCIA panel, composed of an eminent Dutch lawyer, the director of the Austrian Chamber of Arbitration, and an English QC unanimously rejected the challenge\(^{121}\).

Since *KFTCIC*, it has been held that no objectionable relationship will exist where two arbitrators participate in seminars and similar professional development activities related to the arbitration\(^{122}\). More direct professional contact will be more likely to offend, especially where the relationship is contractual: for example, arbitrators who consult to the directors and officers of a party involved in the matter before them will lack independence\(^{123}\). The same is true where the arbitrator is engaged as a consultant by a party shortly after they issue their award: this will cause a retrospective appearance of bias to arise\(^{124}\).

Marteau (2000)

In *Marteau* the Paris Court of Appeals court upheld a challenge to the independence of an arbitrator who was from an accounting firm that acted as auditors to a subsidiary of the party that appointed him\(^{125}\).

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120 Above note 29, p.285
123 Above note 29, p.285
Transgrain France (1998)

Transgrain France is persuasive authority for the proposition that an arbitrator will lack independence where he is an executive officer of a company that is involved in a parallel dispute with one of the parties before him.\(^{(126)}\)

Milan Presse (1999)

The NCCP prohibition against familial relationship appears to be wider in arbitration than state court proceedings. It extends to counsel and not just the party they represent. Stepchildren are certainly within its scope. In Milan Presse\(^{(127)}\) the Paris court found that the fact that the arbitrator was married to the mother of one of the advocates before him justified doubts about his impartiality and independence. Milan Presse is another demonstration of actionable Laker Airways Familiarity.

Richy v Warlaumont (1996)

NCCP Article 341 covers situations where the judge is subordinate to a party. French courts have also found the reverse to be actionable (i.e. where the judge is the superior of a party). In Richy v Warlaumont the Court of Appeal of Paris held that the arbitrator’s independence was impaired by the fact that he was hierarchically superior to one of the parties.\(^{(129)}\) This ruling raises distinct problems for arbitration, where status and rank are less clear than they are in state court adjudication. Unlike the judge and the advocate in a civil court, arbitrator and counsel are of a common caste, both being private individuals engaged in the practice of commercial dispute resolution. The arbitrator may not formally outrank the advocate but the disparity in professional status may be sufficiently clear for one to reprimand (or even give orders to) the other.\(^{(130)}\) Richy v Warlaumont may conceivably provide a basis for a challenge in such a situation. In this sense it is an interesting case.


\(^{(128)}\) Above note 29, p.285


\(^{(130)}\) Picture a junior barrister sitting in determination of a matter in which a very well known senior lawyer is appearing as counsel. If the test for bias is the perception of the parties as reasonably informed bystanders, it is not out of the question that this type of situation could qualify as ‘subordination’ for the purposes of Article 341 NCCP?
Jean Lion (1999)
Vertically staged dispute resolution processes may fall afoul of the rule against subordination. In *Societe Jean Lion v Societe Etablissements Gortzounian* the Court of Appeal of Rouen found that grounds to challenge existed in the fact that the arbitrator was the subordinate of the president of the first tier panel. The Rouen court held that the subordinate arbitrator was ‘objectively deprived of his independence’.

Qatar v Creighton (1999)
The structure and chronology of multi-party arbitrations may also raise concerns as to the independence of arbitrators. In France, the rule seems to be that an arbitrator may act in successive arbitrations so long as they do not take a position in the earlier matter that may prejudice a party to the later matter. In *Creighton* the arbitrator acted in an arbitration between the prime contractor (Creighton) and its subcontractors, then in the arbitration between the prime contractor and the principal (the State of Qatar).

The Court of Cassation held that there was no basis for challenge because the arbitrator’s determination in the first arbitration did not prejudice the State of Qatar in the second. The fact that one party has appointed an arbitrator three times in the past does not cause that arbitrator to lack independence when deciding subsequent matters involving that party. Best practice is to disclose prior appointments, but failure to do so will not disqualify the arbitrator. In reaching this conclusion, the Court of Cassation framed the test for objective bias in terms of ‘reasonable doubt’, departing from the rule of ‘definite risk’ laid down by the Paris Court of Appeal in *TAI*.

Setec Bâtiment (1986)
Like *Creighton*, the *Setec Bâtiment* challenge arose out of multi-party arbitral proceedings regarding a construction project. The first proceeding was between the owner and the prime contractor; the second arbitration was between the owner and the engineer, and related to the liability of the engineer under certain contractual warranties given to the owner. The

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132 Above note 29, p.284
133 *Qatar v Creighton* at 308
135 *Fretal v ITM Enterprises* at 299
owner appointed the same arbitrator in both the first and second proceedings and the engineer challenged the owner’s appointee in the second proceeding. The judge of the Court of First Instance prefaced his ruling by confirming that the arbitrator’s knowledge of the first set of arbitral proceedings was not such as to cast doubt on his impartiality or his ability to reach a fair decision regarding the second. But examination of the first award did cast doubt - despite the fact that the engineer was not a party to that main arbitration, the arbitrator’s award gratuitously dealt with the liability of the engineer. As the engineer’s liability was the ultimate issue in the second arbitration, the judge saw fit to make orders disqualifying the arbitrator. Following the dicta in Setec Batiment and Ben Nasser v BNP, the French rule is that an arbitrator will only be barred from sitting in related arbitrations where he has made a ruling in the earlier matter that can be characterised as prejudicial in the subsequent matter; French case law therefore prohibits Telekom Malaysia Bias in the narrow, ‘issue conflict’ sense. It is an open question, however, whether the rule in Setec Batiment and Ben Nasser could be extended to such abstract situations of prejudgment as that encountered in the Eureko and Vivendi arbitrations, where the appearance of bias was generated from both role and issue conflict.

The decision in Setec Batiment is to be contrasted with that in Gemanco v SAEMA, where the request for orders of disqualification was denied by the Paris Court of Appeal. It is notable that in Abu-Dhabi Gas Liquefaction v Eastern Bechtel Co, a similar situation to Setec Batiment, the English Court of Appeal ruled the other way holding that ‘a sole arbitrator may be appointed in two different arbitral procedures in which the set of facts is closely interrelated…this is desirable to avoid contradictory findings of fact’. Given the complex, multi-party reality of international commerce today, the English Court’s position in Abu-Dhabi Gas

**Uni-Inter (1990)**

The parties in this matter were franchisor and franchisee; a dispute arose and the matter was referred to arbitration. During the proceedings the applicant learnt that the arbitrator had made prior statements of opinion as to a matter of law that was live in the dispute. A

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137 *Setec Bâtiment* at 63
challenge followed. The Paris Court of Appeals held the documents adduced by the applicant in support of their challenge did not raise doubt as to the impartiality of the arbitrator because they did not reveal excessive vehemence or systematic hostility such as might cause a presumption of bias to arise.

_Dubai v Halcrow (1993)_

In this matter the arbitrator was challenged after his preliminary award on the law applicable to a state contract described the legal system of the Emirate of Dubai as ‘somewhat autocratic’. The Paris Court of First Instance held that this statement did not demonstrate any hostility towards the state party or prejudice against the arguments advanced by them. Interestingly the Paris court dismissed the challenge for lack of a ‘definite risk of bias’\(^{142}\). No _Catalina_ Bias was found to exist.

### 4.2 International Chamber of Commerce

France is held in high regard by practitioners of international arbitration. At least one of the reasons for the popularity of France as a seat is the role that the International Chamber of Commerce (ICC) has played in the development of French arbitration law\(^{143}\). Article 7(1) of the ICC rules states that ‘every arbitrator must be and remain independent of the parties involved in the arbitration’. From the early 1980’s, in a process of rule-making which involved the French courts, the ICC pioneered the rule of disclosure in ICA. In Chapter 8 the writer will examine this process in more detail. Here we are concerned with the rules themselves: ICC Rules Article 7(2) requires that arbitrators sign a declaration of independence; Article 11(1) confers the right to challenge an arbitrator ‘whether for lack of independence or otherwise’. Like the Swiss Rules, the ICC Rules extend the obligation of impartiality beyond the _person_ of the arbitrator to the proceedings themselves\(^{144}\). Article 15(2) requires that ‘in all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case’. Where a party alleges

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\(^{142}\) _Dubai v. Halcrow_ at 455

\(^{143}\) Lew, J.D.M., Mistelis, L.A., Kroll, S.M., _Comparative International Commercial Arbitration_, (Kluwer 2003), p.38; the international business community established the ICC in 1919. The ICC Court of Arbitration was set up four years later. The draft convention on the recognition and enforcement of arbitral awards prepared by the ICC in 1953 was a key discussion document in the negotiation of the New York Convention. The ICC is the most widely used and accepted international arbitration institution today. The ICC Court of Arbitration has handled over ten thousand cases since 1923

\(^{144}\) Kurkela, Matti S., _Due Process in International Commercial Arbitration_ (Oceana 2005), p.158
a breach of this mandatory procedural rule, the ICC Court will evaluate the challenge. All arbitral proceedings before the ICC court are confidential\textsuperscript{145}, and challenges are no exception. Article 2.13 of the ICC rules provides that decisions on challenges are final and the reasons shall not be communicated.

The challenge procedure is split into two phases: the first stage of the challenge is written submissions to the Secretariat; the second stage is where the challenge is decided by the ICC Court in Plenary Session. ICC Court challenge decisions are not published. The result of these articles is that we have relatively little institutional guidance on what standards of impartiality and independence prevail. A high threshold has been hinted at by some notable commentators – former Secretary General Yves Derains has observed, for example, that

\begin{quote}
the [ICC] Court has not normally accepted to replace an arbitrator unless it appears likely that he is not, in fact, independent [emphases added]\textsuperscript{146}
\end{quote}

The public position of the ICC Court is, however, that no uniform standard is applied: challenges are assessed on a case-by-case basis. Because reasons are not given, it is difficult to say whether the declared position of the Chamber is supported by its practices. However, we can observe a faint pattern from following successful challenges blindly reported in ‘Independence of Arbitrators’, the Special Supplement to the ICC Bulletin of 1997.

\textit{ICC Challenge 1}

The Claimant challenged the Respondent’s co-arbitrator who, after being confirmed by the ICC Court, disclosed that he had given legal advice the Respondent in the past, and had been involved in the development of the project to which the contract the subject of the dispute related\textsuperscript{147}.

\textsuperscript{145} ICC Rules, Articles 7.2 –7.3
**ICC Challenge 2**

The Respondent challenged the sole arbitrator on the basis that he was a member of a law firm allied to the accounting firm that had acted as auditors for the Claimant. The arbitrator then disclosed that his firm was a member of an alliance of firms linked to a group of accounting firms, of which the auditor’s firm was a member. This case illustrates a broader problem of modern legal practice: as the former Secretary General of the ICC Anne Marie Whitesell observed in 2007, the rise in the number of global alliances of law firms and multi-disciplinary partnerships has caused new issues of independence to arise in ICC proceedings.

**ICC Challenge 3**

The Respondent challenged the Chairman on the basis that a foreign office of his law firm was acting for a party in an unrelated state court proceeding against the Respondent’s parent company.

**ICC Challenge 4**

The Respondents (a state and a state agency) challenged the arbitrator appointed on their behalf. The basis of their challenge was that the arbitrator had acted as counsel for parties claiming against them in unrelated proceedings, several of which were on foot at the time of the challenge.

**ICC Challenge 5**

The Claimant challenged the Respondent state’s arbitrator on the basis that he failed to disclose the fact that he was a member of the Respondent government’s legal advisory branch.

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148 Ibid
149 Ibid at p.8
150 Ibid
151 Ibid at p30
152 Ibid
**ICC Challenge 6**

The Respondent challenged the arbitrator appointed on their behalf on the basis that he failed to disclose that he had served as Chairman on a non-ICC tribunal convened in respect of the same construction project as the ICC case. The arbitrator responded that, because the non-ICC arbitration had never progressed to the hearing stage, he did not consider his independence to be impaired. The Court disagreed, and removed the arbitrator.\(^{153}\)

**Saudi Cable (2000)**

Challenges arising out of arbitrations governed by the ICC Rules sometimes end up in state courts, mostly when the losing party commences proceedings against the award. The writer has already discussed the challenge in *Saudi Cable* in Chapter 2. It is, however, pertinent to revisit that matter here. The reader will recall that the ICC rules on disclosure and independence were at issue in the *Saudi Cable* case.\(^{154}\) The English Court of Appeal reviewed the decision of the ICC on the challenge to Arbitrator Fortier, effectively disregarding the Article 2.13 finality provision of the ICC rules. The ICC Statement of Independence requires appointees to tick one of two boxes; ticking the first box confirms independence and the absence (to the best of the appointee’s knowledge) of circumstances that may ‘call into question [the arbitrator’s] independence in the eyes of the parties’. Ticking the other box confirms independence but discloses possible causes for doubt. In *Saudi Cable* Arbitrator Fortier ticked the first box, failing to bring to the attention of the ICC and the parties the fact that he was a non-executive director of, and small shareholder in, a competitor of one of the parties. The English Court of Appeal held that the inadvertent non-disclosure of a fact which might have affected the appointment process is not sufficient to lead to a real danger of bias.\(^{155}\) Guided by the ECHR, and applying an objective ‘reasonable suspicion’ test, it is probable that a French court would not have reached the same conclusion.\(^{156}\)

**Cubic Defence (2001)**

The appeal in *Cubic Defence Systems* arose out an action against the ICC for damages for the inadequate organization of the arbitral proceedings. The proceedings included a challenge. Amongst other things, Cubic Defence Systems alleged that the ICC Court of International

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\(^{153}\) Ibid

\(^{154}\) *Saudi Cable* at 626

\(^{155}\) Above note 143, p.270

\(^{156}\) Ibid, p.271
Arbitration had failed to deal with its challenge in accordance with ECHR Article 6. After failing at the first level of appeal, Cubic took the matter to the Court of Cassation. The Court of Cassation dismissed the appeal, ruling that the ICC Court was not subject to the ECHR because the Convention only bound member states and their courts. The Court preferred to characterise the ICC Court as a ‘not-for-profit organisation’ rather than a judicial body. Commentators have suggested that this decision extends to arbitral institutions generally.

4.3 BELGIUM

Belgium’s arbitration law is found at Part 6 of the Judicial Code (BJC). The Law of 19 May 1998 (Amending Belgian Legislation Relating to Arbitration) inserted the present arbitration articles into the BJC. Belgian arbitration law affords almost unfettered Party Autonomy: Belgium is notable because (along with Switzerland) it is one of about four states in the world where the parties can fully contract out of recourse to municipal courts. Under Article 1717(4) of the Belgian Code, the agreement to fully exclude judicial review must be express and in writing. The availability of full exclusion suggests that measures such as the ‘Gough Clause’ proposed by the writer would be upheld as effective by a Belgian court. After all, such an arrangement would not even constitute a full exclusion of judicial review, and would therefore barely touch the sides of BJC Article 1717(4).

Whilst Belgium is not a Model Law state, certain provisions of BJC Part 6 closely resemble the UNCITRAL template; this is true of the challenge provisions of the BJC. Article 1690 covers impartiality and independence. It is a partial adoption of Article 12 of the Model Law. BJC Article 1690(1) reads ‘Arbitrators can be removed if the circumstances are such as to raise legitimate doubts as to their impartiality or independence’. The recent challenge decision in Eureko B.V. v Republic of Poland shows the application of this Article of the BJC.

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158 Above note 29, p.66
159 The other states are Tunisia, Turkey and Switzerland. See Petrochilos, above note 28, p.87
160 Above note 28, p.87
161 This English translation of Article 1690 of the Belgian Code Judiciaire is taken from the English version of the judgment of the Brussels Court of first Instance in Eureko B.V. v Republic of Poland R.G. 2006/1542/A at p.4
162 Challenge Decision in Eureko B.V. v Republic of Poland R.G. 2006/1542/A
Eureko v Poland (2007)

The Eureko matter began as an Investor-State Arbitration (ISA) between a Dutch insurance company and its host state. Eureko claimed that the Polish nationalisation of a leading insurance company breached the Netherlands-Poland Bilateral Investment Treaty (BIT). The three member tribunal handed down its partial award on liability in August of 2005. By majority, the tribunal found Poland to be in breach of the BIT. In October Poland served a notice of recusal on Arbitrator Schwebel. Poland alleged that Arbitrator Schwebel was advising Sidley Austin, the lawyers for United States multinational Cargill Corporation, in a concurrent but unrelated BIT arbitration against Poland. The Republic’s factual contention in this regard was based upon an erroneous report in American Lawyer magazine. Poland also alerted the court to the fact that Schwebel’s Washington office was in the same building as Sidley Austin’s. On these grounds Poland argued that Schwebel had a relationship with Sidley Austin in the Cargill case that caused him to appear to lack impartiality and independence.

Judge Stevens of the Brussels Court of First Instance held that Poland’s application for recusal was without merit. In reaching his conclusion His Honour did not cite any standard for bias, actual or apparent. It seems that His Honour did not feel that he had to: it was common ground that Schwebel’s involvement in the Cargill case was misreported, and given the impugned arbitrator’s denial of the same there was no compelling evidence to support the Article 1690 challenge. The mere fact Shwebel and Sidley Austin shared a building in Washington was not enough to cause Laker Airways Familiarity depriving him of impartiality or independence. The judgment is interesting for its passive acceptance of Lord Hewart’s dictum in Sussex Justices. In his summary of Poland’s argument Judge Stevens wrote:

[Poland argues] that it has justifiable legitimate doubts as to the impartiality and the independence of Mr Schwebel and relies namely on the English saying “justice must not only be done, it must also be seen to be done”; this is a principle developed by case-law of the European Court of Human Rights.

His Honour’s ostensible acceptance of this submission suggests that a ‘reasonable apprehension’ test was applied to Poland’s challenge. This inference is supported by the fact

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163 Eureko at p.5
164 Eureko at p.4
that Belgium is a party to the ECHR and a leading EU seat. On appeal Poland advanced the additional objection that Schwebel was co-counsel with Sidley Austin in an unrelated concurrent ICSID arbitration (*Vivendi v Argentina*, see Chapter 8), and that Shwebel and Sidley Austin had cited the *Eureko* award as authority for certain propositions they were making on behalf of their clients against Argentina before the ICSID tribunal. The issue was whether Schwebel’s impartiality was cast into doubt by the fact that he participated as arbitrator in the making of an award in one arbitration (*Eureko v Poland*) that would aid his arguments as counsel in another (*Vivendi v Argentina*). In its judgment of 29 October 2007, the Belgian Court of Appeals declined to rule on Poland’s additional objection on the basis that Poland failed to notify the arbitrators in accordance with the Belgian procedural rules or make the ‘issue conflict’ argument before the Court of First Instance. Despite the absence of outcome, the *Eureko* appeal provides a fascinating illustration of the unique problem of *Telekom Malaysia* bias in ISA, where a handful of practitioners are involved in substantive rule-making as arbitrators and substantive rule-using as counsel. ICA is not exposed to the problem *Telekom Malaysia* bias because the community of practitioners is bigger and the bodies of substantive legal principles applied by tribunals are usually municipal in origin.

### 4.4 THE NETHERLANDS

The Netherlands has not adopted the Model Law. Dutch arbitration law is monist – the Dutch Arbitration Act 1986 (DAA) does not distinguish between domestic and international arbitral proceedings. The Netherlands is the seat of several important international tribunals, namely the Permanent Court of Arbitration (PCA) and the Iran–United States Claims Tribunal (IUSCT). Dutch courts use a ‘justifiable doubts’ test for impartiality and independence which draws on Article 12 of the Model Law and Strasbourg Jurisprudence.

*Aegon Verzekering Leven (2007)*

This dispute arose out of an insurance agreement. The insurer denied liability under the policy and the Claimant commenced arbitration. The appointing authority – the Netherlands Arbitration Institute – put in place a three member tribunal that included two medically qualified experts. Both of these experts had physically examined the Claimant. The Claimant challenged the impartiality and independence of these two arbitrators. At first instance the NAI dismissed the challenge. The Claimant appealed and the president of the District Court upheld the challenges. The Respondent appealed to the Supreme Court.
The Supreme Court agreed with the lower court’s ruling. The Supreme Court applied the standard that there must be ‘justified doubt about the arbitrator’s impartiality or independence’\textsuperscript{165}. The Court held that whilst an arbitral tribunal is generally free to apply the rules of evidence provided that the parties have not agreed otherwise, arbitrators should leave it to the parties to gather and present the evidence. The tribunal’s proper role is then to review the evidence led. To the extent that an arbitrator is required to investigate they must do so ‘in accordance with the principles of impartiality of the arbitrator, the equality of the parties and fundamental principles of due process’. Importantly, the Supreme Court expressed this rule as conditional upon an absence of contrary agreement by the parties, suggesting that where the parties have opted out of such procedural protections the tribunal may inform itself in accordance with their bargain\textsuperscript{166}. The Supreme Court determined that, because there was no such contrary agreement, in conducting their physical examinations of the Claimant the arbitrators had violated the fundamental principles of impartiality and independence and that the District Court was right to uphold the challenge to them.

\textbf{4.5 Permanent Court of Arbitration}

The most significant permanent arbitral tribunal in The Netherlands is the Permanent Court of Arbitration (PCA). The PCA was established by the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907. Disputes between states may be referred to the PCA. Disputes between private parties and states may also be referred to arbitration under the auspices of the PCA. Parties may elect to use the UNCITRAL Rules or the PCA rules. The current PCA rules are based upon the 1976 UNCITRAL Rules.

Whilst the PCA was a key institution in the early 20\textsuperscript{th} century, handling such famous cases as the \textit{Russian Indemnity Arbitration} (1912) and the \textit{Norwegian Shipowners Claims Arbitration} (1922), its substantive case load fell after World War Two\textsuperscript{167}. The PCA has, however, enjoyed a period of rebirth in the last decade as an alternative seat for ISA proceedings. More generally, the Court also plays an important role in the appointment of arbitrators in international disputes. This function may be performed at \textit{ad hoc} request, or as a result of the

\textsuperscript{165} Decision of Supreme Court of the Netherlands of June 2007 in \textit{N. v Aegon Verzekering Leven} (English translation of judgment by Jacomijn van Haersolte, ITA Board of Reporters)

\textsuperscript{166} \textit{N. v Aegon Verzekering Leven} at 2

use of the UNCITRAL Rules. Under UNCITRAL Rules 11 and 12 the Secretary General of the International Bureau of the PCA is designating authority, meaning they are empowered to nominate a third party to serve as appointing authority in the disputed appointment process. An example of this role being played is the designation of Sir Robert Jennings as appointing authority to hear the Iranian challenge to Judge Broms of the IUSCT in 2001. If asked to do so by the parties the Secretary General may also act as appointing authority in his own right.

The significance of the PCA is rising because of this appointment function and the fact that the UNCITRAL Rules are the most widely used arbitration rules today (so much so that they may well be lex mercatoria). There is currently a push within UNCITRAL to broaden the role of the PCA as appointing authority where the UNCITRAL Arbitration Rules are used. If such changes are made the importance of the PCA in the practice of international commercial arbitration will climb further. This will, in turn, elevate The Netherlands as a seat, because the PCA is subject to Dutch municipal law. The combined effect of Articles 1035(2) and 1073 of the Dutch Code of Civil Procedure (DCCP) is that the District Court of The Hague has jurisdiction to hear challenges arising out of proceedings before international arbitral tribunals including the PCA (and the IUSCT).

**Telekom Malaysia (2005)**

In 1997 Telekom Malaysia (TM) paid USD$38m for a 30% stake in Ghana Telecom. As part of the acquisition TM took over the management of the former public utility on the condition that they install 40,000 landlines by 2002. In early 2000 TM paid USD$50 million more in an attempt to acquire a further 15% of Ghana Telecom. When Ghana’s currency crashed TM began to take significant losses, due mostly to the fact that it was purchasing material in US dollars and billing its users in rapidly devaluing Ghanaian cedi. Looking for a way out TM demanded that Ghana buy back TM’s share in Ghana Telecom. No agreement was reached. TM then alleged expropriation against the host state.

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168 Decision of the Appointing Authority to the Iran-US Claims Tribunal, 7 May 2001, at 10-11
169 Private discussion between the writer and Mr William Storey, Office of the Commonwealth Attorney General, Canberra, Australia on 29 June 2008
In 2002 TM commenced arbitration against the Republic of Ghana under the investor protection provisions of the Malaysia-Ghana BIT. The parties submitted to UNCITRAL Rules arbitration at PCA in The Hague with the Secretary General of the PCA as designated appointing authority. TM appointed Freshfields partner Nigel Blackaby and Ghana appointed Dr S.K.B. Asante. These two party-appointed arbitrators agreed to Albert Jan van den Berg as chairman. Both Mr Blackaby and Dr Asante were successfully challenged before the appointing authority. Professor Emmanuel Gaillard and Robert Layton were put in place by the appointing authority as substitutes.

In November 2005 Ghana challenged Professor Gaillard on the basis that he was serving as counsel in a similar but unrelated investor-state dispute in which he was pressing an expropriation claim on behalf of a foreign consortium against the Kingdom of Morocco\(^{171}\). When Professor Gaillard refused to stand down the challenge went to the appointing authority, with Ghana relying on the objective test in General Standard 2 of the IBA Guidelines\(^{172}\). It is notable that both Emmanuel Gaillard and Albert Jan van den Berg were members of the 19 member Working Party that produced the IBA Guidelines\(^{173}\). The Secretary General held that there were no circumstances likely to give rise to justifiable doubts as to Professor Gaillard’s impartiality or independence. Ghana then applied to the District Court of The Hague. In his decision Judge Von Maltzahn summarised Ghana’s apprehension as follows:

[Ghana] argues that Prof. Gaillard in his capacity of counsel to RFCC will of course advance all the arguments he can think of in order to plead the annulment of the award in the RFCC/Morocco case. By contrast Prof. Gaillard in his capacity of arbitrator should be unbiased when judging the question whether or not the ruling in the RFCC/Morocco case is relevant to the examination of the case in the present

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\(^{171}\) Professor Gaillard was acting as counsel for the Italian construction company RFCC in its ICSID claim against Morocco.

\(^{172}\) IBA Guidelines General Standard 2 requires that an arbitrator decline to act or refuse to continue in circumstances which form a reasonable third person’s point of view give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

\(^{173}\) The other members of the Working Party are listed at footnote 1 of the Introduction to the IBA Guidelines. A number of the members are the subject of challenges discussed in this thesis. The Telekom Malaysia matter is an excellent example: both the arbitrator challenged and counsel running the challenge were members of the Working Party. There is nothing suspicious or improper in this – it simply shows the ‘ICA mafia’ at work. Because the members of the Working Party included many of the most distinguished and active international arbitrators, it is wholly unsurprising that their names recur in the record: these are, after all, the ‘Grand Old Men’ (and women) of modern international arbitration; not strangers from far away lands.
arbitration proceedings. In this situation he will not be able as an arbitrator to be an unbiased participant in consultations with his fellow arbitrators, or appearances will at any rate be against him 174

Ghana’s challenge was therefore based on a risk of merits prejudgment by involvement in concurrent (but unrelated) investor-state proceedings. The question was whether a decision against Ghana would strengthen Professor Gaillard’s position as counsel for RFCC again Morocco, or as E R Meerdink put it, whether by deciding for Ghana (and against Telekom Malaysia) Professor Gaillard would be ‘generating case law against his client’s position’ 175. Counsel for Ghana, Arthur Mariott QC (another member of the IBA Working party), acknowledged that the applicant was in some difficulty. In his submissions to the District Court counsel conceded that ‘there is no automatic or general principle of conflict of interest applied to bar those who are advocates from acting as arbitrators. There are strong policy reasons against such a rule’. In opposing the challenge TM argued that Ghana should have raised the issue of Professor Gaillard’s independence earlier and by not doing so had waived its right to do so, that the facts of the RFCC v Morocco arbitration were different, and that the situation at hand was analogous to that dealt with at item 4.1.1 of Green List of the IBA Guidelines and as a result did not require disclosure 176. Judge Von Maltzahn disagreed. In upholding the challenge Von Maltzahn J cited Article 1033 of the Dutch Code of Civil Procedure as authority for the proposition that a challenge to an arbitrator must be assessed from an objective point of view on the basis of the facts and circumstances of the case 177. His Honour also noted that the analysis of whether there are sufficient grounds for a challenge should also take account of outward appearance. Von Maltzahn J held that

account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Morocco award. This attitude is incompatible with the stance Prof. Gaillard has to take as an arbitrator in the present case, i.e. to be unbiased and open to all the

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174 Telekom Malaysia at para 2
176 Telekom Malaysia at para 3; Article 4.1.1 of the IBA Guidelines describes situations where ‘the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated)
177 Telekom Malaysia at para 4
merits of the RFCC/Morocco award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the annulment proceedings against the RFCC/Morocco award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid giving the appearance of not being able to keep these two parts strictly separated.

Judge Von Maltzahn made orders requiring Professor Gaillard to stand down as attorney in *RFCC v Morocco* within ten days or resign as Chairman in the instant matter. When Professor Gaillard complied Ghana challenged him again on the basis that he had already participated in certain decisions and that Ghana was prejudiced as a result. Judge Punt of the District Court dismissed the second challenge on the basis that the decisions made were neither prejudicial to Ghana nor illogical. His Honour was impressed most by the fact that the decisions in question were purely procedural in nature. The second challenge fell on this ground because the bias pleaded in the first challenge related to the merits of the host state’s defence. Punt J held that against this background there was ‘no ground for an assumption or appearance of partiality or prejudice on the part of Professor Gaillard with regard to his contribution to these non-substantive decisions of the Tribunal’.

### 4.6 Iran–United States Claims Tribunal

The IUSCT was established by the Algiers Accords to resolve compensation claims arising out of the Iranian hostage crisis of 1979-81. Its functions include the conduct of arbitrations relating to the post-Revolution nationalisation of US assets. The IUSCT uses a modified version of the UNCITRAL Rules. It is seated in The Hague. The IUSCT panel is composed of nine members: three US-appointed, three Iran-appointed, and three ‘neutrals’.

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178 *Telekom Malaysia* at para 4
179 *Telekom Malaysia* at para 10
180 *Telekom Malaysia* at para 10
182 Article III(2) of the Claims Settlement Declaration between the United States and Iran provided that the members of the IUSCT would be appointed in accordance with the UNCITRAL arbitration rules, and that those rules would apply except to the extent that they were modified by the parties or the tribunal.
from other states. For private claims there is allowance for sole arbitrators and panels of three. State-state claims are heard by the full nine member tribunal en banc. Procedural peculiarities aside, the IUSCT is notable for the volume of high value disputes it has heard since its formation in 1981.

Articles 11 and 12 of the IUSCT Rules prescribe the method by which challenges to arbitrators may be made. Articles 6 and 7 provide that the parties may ask the Secretary General of the PCA to designate an appointing authority to decide a challenge. Article 6(4) provides that:

In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

In the extreme political climate of the Algiers Accords, the large panels and tiered appointment procedures provided for by the IUSCT rules were seen as necessary to ensure the all important party perception of neutrality. The IUSCT uses the ‘justifiable doubts’ standard set by UNCITRAL Rule 10(1). IUSCT challenges have attracted a great deal of scholarly attention. This is mostly attributable to the extraordinary nature of the Tribunal and its mandate. But it is also because many of the challenges have involved allegations of bias based upon political persuasion and ‘judicial nationalism’, run against a backdrop of strained international relations. In September 1984, the IUSCT was the theatre of one of the most extraordinary bias challenges following a physical attack on Swedish ‘neutral’ arbitrator by two Iranian arbitrators. In Challenge to Arbitrators Kashani and Shafeiei the IUSCT appointing authority was faced with the task of deciding the US challenge to the assailants. It is important that due consideration be given to this exceptional case and its background facts.

Re Arbitrators Kashani and Shafeiei (1982)

Judge Nils Mangard was appointed as neutral member and presiding arbitrator of Chamber Three of the IUSCT in 1981. On 28 December 1981 the agent for Iran wrote to Judge

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Mangard, informing him of the fact that they ‘no longer believed in [his] neutrality’ and suggesting that he should resign from his post. He refused to stand down. On 1 January 1982 the agent for Iran again wrote to Judge Mangard purporting to disqualify him on the grounds of bias. Iran put it that Judge Mangard had engaged in ‘unsound political propaganda’ by condemning the practice of capital punishment by Iran. In the challenge that followed the agent for Iran wrote that ‘The obvious implication of such statements is nothing but a groundless prejudgment against a political system whose acts will be brought before you for evaluation and neutral decision’\textsuperscript{185}. The agent for Iran stated that Judge Mangard was incapable of fairly judging acts attributed to the Islamic Republic of Iran\textsuperscript{186}. Iran asked the Tribunal to refrain from holding further hearings until Judge Mangard was replaced\textsuperscript{187}. The Tribunal took the unprecedented step of hearing the matter \textit{en banc}. Iran argued that it had a right to disqualify a judge that was derived from its status as a sovereign nation rather than the rules of the Tribunal. The majority held that the only challenge procedure open to Iran was that prescribed by the UNCITRAL Rules adopted in the Claims Settlement Declaration. Importantly, Iranian arbitrators Mahmoud Kashani and Shafie Shafeiei wrote a separate opinion in favour of Iran\textsuperscript{188}.

The Tribunal referred the challenge to the Secretary General of the PCA in accordance with UNCITRAL Rules 11 and 12. The Secretary General nominated Dr Charles Moons, President of the Supreme Court of the Netherlands, to act as appointing authority in the matter. An oral hearing was held on 17 February 1982. The only exhibits before Judge Moons were Iran’s letter ‘disqualifying’ Judge Mangard, the US answer, the Tribunal’s full court decision and Judge Mangard’s reply\textsuperscript{189}. Judge Moons rejected the Iranian challenge on evidentiary grounds: Iran had failed to adduce sufficient evidence to prove if and when Judge Mangard had said the things alleged\textsuperscript{190}. If Iran had been able to prove their case at the hearing it is probable that Judge Moons would have found their doubts to be justified and made orders of disqualification\textsuperscript{191}.

\textsuperscript{186} Ibid
\textsuperscript{187} Ibid, p.66
\textsuperscript{188} Re Judge Mangard ‘Challenge Decision’, 1 Iran-US Cl. Trib. Rep. 115-116
\textsuperscript{189} Above note 185, p.69
\textsuperscript{190} Re Judge Mangard ‘Challenge Decision’, 1 Iran-US Cl. Trib. Rep. 509, 516-518
\textsuperscript{191} See for example Khan, above note 185 at p.70 where the author expresses the view that if Judge Mangard had condemned the execution of political dissidents in Iran then this would have been inconsistent with his status as a judge of the Tribunal. See also Lew \textit{et al}, above note 143, p.260
Iranian arbitrators Kashani and Shafeiei began to express a lack of confidence in his abilities and independence. The relationship between the members of the tribunal deteriorated rapidly. In later memoranda the Iranian members would allege that Mangard ‘worked solely to support the demands of the United States and American nationals’ and that he always decided in their favour, often without giving reasons. The situation reached a climax in September 1984 when the Iranian arbitrators Kashani and Shafeiei physically attacked Mangard in the entry hall to the Tribunal. After the fracas the Iranian arbitrators refused to apologise or undertake to behave properly, and made it clear that they intended to bar Judge Mangard from entering the Tribunal Chamber in future. The correspondence between the parties and the appointing authority reveals the total breakdown of relations that had occurred. Arbitrator Kashani was quoted in the memorandum of the US agent as saying that Mangard was ‘already a corpse’ and that ‘If Mangard ever dares enter the Tribunal, either his corpse or my corpse will leave it rolling down the stairs’.

On 17 September the United States challenged Kashani and Shafeiei. The US challenge was based upon two grounds; first that the Iranian arbitrators should be removed under Article 13(2) of the Rules on the basis of the de facto impossibility of their performing their judicial function in future, and second that their attack on Judge Mangard gave rise to justifiable doubts as to their impartiality or independence. The US agent argued that the attack and subsequent statements showed that

Mr Kashani and Mr Shafeiei identify themselves so completely with what they consider to be the interests of the Islamic Republic of Iran that they will resort to unprecedented physical violence to protect those interests…Arbitrators who resort to physical violence in order to protect the interests of the party that appointed them demonstrate such a deep-seated bias that they must be presumed to display similar partisanship in future.

The Secretary General again designated Judge Moons. Due to his being the subject of earlier allegations of partiality by Kashani, Judge Moons recused himself. Whilst the Secretary

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193 US Agent’s Memorandum to the Appointing Authority Re: Challenge to Arbitrators Kashani and Shafeiei by the Government of the United States of America, 7 Iran US Cl. Trib. Rep., pp.291-3
194 Ibid, p.298
General was considering a replacement Iranian officials advised that arbitrators Kashani and Shafeiei were being replaced by their Government. The United States ceased pressing its challenge, and no appointing authority was named. Ultimately no decision was made in the matter. It seems safe to say, however, that the US challenge would have been successful. There can be no doubting that the relevant arbitrators were actually biased in favour of the Islamic Republic of Iran. But this is a rare and extreme case of ‘judicial nationalism’, where physical actions (as opposed to words, written or spoken) prove the lack of independence and impartiality.

**Re Judge Briner (1988)**

The records of the IUSCT disclose other challenges. In 1988 Judge Robert Briner, chairman of IUSCT Chamber Two, was challenged by Iran in *Amoco Oil Company v The Government of the Islamic Republic of Iran*¹⁹⁵. In *Amoco* there was well over US$1.5 billion at stake, and the composition of the three member tribunal was such that ‘the third country arbitrator – and he alone – would determine the outcome of the case’¹⁹⁶. Iran argued that Judge Briner had failed to disclose that he was sole director of a Swiss subsidiary of Morgan Stanley & Company. Employees of Morgan Stanley were called as expert witnesses in the *Amoco* arbitration. Iran’s position was that this relationship gave rise to justifiable doubts as to Judge Briner’s impartiality or independence, and that his failure to disclose it gave rise to an additional ground of challenge¹⁹⁷. At first Judge Briner refused to withdraw. Amoco labeled the challenge ‘a transparent attempt to delay’ the award¹⁹⁸. Memoranda were filed with the Appointing Authority (Judge Moons again). Before any decision was reached Judge Briner withdrew, repeating his earlier denial but citing the *bona fide* beliefs of the challenger and the best interests of the Tribunal as his reasons for standing down¹⁹⁹.

Seven months later, during proceedings in the matter of *Phillips Petroleum v The Islamic Republic of Iran*²⁰⁰, Iran challenged Judge Briner again. This time Iran alleged that Briner had deliberately breached the procedural rules of the Tribunal by conferring with the US

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¹⁹⁵ Case No.55/1988 IUSCT
¹⁹⁷ Ibid
¹⁹⁸ Letter from Agent for Amoco to Judge Moons, 16 September 1988, in Brower & Brueschke, above note 196, p. 172
¹⁹⁹ Above note 196, p. 172
arbitrator in the absence of Iran’s member, and that the award was tainted with efforts to conceal or slant evidence in favour of the Claimant. Judge Moons rejected the challenge. His reasons were procedural: the bulk of the documents supporting the challenge were not filed within the 15 day time limit set by Article 11.

**Re Judge Broms (2001)**

Most recently, in December 2000 the IUSCT handed down a decision (A23) regarding the security account used to pay awards against Iran. In his dissenting opinion, the third party Finnish Judge Bengt Broms recited the terms of discussions between members on the merits of the application. The United States filed a challenge with the appointing authority, alleging that Judge Broms’ breaches of tribunal rules on the secrecy of deliberations gave rise to a reasonable apprehension of pro-Iranian bias. The US argued that by inappropriately divulging information about the internal deliberations of the panel Judge Broms had displayed a strong sympathy for the Iranian position, and that on this basis their doubts as to his impartiality and independence were justified. The appointing authority, Sir Robert Jennings, dismissed the US challenge. Sir Robert held that

the materials put before the appointing authority do not anywhere suggest that Judge Broms is so beholden in some way to the Iranian Government such that he has lost his independence of thought and action… The question of impartiality is more difficult. There is no doubt, judging by his opinion in Case A28, that he strongly sympathises with what he sees as the Iranian position, and that he is correspondingly to that extent opposed to what he sees as the United States position. But any judge, though he ought to begin in an impartial stance, is required as a matter of judicial duty eventually and on the basis of the presented arguments to become partial to one side or the other. To remain neutral to the end would be a dereliction of duty….I do not see how one can infer from the evidence of his single Opinion that the United States suspicions of partiality are justified

The appointing authority took the view that the circumstances in which Judge Broms broke tribunal rules were not such that justifiable doubts as to his impartiality and independence

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201 Above note 196, p. 174
202 IUSCT Rules, Article 31
203 Re Judge Broms Decision of the Appointing Authority to the Iran-US Claims Tribunal, 7 May 2001, at 5-6
204 Re Judge Broms at 10-11
arose. In the context of this thesis, *Re Judge Broms* is valuable for two reasons. Firstly, it shows that independence and impartiality are separable heads of challenge under the modified UNCITRAL arbitration rules in use at the IUSCT, and that impartiality involves more complex considerations (and difficulty for the applicant) of law and fact than independence. Secondly, Sir Robert’s judgment demonstrates that independence is an ‘absolute’ requirement of the arbitral process and impartiality is not. Some erosion of impartiality must occur if an arbitrator is to discharge their duty to decide. This erosion is – as Sir Robert notes – only legitimate in so far as it is dictated by the arguments presented. Other causes will be illegitimate and will expose the arbitrator to challenge and removal.

4.7 GERMANY

Germany is a Model Law monist jurisdiction. German arbitration law is derived principally from the Code of Civil Procedure (GCCP). The Model Law’s dual requirement of independence and impartiality was adopted without alteration by German Federal Parliament. Consistent with this approach, German courts use a Model Law ‘justifiable doubts’ test for challenges to arbitrators. GCCP Article 1036(1) states that an arbitrator must be independent and impartial and that they can be challenged ‘if circumstances exist that give rise to justifiable doubts as to their impartiality or independence’. The same article of the GCCP obliges the arbitrator to disclose conflicts of interest. Article 11(1) of the Arbitration Rules of the German Institute of Arbitration (DIS) also uses a ‘justifiable doubts’ test.

GCCP Article 1036 does not list the circumstances in which ‘justifiable doubts’ will arise. German appeal courts tend to read Article 1036 in a manner consistent with the GCCP rules for the disqualification and recusal of judges. GCCP Article 41 excludes a state court judge from sitting in determination of a matter where:

1. the judge is party, co-debtor, co-creditor or liable to recourse;
2. the matter involves a (present or former) spouse of the judge;
3. the matter involves a person with whom the judge has certain family ties;

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206 See GCCP Article 1036(2)
207 See GCCP Article 1036(1), which is an enactment of Model Law Article 12.
208 See for example OLG Naumburg decision 19 December 2001 (10 SchH 03/01 in DIS databank).
the matter is one in which the judge is or was retained as attorney of record or as a legal advisor to a party, or is or was authorised to appear as the legal representative of a party;

(5) the matter is one in which the judge is examined as a witness or an expert; or

(6) the matter is one in which, in earlier court or arbitration proceedings, the judge was involved in the issuance of the decision under appeal, provided that this does not concern the activity of a commissioned or requested judge.

GCCP Article 42 permits challenge when a reason exists that justifies a lack of confidence in the impartiality of the judge. Challenges to judges are increasingly common in Germany. In a recent conversation with the writer, a Munich Appeal Court judge reported that ‘a judge in my court is challenged almost weekly’. Despite this phenomenon German courts are averse to hearing challenges to arbitrators, especially after the award has been made. This is the result of a policy preference for upholding the certainty of the arbitral bargain and process.

Post-award challenges must show ‘grave and obvious partiality or dependence’ if the award is to be set aside.

**Billerbeck (1976)**

Prior to reunification in 1990, German courts gained some experience with nationality challenges in arbitrations involving parties from Communist states. In Billerbeck the parties were from Switzerland and East Germany; they had agreed to arbitrate before the Arbitration Court of the East Berlin Chamber of Commerce (EBCC). The EBCC Arbitration Court followed the rules of the Chamber of Foreign Trade of the German Democratic Republic, which only allowed arbitrators appointed from its list. All of the people on the list were East German nationals. An award was made against Billerbeck and they resisted enforcement under the Geneva Convention 1927. The West German Supreme Court enforced the award, rejecting the argument that the solely East German tribunal might be inherently acceptable.

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209 GCCP Article 41
210 Private conversation between the writer and His Honour Judge Karl Peter Puszkajle of the Munich Court of Appeal at Vienna, 16 March 2008
211 See the decision of the Bundesgerichtshof dated 4 March 1999, ZIP 859 (1999). French and Swiss courts have taken the same position. For France see the decision of the Paris Court of First Instance in Annahold. In Switzerland see the decision of the Federal Tribunal, 14 March 1985, Societe Z v L, ATF/BGE 111 1A 72
212 Above note 143, p.314
214 Billerbeck Cie v Berghau-Handel GmbH BG Decision 3 May 1967 (1976) 1 YBCA 200
predisposed against the Swiss party\textsuperscript{215}. No actionable apprehension of \textit{Catalina} Bias was found. In reaching this conclusion the Supreme Court focused on the proven behaviour of the tribunal and whether it showed partiality.

\textbf{\textit{X v Y (2007)}}

The challenge in \textit{X v Y} was run in the Higher Regional Court of Central Frankfurt on an allegation of \textit{Uni-Inter} Bias. The underlying dispute arose out of a merger of two companies. After the merger, the Claimant sought an indemnity from the Respondent against penalties for breaches of European and American anti-trust regulations. The Respondent declined to give such comfort and the Claimant commenced arbitration under German Institute of Arbitration (DIS) Rules. The Claimant sought a declaratory judgment from the tribunal that any anti-trust penalties were for the Respondent to bear. The proceedings went to a primary hearing. The tribunal did not conduct a secondary hearing on the merits of the Claimant’s argument that EU and US antitrust laws had been offended, preferring instead to accept that the Claimant’s allegations in this regard were substantiated\textsuperscript{216}.

Just before the award was handed down the Claimant learned that counsel for the Respondent had given a lecture on ‘Arbitration Proceedings and Anti-Trust Law’ at a DIS symposium. The Chairman served on the Board of the German Institute of Arbitration, and his name had appeared as a co-editor of the DIS journal in which counsel’s lecture was published. The Chairman’s introduction effectively prefaced counsel’s paper. The Claimant asked the Tribunal to disqualify the Chairman under Article18.1 of the DIS rules. The petition was declined and the Tribunal rendered its award. The Claimant then petitioned the Higher Regional Court of Central Frankfurt to review the decision of the tribunal pursuant to GCCP Article 1037.

The court phrased the relevant test as ‘whether there are sufficient objective reasons to cause a reasonable person in the position of the party to fear that the arbitrator had prejudged the matter and is thus not impartial’\textsuperscript{217}. Applying this to the facts the court dismissed the application for review. The court held that, although the Chairman had served on the Board of the Institute at which counsel for the Respondent gave the lecture in question, and the topic

\textsuperscript{215} \textit{Billerbeck} at 200  
\textsuperscript{216} See decision of the Higher Regional Court of Frankfurt am Main of 4 October 2007 in \textit{X v Y} (English translation of judgment by Richard Kreindler, Kluwer Arbitration).  
\textsuperscript{217} Ibid
of the lecture given was closely related to the merits of the dispute in which the Chairman was hearing counsel for the Respondent, there was no evidence that the Chairman shared the legal positions voiced by counsel in the lecture. Second, although the Chairman served as co-editor of the DIS journal and his name appeared underneath the introduction to the volume, when challenged the Chairman explained that he had not written the introduction and had not read the anti-trust article before its publication\textsuperscript{218}. The court also made general remarks on the permissibility of professional association between counsel and arbitrator in circumstances where they are practitioners in a common specialty field such as anti-trust arbitration. Significantly, the IBA Guidelines on Conflicts of Interest in International Arbitration were cited with approval by the Frankfurt Court.

\textit{D v E (2007)}

In \textit{D v E} the parties shared a medical practice. The Claimant alleged that the Respondent had physically attacked him and his wife. A three member tribunal was convened to decide the dispute. The Chairman was a former criminal court judge. A partial award was made in favour of the Claimant. The Respondent applied for orders removing the Chairman on grounds of bias. The Respondent claimed that the Chairman had attempted to intimidate the Respondent’s attorney during proceedings. The request was based upon a sarcastic comment allegedly made by the Chairman to the Respondent’s counsel, and a letter subsequently written by the Chairman to counsel for the Respondent pressing her to withdraw allegations about the comment or face perjury charges. The Chairman’s letter also questioned the motives of counsel (who had previously jointly represented Respondent and Claimant).

The Court held that the standard for assessing arbitrator bias was the same as that used for judges. Pursuant to the GCCP, a judge can be disqualified if the evidence gives rise to justified concerns about his or her impartiality or independence. However, such evidence must be objective rather than subjective\textsuperscript{219}. The Court held that there was insufficient objective evidence to support a finding of bias on the part of the Chairman. The Chairman’s advice to the Respondent regarding his attorney’s conflict of interest in the matter did not support a finding of arbitrator bias. The Court held that a party could only succeed on an allegation of bias if the arbitrator’s animosity was aimed directly at the client\textsuperscript{220}. Secondly,

\textsuperscript{218} See decision of the Higher Regional Court of Frankfurt am Main of 4 October 2007
\textsuperscript{220} Ibid
the Court determined that the chairman’s suggestion that the Respondent’s claims constituted perjury was also insufficient for finding that the arbitrator was biased. Central to this finding was the fact that the Chairman addressed these concerns in a letter, so as to remain ‘outside of the context of the arbitral proceedings’\textsuperscript{221}. Finally, the Court held that arbitrators have a right to defend themselves against wrongful allegations, even where the arbitration is on foot, so long as their exercise of this right is done in an objective and appropriate manner and within the bounds of the law. The Court found that the Chairman’s letter fell within these bounds. Accordingly, the application for removal was dismissed.

\textit{Undisclosed v Undisclosed} (2006)

In the underlying proceedings the Claimant and the Respondent had entered into a takeover contract, which included an arbitration clause stipulating that any disputes would be settled by ‘A’, who would act as a jointly appointed arbitrator. ‘A’ was the Claimant’s brother. In an attempt to settle the dispute a conciliatory hearing was convened by ‘A’. Arbitrator ‘A’ proposed that the Respondent pay the Claimant €35,000 in full and final satisfaction. When Respondent rejected the proposal ‘A’ expressed regret in the following terms ‘I am sorry that you did not accept B’s excellent offer. I had warned you urgently that any other arrangement would result in much greater expenses for you’\textsuperscript{222}.

The Claimant then commenced arbitration on its claim. The Respondent applied to the Court to have ‘A’ removed. The Respondent advanced three grounds in support of its application. First, the Respondent argued that the arbitrator’s familial relationship to the Claimant violated German constitutional principles of impartiality and independence, with the effect that the arbitration clause that had caused ‘A’ to be appointed was unenforceable. Second, the Respondent claimed that the actions of ‘A’ as conciliator prior to the arbitration disqualified him from acting as an arbitrator. Third, the Respondent claimed that ‘A’ was biased. Their final submission was based upon the arbitrator’s statements about the rejected offer and his refusal to grant the Respondent a stay of arbitration (which the arbitrator stated was ‘just another trick’ to ‘gain time’)\textsuperscript{223}.

\textsuperscript{221} Ibid
\textsuperscript{222} Undisclosed v Undisclosed (1 April 2006), English translation of judgment by Richard Kreindler, Kluwer
Arbitration
\textsuperscript{223} Undisclosed v Undisclosed (1 April 2006)
The Court rejected the Respondent’s first argument, holding that the arbitrator’s appointment was valid. Importantly, the Court then proceeded to distinguish the standards used for dismissal of judges from those used for dismissal of arbitrators. The Court explained that, because in arbitration the parties have a direct influence on the tribunal’s composition, “a party may challenge an arbitrator only for reasons of which it became aware after the appointment was made.” Because the Respondent knew ‘A’ was the Claimant’s brother before the appointment was made, the Respondent’s argument on familial relationship could not succeed. The Court also rejected the Respondent’s second argument, finding that the arbitrator’s attempts to settle the case during the conciliatory hearing did not disqualify him from acting as an arbitrator. Since the Respondent had actively participated in the conciliatory hearing, and the attempts at settlement were in the best interests of both parties, the Court found the situation to be analogous to those in civil proceedings before German courts, where judges do the same thing. Finally, the Court agreed that the statements made by ‘A’ regarding the Claimant’s offer, as well as the arbitrator’s denial of the Respondent’s motion to stay the arbitral proceedings, were sufficient to raise doubts about the arbitrator’s impartiality. But despite these merits the Court ultimately refused to remove ‘A’ because these objections were not raised in the timely matter required by the GCCP.

### 4.8 Austria

Austria is the leading Model Law seat in Central Europe. Vienna regularly hosts ICC proceedings, and the institutional case load of the Vienna International Arbitration Centre (VIAC) is increasing. The Austrian arbitration law has recently undergone amendment. The new law came into force on 1 July 2006 (on which day the revised Vienna Rules came into force also). The new law shows the influence of German arbitration law and Model Law jurisprudence. Like many Civil Law states Austria does not have a free-standing arbitration ordinance. Instead, Articles 557 to 618 of the Austrian Code of Civil Procedure (ACCP) govern arbitral proceedings. The ACCP does not distinguish between domestic and international arbitrations, with the effect that Austrian arbitration law is monist.

Article 588 adopts a modified version of Article 12 of the Model Law. Proof of actual bias will result in removal of the relevant member of the tribunal. Actual bias is also grounds for

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224 Undisclosed v Undisclosed (1 April 2006)
vacation of the award under ACCP Article 611. Apparent bias is approached ‘case-by-case’. Local practitioners report that a ‘reasonable third person test’ prevails\textsuperscript{225}, as long as there is an ‘objectively justified doubt’ as to the arbitrator’s impartiality or independence the challenge will succeed\textsuperscript{226}. Commentators have suggested that the Austrian domestic public policy of maintaining judicial integrity informs the application of the challenge, disclosure and vacatur articles of the ACCP\textsuperscript{227}. This domestic policy setting may explain why Austrian courts are hesitant to take into account international instruments like the IBA Guidelines in challenge proceedings\textsuperscript{228}.

\textbf{OG Decision 11 June 1969}

In this case the Austrian Supreme court was required to decide whether it was a violation of the requirements of impartiality and independence for a three member tribunal composed entirely of Bulgarian nationals to sit on a matter in which one of the parties was Bulgarian. The Supreme Court enforced the award, holding that ‘it is not a violation of the Austrian public policy to recognise an award made by an arbitral tribunal to which the parties have subjected themselves in conformity with their agreement’\textsuperscript{229}.

\textbf{OG Decision 28 April 1998}

Before the promulgation of the new arbitration law - Article 588 of which creates an express duty of disclosure - the posited law of Austria did not include a requirement that arbitrators disclose circumstances likely to call into question their impartiality or independence. In this challenge the Austrian Supreme Court held that the duty to disclose was part of Austrian law\textsuperscript{230}.

\textbf{4.9 SWITZERLAND}

Switzerland has an esteemed history as a seat for international arbitration, and Swiss jurisprudence has played a leading role in the development of the law and practice of ICA.

\begin{itemize}
  \item \textsuperscript{225} Zeiler, G., Steindl, B., \textit{Arbitration in Austria: A Basic Primer}, (Schonherr Rechtsanwalte GmbH 2007), p.47
  \item \textsuperscript{226} Ibid
  \item \textsuperscript{227} Mayr, in Rechberger, \textit{GCCP Kommentar}, section 19JN (para 4ff), in \textit{Global Arbitration Review} (The European and Middle Eastern Arbitration Review: Austria, 2008), Schwarz, F.T., available at www.globalarbitrationreview.com/handbooks/3/sections/6/chapters/58/Austria
  \item \textsuperscript{228} Ibid, p.1
  \item \textsuperscript{229} Tupman, M, ‘Challenge and Disqualification of Arbitrators in International Commercial Arbitration’, Int & Comp L Q Vol. 38, No. 1 (Jan., 1989), p.46
  \item \textsuperscript{230} See decision of OGH of 28 April 1998 (1 Ob. 253/97f)
\end{itemize}
Switzerland also has a long standing human rights tradition. After joining the Council of Europe in 1963, Switzerland ratified the ECHR in 1974. The General Procedural Guarantees contained at Article 29 of the Swiss Constitution grant every person the right to equal and fair treatment in judicial and administrative proceedings. Article 30 of the Constitution requires absolutely that judicial proceedings be conducted with independence and impartiality. Swiss courts read Article 30 of the Constitution in a manner that is consistent with ECHR Article 6. Although they have shown themselves to be cautious in their application of the ECHR to arbitral proceedings, because an arbitration is a ‘judicial proceeding’ for Constitutional purposes it seems safe to say that an arbitrator sitting in Switzerland must respect the fundamental rules of procedural fairness codified in ECHR Article 6.

Arbitral proceedings seated in Switzerland are governed by the Swiss Private International Law (SPIL). The SPIL is non-Model Law and dualist. As has been noted above Switzerland is one of the few states with a national arbitration law that is strictu sensu silent on the requirement of impartiality. The SPIL provides for challenges based on a ‘lack of independence’ but does not refer expressly to ‘impartiality’ as a ground. Nevertheless, even before the drafting of the New Swiss Constitution in 2000 (which does use the term in its fair trial guarantee) Swiss courts treated the requirement of impartiality as fundamental. As in France, pre-award challenges based on allegations of bias are subjected to the same standard as post-award applications. Where a tribunal has failed to act impartially Swiss courts will annul its award under the SPIL. Post award applications for vacatur are governed by Article 190 SPIL. Like Belgium, Swiss law allows full exclusion of judicial review. The requirements of Article 192 are similar to the Article 1717(4) of the Belgian Judicial Code. The agreement must be written and in specific terms, and neither party may have its domicile, habitual residence or place of business in Switzerland.

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231 Constitution of Switzerland 2000, Article 29(1)
232 See Constitution of Switzerland 2000; Article 30(1) provides that ‘every person whose case is to be judged in judicial proceedings has the right to a court established by law, with jurisdiction, independence and impartiality. Exceptional tribunals are prohibited.’
233 See for example the decision of the Swiss Supreme Court of 11 June 2001 [2001] Bull ASA 566, cited in Liebscher, above note 29, p.66
234 See for example the decision of the Swiss Supreme Court of 11 June 2001 [2001] Bull ASA 566, cited in Liebscher, above note 29, p.66
235 See Articles 29 and 30 of the Swiss Constitution 2000.
236 See the decision of the Federal Tribunal, 14 March 1985, Societe Z v L, ATF/BGE 111 1A 72
238 Above note 143, p.304
SPIL Article 190(2)(d) provides that an award can be set aside where equal treatment has not been afforded to the parties. Where an arbitrator is subsequently found to have lacked independence an application may also be made under Article 190(2)(a). This item of the SPIL covers ‘irregular constitution’. The alleged irregularity will be viewed through the glass of Swiss procedural law. Violation of a fundamental principle of procedural law will offend Swiss notions of public policy, with the effect that (assuming competence under the NYC) vacatur may be sought under Article V(1). Where the procedurally defective award is non-Swiss rendered sua sponte vacation under NYC Article V(2)(b) may also become possible. In international matters, the Swiss reading of public policy is similar to the French. Purely Swiss notions of public policy, even international public policy, will not apply in international arbitration unless they are shared by other states.

A ‘legitimate doubts’ test for apparent bias prevails in Switzerland. Article 180(1)(c) SPIL governs pre-award challenges and applications for removal. In Swiss law there is persuasive authority for the proposition that arbitrators are subject to a lower standard of independence than cantonal and federal judges. It seems that a ‘bare minimum of independence’ will suffice. Swiss courts take this view for the practical reason that, in contrast to judges, arbitrators regularly have contact with parties and their lawyers. Generally speaking these kinds of professional contacts will not be enough to establish an objectionable lack of independence in a Swiss court. This does not mean that the standard applicable to judges is not relevant for arbitrators. Indeed, Article 18 of the Inter-Cantonal Arbitration Convention (‘the Concordat’) provides that a party can object to an arbitrator on any grounds which the now-repealed Swiss Federal Judicial Organization Act (OG) provided for the obligatory or facultative withdrawal of the federal judges, and on any grounds set out in rules of arbitration to which the parties have submitted. In the past the Swiss Supreme Court has held that the grounds for exclusion and refusal listed in the OG must be taken into account by arbitrators.

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240 Above note 28, p.98 (FN 250); this can be viewed as a tronc commun reading of international public policy. Consistent with this preference for commonality Swiss courts interpret the New York Convention concept of ‘public policy’ narrowly
241 SPIL Article 180(1)(c)
242 Above note 29, p.291
243 See the decision of the Swiss Supreme Court (BG), 9 February 1998 [1998] Bull ASA 634.
244 Concordat, Art icle 18. See Loi fedrale d ‘organisation judiciaire du 16 December 1943, RS 173.110, Articles 22 and 23 (setting forth the grounds for mandatory and discretionary recusal of judges); cited in Tupman, above note 229, p.36
when they discharge their duty to disclose. Under OG Article 22 a judge was excluded when:

(i) in all matters in which the judge, or a person with whom the judge has certain family ties, or a person for whom the judge acts as guardian or advocate, or

(ii) with whom it is associated by way of adoption, has an immediate interest in the outcome of the dispute;

(iii) the judge has already acted in the matter as a member of an administrative or judicial authority, as a counsel of a party or as an expert witness.

Article 23 stipulated that a judge must refuse to act when:

(i) the case involves matters concerning a legal entity of which the judge is a member;

(ii) special friendship or personal enmity or a special relationship of liability or dependency exists between the judge and a party; or

(iii) facts exist which make the judge appear biased in the case at hand.

The OG has been replaced by the Federal Supreme Court Act 2007 (BGG). The BGG came into force on 1 January 2007. The BGG rules for the withdrawal and disqualification of judges are similar to those that were in force under the OG. BGG Article 34(1) provides that a judge or law clerk is excluded:

(a) if they have a personal interest in the case;
(b) if they have been involved in the case in a different position, be it as member of an agency or administrative body, as counsel, expert or witness;
(c) if they are married to a party, his/her counsel or another person that has treated the case in a lower instance, or if they are the registered partner of such a party or live in a steady relationship with such a party;
(d) if they are related by blood (in a straight line or up to the third degree) or related by marriage to a party, his or her counsel or another person that has heard the case in a lower court; or

See BG decision 28 April 2000 [2000] Bull ASA 558
BGG Article 131 provides that the BGG repeals and replaces the OG in full.
(e) for other reasons, especially because of friendship with or a special hostility towards one party or his/her counsel

BGG Articles 34(1) covers the circumstances envisaged by OG Article 22. The BGG also makes certain extensions to the OG subject matter: the degree of disqualifiable consanguinity is clarified (‘to the third degree’; Article 34(1)(d)) and homosexual relationships are accounted for (‘registered partners’; Article 34(1)(c)). The disqualifying circumstances of Article 34 also expressly extend to the judge’s law clerk (greffier). It is notable that Article 34(2) provides that ‘the involvement in an earlier supreme court procedure is not in itself a reason for exclusion’. The writer is not aware of any challenge that has been decided by reference to the BGG. However, given that Swiss courts tend to require the same standards of independence for arbitrators as that which they expect of judges, and considering the well developed body of Federal case law applying the judicial disqualification provisions of the OG to arbitrators, it is probable that future judicial applications of the challenge and vacatur provisions of the SPIL will be informed by the terms of BGG Article 34.

Supreme Court jurisprudence stresses that when a lack of independence is pleaded the circumstances are to be considered objectively. This rule applies equally in arbitral proceedings. Swiss courts have repeatedly expressed the opinion that the violation of the duty to disclose any relevant facts does not give rise to an automatic right of challenge. The facts themselves (including those facts not disclosed) will determine the availability of the right to challenge. Although a case-by-case approach is taken, the facts of previous applications provide important guidance. Profound hostility (or close friendship) between judge and advocate may be relevant, but generally the independence of a judge will be measured by relation to the party and not their lawyers. A judge will not lack independence when a lawyer they have briefed in an unrelated matter appears before them. This situation is to be distinguished from that of a previous or ongoing business relationship between judge and party. Previous business relationships (including attorney-client relationships) will

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247 The writer is indebted to Bernhard Stehle, Fribourg University, for this unofficial translation of the BGG.
251 BG decision 20 March 2000 [2002] Bull ASA 70
252 Above note 29, p.293
253 BG decision 20 March 2000 [2002] ASA 70
254 Above note 29, p.292
255 BG decision 20 December 1990 BGE 116 Ia 485
only be relevant if non-negligible commercial or ‘emotional’ ties remain. Not surprisingly, justifiable doubts were found to exist where an arbitrator was a board member of a corporate party to the proceedings before him. Justifiable doubts were found where the arbitrator was an advisor to a firm that represented one of the parties before him. The mere fact that the arbitrator has acted for a party in the past, or acts as counsel in a similar but unrelated matter, will not be enough to expose the award to vacatur. It has also been held that common membership of the board of a charitable institution will not usually raise sufficient doubt.

It is important to note that the Swiss lex arbitri expects less independence from party-appointed arbitrators than it does sole arbitrators and neutral chairs. Although this Sunkist-type distinction is not as well settled in Switzerland as it is in domestic arbitration law in the United States, it is supported by the drafting history of the SPIL. Supreme Court rulings have also confirmed its existence. It seems to be that the criteria of OG Articles 22 and 23 will still apply but ‘less severely to the party-appointed arbitrator’. In Chapter 4, the writer has expressed his respectful approval of this distinction.

**Centroza v Orbis (1966)**

This 1966 judgment of the Swiss Federal Court prevented the appointment of a local magistrate as arbitrator on the grounds that the magistrate’s wife was an assistant to the counsel for the Respondent. Importantly, in disqualifying the magistrate the Federal Court defined arbitrators as judges.

**SA v V (Hong Kong)**

In *SA v V* the Swiss Federal Court held that a common commercial interest existing between counsel and arbitrator, generated by the fact of their owing a law firm together, did not justify a challenge to the arbitrator’s independence.

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257 BG decision 18 August 1992 BGE 118 II 359  
258 BG decision 18 August 1992 BGE 118 II 359  
262 Above note 29, p.294  
263 See the writer’s comments on Sunkist in Chapter 4, and the proposal for a Sunkist compromise in Chapter 8.  
264 See decision of Swiss Federal Court of 26 October 1966 in Centroza v Orbis
**Ligier & Diffucia (1989)**

The fact that an arbitrator has a relationship with a material witness may cause justifiable doubts as to his independence to arise. The case of *Ligier & Diffucia v Alfà Lancia Industriale* provides an interesting example in this regard. This matter involved a dispute between two automobile companies: the key witness in the proceedings was a former client of the sole arbitrator; it was also apparent that the arbitrator would act as counsel to that key witness again in future. The Swiss Supreme Court held that the circumstances objectively justified the doubts as to the arbitrator’s independence.

**X v Y (2007)**

This dispute arose out of a contract between an Algerian brewery (X) and a German company (Y) specialising in beverage packaging machinery. The materials facts of the application were that the arbitral panel had included in its award a five page section entitled ‘Claimant’s Attitude’ detailing why it felt X’s behaviour was incompatible with good-faith performance. X pointed to this portion of the interim award in support of its argument that the tribunal was irregularly constituted. The Supreme Court acknowledged that it would have been better if the tribunal had not used such ‘vivid and partly ironic language to describe the behaviour of X’, but concluded that it did not have grounds for criticising the conduct of the tribunal. The Supreme Court based this conclusion on several factors. Firstly, the arbitral tribunal had followed X’s argument in the first interim award it made. Secondly, Y had requested that the tribunal limit its liability to 10%. This was denied, a ruling that was similarly in favour of X. These interim orders in favour of X negated the appearance of bias. Finally, X never presented any other evidence of the arbitrator’s lack of impartiality. As a result of this paucity of evidence the Supreme Court focused on the real effects of the alleged ‘irregular constitution’ of the panel, and in so doing strengthened the rule that each challenge is be determined on a case-by-case basis.

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265 [1989] Rev Arb 505
266 BG decision 16 September 1988, discussed in Liebscher, above note 29, p.293
267 X commenced arbitration against Y for partial non-performance of its obligation under the contract; Y argued that X’s claims were time-barred. The arbitral tribunal subsequently issued an interim award holding the claim was not time-barred, and that the contractual obligations of Y were still live. X then challenged the constitution of the tribunal, requesting that a second interim award be annulled and that the arbitrators be replaced. The application was made to the Swiss Federal Supreme Court.
268 September 2007 in *X v Y* (English translation of judgment by Dr. Georg von Segesser, ITA Board of Reporters)
269 See decision of Swiss Federal Supreme Court of 26 September 2007 in *X v Y* (English translation of judgment by Dr. Georg von Segesser, ITA Board of Reporters).
**A Ltd v B Inc (2004)**

*A Ltd. v B. Inc.* provides a ‘cloak and dagger’ illustration of the circumstances in which bias challenges are sometimes run in ICAs. Whilst the arbitration was on foot the Chairman of the arbitral tribunal discovered that he was under private surveillance in relation to an allegation of bribery made by an unknown party. Incensed, he announced at the next hearing that the police had investigated his report and advised that one of the parties to the dispute before him had arranged the surveillance. The Chairman explained that he wanted the surveillance to stop, and requested that the party which commissioned the surveillance step forward. The Chairman explained to the parties that his impartiality would not be affected if the party gave him even ‘semi-credible’ reasons for commissioning the surveillance services. No party came forward. The Claimant then formed the view that the Chairman assumed it was them who commissioned the surveillance because they had been unsuccessful in the proceedings thus far. On the basis of this perception the Claimant challenged the arbitrator.

The matter went to the First Civil Division of the Swiss Federal Court. The Court said that the Chairman’s reaction to the surveillance was ‘appropriate and does not permit the drawing of a conclusion of bias against one of the parties’ 270. The Court concluded that the Chairman was allowed to address the parties and request disclosure in the manner which he did, and that his actions in this regard did not automatically lead to a conclusion that he had lost his impartiality. The Court held that the Chairman was permitted to announce what his attitude would have been if he found out which party had him put under surveillance provided his choice of words was neutral (which the Court found it was). So long as the Chairman’s statements did not contain any personal attacks or allude to any party-specific suspicions they did not raise any doubts concerning his impartiality. The challenge was dismissed 271.

**4.10 Court of Arbitration for Sport**

The Court of Arbitration for Sport (CAS) is seated in Lausanne, in the Canton of Vaud. It was created in 1983 by the International Olympic Committee (IOC). Due to its increased use as a forum for the settlement of high value sports media and entertainment licensing disputes the CAS is an important arbitral institution today. It is the peak institution for the specialist

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270 December 2004 in *A. Ltd. V B. Inc.* (English translation of judgment by Nicolas Ulmer and Franz Stirmimann, ASA)

271 December 2004 in *A. Ltd. V B. Inc.* (English translation of judgment by Nicolas Ulmer and Franz Stirmimann, ASA Bull)
practice of sports law and dispute resolution. As has been observed, with specialisation comes the risk of bias; the CAS has some experience with challenges. In fact, it is to a challenge that the CAS owes its present institutional form. In *Grundel v International Equestrian Federation* the challenger (a German horse-rider) argued that the CAS lacked independence from the IOC[^72].

### Grundel (1993)

Grundel’s appeal rested on the submission that when the CAS dismissed his appeal against suspension, it lacked the independence required of arbitral tribunals under Swiss law because the body that suspended him (the International Equestrian Federation) was a member of the International Olympic Committee and the IOC established the CAS. The First Civil Appeals division of the Swiss Federal Tribunal held that although the CAS would lack independence in a proceeding in which the IOC was a party, and despite the fact that there was a *prima facie* appearance of bias in the instant matter, the CAS was sufficiently independent of the IOC to justify upholding its decision against the Appellant. The Court did, however, express concern as to the institutional proximity of the CAS and the IOC, commenting in *obiter*:

> Certain objections with regard to the independence of the CAS could not be set aside without another form of process, in particular those based on the organic and economic ties existing between the CAS and the IOC. In fact, the latter is competent to modify the CAS statute; it also bears the operating costs of this court and plays a considerable role in the appointment of its members[^73].

The IOC reacted to the *obiter in Grundel* by establishing the International Council of Arbitration for Sport (ICAS) in 1994. In order to sever its organic and economic ties, the IOC divested itself of its responsibility for the CAS, transferring control of the court to the new Council. The regulatory framework of the CAS was renovated, and a CAS Code was implemented in 1994. Today, the IOC has far less influence over the CAS appointment process: only one in five arbitrators on the CAS list is an IOC nominee[^74]. Generally speaking, the *Grundel* restructuring has been successful. In *Lazutina v CIO & FIS* the Swiss

[^72]: 1 Civil Court ATF (15 March 1993)
[^73]: *Grundel v Federation Equestre Internationale* (1993) 1 Digest of CAS awards 561 569-70
Federal Tribunal held that the changes made post-Grundel made the CAS sufficiently independent of the IOC\textsuperscript{275}.

The CAS Code split the CAS into two divisions: Ordinary Arbitration and Appeals Arbitration. There is also an \textit{Ad Hoc} Arbitration Division. Each Division has a President, whose powers include jurisdiction to rule on pre-appointment applications. Applications (including challenges) made post-appointment are heard by the tribunal itself, and then by the ICAS\textsuperscript{276}. In \textit{ad hoc} arbitrations the President of the Ad Hoc Division is competent to rule on challenges. CAS tribunals, the ICAS and the President are bound by the Code. The official English version of Article 11 of the 2004 CAS Code reads:

A member of the ICAS or the Board may be challenged when circumstances allow legitimate doubt to be cast on his independence \textit{vis a vis} one of the parties to an arbitration...He shall spontaneously disqualify himself when the subject of a decision is an arbitration procedure in which a sports-related body to which he belongs or appears as a party or in which a member of the law firm which he belongs is an arbitrator or counsel\textsuperscript{277}

The recusal provision of the CAS Code reflects the statute’s heritage: much as the the ICAS was established in response to concerns as to the organic proximity of the CAS to the IOC, Article 11 attempts to ensure a separation of arbitrator and party. It focuses on the situation of the decision maker rather than his attitude. The CAS Code refers only to the requirement of independence and says nothing of impartiality. None of the CAS Arbitration Rules refer to impartiality as a procedural requirement or ground of challenge. Rule 33 of the CAS Rules is in the following terms:

\textit{R33 Independence and Qualifications of Arbitrators}

\textit{Every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties.}

Similarly, the challenge provision of the CAS Rules (Article 34) states ‘An arbitrator may be challenged if the circumstances give rise to legitimate doubts over his independence’\textsuperscript{278}. Article 12 of the CAS \textit{Ad Hoc} Rules ‘no arbitrator may act as counsel for a party or other interested person before the \textit{ad hoc} Division’\textsuperscript{279}, and Article 13 provides that an arbitrator may be challenged by a party if circumstances give rise to legitimate doubts as to his or her independence\textsuperscript{280}.

The writer has found nothing to indicate that a lack of impartiality is a valid ground for challenge under the CAS Code. Both reported post-Grundel challenges (\textit{Celtic Plc v UEFA} and \textit{Cross Country Skiers}) dealt with a lack of independence: \textit{Celtic v UEFA} is a decision of the Board of the ICAS on prior service against a party as counsel; \textit{Cross Country Skiers} is a decision of the Swiss Supreme Court on professional connections between arbitrators. If impartiality is available as a head of challenge it would be derived from the SPIL, Swiss public policy or the ECHR.

\textbf{\textit{Celtic Plc v UEFA} (1998)}

This challenge was brought on the basis of an arbitrator’s previous function as counsel in a matter in which a party to the instant matter was involved. The case provides an interesting illustration of Common Law and Civil Law systems in conflict. In his challenge hearing before the Board of the ICAS (\textit{Celtic Plc v UEFA}), ICAS Decision of 2 October 1998) the challenged arbitrator (Michael Beloff QC) put it that English practice allowed him to be counsel in one hearing and arbitrator in the next. The challenged arbitrator referred the Board to the ‘Cab Rank Rule’, which he summarised in his description of an English barrister as a professional person putting forward his client’s case against the other side in the particular manner in which he is instructed. The next day he might well be acting for the other side in another case. As a result of these factors it is impossible to assert that simply because I act against UEFA in one case, I cannot impartially arbitrate in another case in which UEFA are a party, especially when the case has no connection

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{278} CAS Rules, Article 34
\item \textsuperscript{279} CAS \textit{Ad Hoc} Rules, Article 12, available at \url{www.tas-cas.org/adhoc-rules}
\item \textsuperscript{280} CAS \textit{Ad Hoc} Rules, Article 13
\end{itemize}
\end{footnotesize}
other than UEFA’s participation in them. To hold otherwise would be to deny the independence of any English barrister of his client\textsuperscript{281}

The ICAS Board disqualified Mr Beloff. The ICAS referred to their governing code and stated that an arbitrator’s independence

must be assessed according to the circumstances of the case and thus not on the basis of general or subjective assumptions which are not objectively verified in the case in hand. A serious doubt regarding an arbitrator’s independence must be based on concrete facts that can justify, objectively and reasonably, a lack of confidence on the part of a person reacting in a reasonable manner\textsuperscript{282}

Strasbourg principles of objective verification won the day. Whilst the decision in \textit{Celtic v UEFA} can perhaps be seen as an illustration of Continental intolerance for client-counsel connections, it was referred to with apparent approval by Morison J in \textit{ASM Shipping} (a matter in which Mr Beloff appeared as counsel).

\textit{Cross-country Skiers (2003)}

In this matter the Supreme Court of Switzerland upheld the decision of the CAS to withdraw awards from two cross-country skiers and suspend them for two years for doping. The skiers challenged the decision based on an alleged lack of independence, arguing \textit{Laker Airways Familiarity} (ie. the arbitrators who formed the panel had worked together before). The Swiss Supreme Court held that the fact that each member of the arbitral tribunal was in some way associated with their fellow members did not give rise to legitimate doubts concerning their independence:

In the small world of international arbitration, individuals often find themselves working together on different cases … it is not uncommon for the same person to be an arbitrator in one particular case and the counsel to a party in another case, pleading in front of one of his fellow arbitrators from the previous case

\textsuperscript{281} Mr Beloff appeared as counsel for the Applicant in the challenge proceedings in \textit{ASM Shipping Ltd of India v TTMi of England} [2005] \textit{APP L.R. 10/19} and read in his submission to the ICAS. It is from paragraph 13 of the \textit{ASM Shipping} judgment that his comments on the Cab Rank Rule are taken.

\textsuperscript{282} This excerpt of the CAS judgment appears at paragraph 14 of the judgment of Morison J in \textit{ASM Shipping}
The challenge was held to be unfounded. The Supreme Court held that the arbitrators who ruled against it at first instance did not infringe Swiss procedural public policy.\footnote{Cross-country Skiers A and B v IOC, ISF, and CAS (Tribunal Federal, 27 May 2003)} Subsequently, the ICAS expressed the wish that the representation of parties before the CAS shall no longer be performed by active CAS members or their colleagues from law firms.\footnote{De Witt Wijnen, O.L.O., The IBA Guidelines on Conflicts of Interest in International Arbitration Three Years On, ICC Bulletin 2007 (Special Supplement), p.111}

4.11 SWEDEN

According to Dezalay and Garth, in the 1970’s ‘Sweden’s neutrality and moral authority, coupled with its location just north of the Baltic Sea, made Stockholm a strong potential site for arbitration of what were then called East-West disputes, especially those between the Soviet Union and the United States’.\footnote{Dezalay, Y, Garth, B.G., Dealing in Virtue: International Commercial Arbitration and the Construction of a Trans-national Legal Order (University of Chicago, 1996), p.188} The perception of Sweden as a neutral site quickly extended beyond East-West dispute contexts. For example, the first Chairman of the Iran-United States Claims Tribunal was a Swede (Judge Gunnar Lagergren). Sweden continues to play an important role in ICA, especially in the resolution of disputes involving parties from the former Communist states of Eastern Europe and the People's Republic of China. Stockholm can be expected to reassert its significance as these economies are integrated into the European Union.

Swedish arbitration law is non-Model Law and monist. The Swedish Arbitration Act (1999) does not expressly require independence of arbitrators, referring only to impartiality. The Swedish Act is also notable for the fact that Article 8 provides a list of instances in which impartiality will be deemed lacking.\footnote{Swedish Arbitration Act (1999), Article 8}

Article 8 of the Swedish Arbitration Act provides as follows.

8. If a party so requests, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator’s impartiality. Such a circumstance shall always be deemed to exist:

\footnote{Swedish Arbitration Act (1999), Article 8}
(1) where the arbitrator or a person closely associated to him is a party, or otherwise may expect benefit or detriment worth attention, as a result of the outcome of the dispute;
(2) where the arbitrator or a person closely associated to him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect benefit or detriment worth attention as a result of the outcome of the dispute;
(3) where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute; or
(4) where the arbitrator has received or demanded compensation in violation of section 39, second paragraph

Along with the Arbitration Law of the PRC, the Swedish Arbitration Act is the only national arbitration law to provide such a list. The Article 8 list is not exhaustive, and circumstances beyond its scope may still qualify as circumstances which may diminish confidence in the arbitrator’s impartiality. Article 9 requires disclosure of circumstances that might fall afoul of Article 8. Article 34 provides that where an arbitrator has been challenged successfully their award may be set aside in whole or in part.

**Re Judge Lind (2006)**

This plea of bias was made in the context of a post award challenge to enforcement. Jilken commenced arbitration against Ericsson. After appointing their arbitrators the parties agreed to former Swedish Supreme Court Judge Johan Lind as Chairman. The proceedings were conducted and an award in favour of the Respondent was handed down on 7 June 2004. The Claimant learned that the Chairman of the tribunal had previously worked as a consultant for Mannheimer Swartling, a major Swedish law firm retained by Ericsson. The Claimant challenged the arbitral award, arguing that the Chairman should have disclosed his relationship with Ericsson’s lawyers and that in failing to do so he had breached Article 9 of the Arbitration Act. Ericsson argued that the Claimant had known of the circumstances earlier...

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287 Swedish Arbitration Act (1999), Article 8
288 Swedish Arbitration Act (1999), Article 33(2). The Swedish Arbitration Act also stands out because it defines public policy trans-nationally
289 Jilkén v. Ericsson AB, Case No. T2448-06 where the Supreme Court of Sweden cited Government Bill 1998/99:35 (p.85 and 218) as authority for the inclusive mode of Article 8
and had not objected to Judge Lind’s involvement, with the effect that the Claimant had lost its right to challenge by operation of Article 34 of the Act. Ericsson also argued that the circumstances were not such as to bring into question Judge Lind’s impartiality or independence.

The Svea Court of Appeals stayed the execution and enforcement of the arbitral award while it heard the challenge\textsuperscript{290}. The Court of Appeals embarked on a detailed examination of Judge Lind’s relationship with Mannheimer Swartling. Heavy reliance was placed upon the terms of the contract of engagement, which stressed \textit{inter alia} the independence of Judge Lind’s arbitration practice within the firm. Judge Lind himself gave evidence that he conducted his arbitration practice separately from his business with Mannheimer Swartling and that he always disclosed his relationship with the firm. The Court of Appeals held that Judge Lind did not appear to lack impartiality or independence because the reality of his relationship with Mannheimer Swartling was that, although he wrote opinions and memoranda of advice for them, he ran his arbitration practice separately. The application was dismissed. The Claimant appealed to the Supreme Court of Sweden.

The Supreme Court reversed the decision of the Svea Court of Appeal. First, the Supreme Court found that the Claimant had not waived its right to object under Article 34 of the Arbitration Act\textsuperscript{291}. The Court then objectively assessed the circumstances of Judge Lind’s relationship with Ericsson’s lawyers. The judgment lays the facts out as follows:

(1) Judge Lind was a part time consultant to Mannheimer Swartling. The nature of his engagement was unclear. The court took the view that, although the contract of engagement described him as a consultant, he was probably a part time employee. He was listed as a staff member on their website and had an office in their rooms. In a report of the Swish Bar Association Disciplinary Committee Judge Lind was described as an employee of the firm (this report also expressed the opinion that Judge Lind should have recused himself in the instant matter)\textsuperscript{292}.

\textsuperscript{290} Jilkén v. Ericsson \textit{AB}, Case No. T 6875-04
\textsuperscript{291} Jilkén v. Ericsson \textit{AB}, Case No. T2448-06 [2007] 3 SIAR 167 at 171
\textsuperscript{292} Jilkén v. Ericsson at 172
(2) Judge Lind derived approximately 20% of his income from his arrangement with Mannheimer Swartling. Whilst this income stream was significant Judge Lind was not found to be dependent upon it\textsuperscript{293}. The relationship with Ericsson generated significant income for Mannheimer Swartling and had caused the firms partners to disqualify themselves from acting in claims against Ericsson in the past\textsuperscript{294}.

(3) Judge Lind operated as an arbitrator from his office at Mannheimer Swartling. In the instant matter the parties had received correspondence from him on Mannheimer Swartling stationary\textsuperscript{295}

The Supreme Court found that these circumstances required disclosure and, if the parties objected, recusal. It was immaterial that Judge Lind was not a partner of the firm retained by the Respondent. The Supreme Court held:

the relationship between the law practice and the client is of commercial importance to the law practice, it must be considered that the bands of interests and loyalties between the partners of and lawyers employed in the law practice, on the one hand, and the client, on the other, constitute a circumstance that may diminish confidence in the impartiality of an arbitrator employed at the law practice, when the client is a party in the arbitration…Such a conclusion finds support in the IBA Guidelines and in case-law from the Arbitration Institute of the Stockholm Chamber of Commerce\textsuperscript{296}

The Supreme Court set aside the award in full and ordered costs against Ericsson. The general reaction of the Swedish arbitration community was one of relief and satisfaction. The Svea Court’s judgment was heavily criticised and read as contrary to the public policy of promoting confidence in arbitration.

\textsuperscript{293} Jilkén v. Ericsson at 173
\textsuperscript{294} Jilkén v. Ericsson at 173-4
\textsuperscript{295} Jilkén v. Ericsson at 172
\textsuperscript{296} Jilkén v. Ericsson at 174
4.12 Stockholm Chamber of Commerce

Stockholm emerged as the seat of preference for disputes between Soviet and Western parties towards the end of the Cold War. Whilst this was a gradual process, a key event occurred in 1976-7 when the American Arbitration Association and the Soviet Foreign Trade Arbitration Commission entered into an Optional Clause Agreement outlining the consensus that disputes between US and Soviet entities should be submitted to arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Today, despite the fall of the USSR, the SCC remains popular as a site for arbitrations between Western parties and Russian, Eastern European and Chinese entities. This is largely due to the fact that the dispute resolution provisions of investment treaties between these states often designate SCC arbitration as an alternative to ICSID arbitration.

Unless the parties agree otherwise, challenges to arbitrators in SCC proceedings are heard first by the fellow arbitrators. The parties then have two options. They may agree that the appeal against the challenge decision may be finally heard by an arbitral institution. Under the SCC rules, an institutional nomination under Article 11 of the Arbitration Act puts the challenge before the Board of the Arbitration Institute of the SCC. The decision of the Board is final. Much like the Court of the ICC, the Board does not provide reasons for its decisions on the challenge of arbitrators. The alternative is that the challenge decision is appealed to the District Court of jurisdiction. When arbitrators are challenged in Swedish state courts, the SCC often reports to the court as amicus curiae.

Article 17 of the SCC rules requires that an arbitrator shall be impartial and independent. The records of the SCC show that the most common cause for challenge is that the arbitrator (or their firm) have had previous contact with one of the parties involved. There have also

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297 Above note 285, p.189
298 Above note 143, pp.38-9
299 Ibid
300 Swedish Arbitration Act (1999), Article 10
301 Swedish Arbitration Act (1999), Article 11
302 SCC Rules, Article 18(4)
303 See Article 7(4) of the ICC Rules, which provides that ‘[t]he decisions of the [ICC International] Court [of Arbitration] as to the […] challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated’
304 See for example the decision of the Supreme Court in Jilkén v. Ericsson
been challenges on common arbitrator-party nationality, apparent outcome preference based on pecuniary interest and prior relations with counsel. In her concise survey of challenges decided by the SCC Board in the period January 1999 to June 2002 Marie Ohrstrom, general counsel to the Arbitration Institute of the SCC, reported that only three out of the thirteen challenges run in this period were upheld.

**SCC Arbitration 60/1999**

This interesting challenge arose out of arbitral proceedings between Chinese and Japanese parties on liability to repay a debt. The Japanese Claimant sought repayment from the Chinese Respondent. The Respondent appointed as its party arbitrator a person who was both a CIETAC panellist and chief judge of the people’s court of the city of its domicile. Counsel for the Respondent practiced in the same city.

The Claimant challenged the Respondent’s arbitrator on the grounds that Chinese courts engage in local protectionism, and that the Claimant was at risk of injustice because they were a foreign company in a dispute with a local entity. The Claimant also argued a type of *Rustal Trading* Familiarity: the Respondent’s counsel appeared regularly in the Chinese court presided over by their arbitrator. The Claimant said this was grounds for reasonably suspecting that the arbitrator would favour the Respondent as a consequence of his familiarity with their counsel. The SCC board held that there were no grounds for ordering disqualification of the Respondent’s appointee.

The Respondent then challenged the Claimant’s nominee, a partner of a Japanese law firm. The Claimant’s appointee disclosed that one of his partners had, from time to time, advised the Claimant on retainer. The Claimant’s appointee made it clear that the partner retained was not acting or in any way involved in the matter at hand. In his submissions to the board the arbitrator cited decisions of French and English courts in support of his refusal to stand down. Despite his apparent distance, the SCC board upheld the challenge and disqualified the Claimant’s arbitrator.

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306 Ibid
307 Ibid
**SCC Arbitration 60/2001**
This challenge arose out of an agreement for the sale and purchase of land in Sweden. The Claimant was Swedish and the Respondent was Dutch. The Claimant appointed a partner of a Swedish law firm as its arbitrator and proceedings commenced. In an innocent omission, the Claimant’s arbitrator failed to disclose that his partner was counsel for the Claimant’s parent company in proceedings before a Swedish state court. Despite the fact that the two corporate entities were legally separate, the SCC Board found that there were justifiable doubts as to the arbitrator’s impartiality and independence.

**SCC Arbitration 87/2000**
In this arbitration between an English Claimant and a Swedish Respondent the Claimant challenged the Respondent’s party arbitrator. The challenge relied on Laker Airways Familiarity: the arbitrator’s cousin was a board member of the Respondent’s corporate parent. The Respondent argued that the relation was remote and outside the circumstances envisaged under Article 8 of the Arbitration Act. The SCC board agreed and dismissed the challenge.

**SCC Arbitration 120/2001**
The Claimant and the Respondent in this matter were both corporations domiciled in the Philippines. A dispute arose out of their Energy Cooperation Agreement, the disputes clause which provided for UNCITRAL Rules arbitration in Sydney, Australia. The parties appointed arbitrators and the proceedings began. The Respondent objected to the Claimant’s nominee. The matter went to the appointing authority designated by the Secretary General of the PCA. The Respondent’s challenge asserted that Claimant’s appointee had

(i) engaged in improper unilateral communications in the Philippines with the Claimant and their lawyers,
(ii) made decisions on fees in violation of Article 39 of the UNCITRAL Rules,
(iii) failed to disclose those aspects of his conduct that were pleaded as improper (including the fact that the Claimant had paid for his trip to the Philippines),
(iv) failed to disclose that he had acted as nominated arbitrator on six occasions on behalf of other companies associated with the Claimant appointed through the same lawyers as were briefed in the matter at hand

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308 Ibid, p.52-3
As is too often the case, the challenged arbitrator withdrew. The Respondent then alleged that during this first challenge the Chairman of the tribunal made active attempts to persuade the Respondent to withdraw its challenge. These attempts included letters (framed as ‘friendly invitations’) imploring the Respondent to discontinue its challenge, expressing opinions on the merits of the challenge, and stating that he was willing to proceed even in the event the Claimant’s arbitrator was actually biased\textsuperscript{309}. The letters also denied that the procedural orders made to date displayed any lack of impartiality or independence on the part of the Claimant’s arbitrator. The Respondent requested the Secretary General of the PCA to designate an appointing authority. The Secretary General referred the matter to the SCC. The Board of the SCC held that

the circumstances relied on by [the Respondent] in support of its challenge do not - neither separately, nor jointly - give rise to justifiable doubts as to the impartiality and independence of [the Chairman]\textsuperscript{310}

The Respondent’s challenge to the Chairman was dismissed. The matter is of interest because it shows that co-arbitrator demonstrations of support for challenged arbitrators can cause secondary challenges to be launched. This risk is especially high in situations where co-arbitrators are required to rule at first instances on challenges to their friends on the panel. Best practice would seem to be to refer the challenge to the appointing authority and refrain from getting involved - ‘silence is an arbitrator’s mother tongue’\textsuperscript{311}.

Rapla Invest (2006)

This challenge arose out of a claim for monies due under an agreement between TNK Trade Ltd (TNK) and Swonco Swedish Oil AB (trading as Rapla Invest) for the sale and supply of oil\textsuperscript{312}. Rapla denied liability and counter-claimed. The contract provided for SCC Rules arbitration before a panel of three. The parties appointed their arbitrators (TNK nominating prominent Russian arbitrator Professor Sergei Lebedev and Rapla appointing Swedish lawyer Hans Liljeblad). Norwegian advocate Helge Jakob Kolrud was agreed as Chairman\textsuperscript{313}. The

\textsuperscript{309} Ibid, p.52-6
\textsuperscript{310} Ibid, p.57
\textsuperscript{311} This comment is attributed to renowned maritime arbitrator Cedric Barclay.
\textsuperscript{312} See decision of the Svea Court of Appeal, Stockholm, Sweden, on 7 December 2006, in Case No. T 5044-04
\textsuperscript{313} See decision of the Svea Court of Appeal, Stockholm, Sweden, on 7 December 2006, in Case No. T 5044-04
tribunal convened and the hearing took place over seven days in January 2004. A unanimous award was handed down in favour of TNK on 19 March 2004\textsuperscript{314}. Rapla’s counter-claim was dismissed in full\textsuperscript{315}. After the final award was handed down, Rapla found out that Professor Lebedev had two years earlier been an arbitrator in a SCC arbitration in which a Ukrainian subsidiary of TNK was a remote party. Rapla also discovered that Professor Lebedev had appeared as counsel for this same subsidiary in insolvency proceedings in the Luhans’k Court of Financial Cases. Lebedev did not disclose any of these prior associations with TNK when he accepted the nomination\textsuperscript{316}.

Rapla applied to the Svea Court of Appeal for \textit{vacatur}. Rapla argued that the tribunal had failed to consider one of their heads of argument, and that Professor Lebedev lacked impartiality and independence required of him under the SCC rules and Swedish law. TNK resisted the application. The Court of Appeal found for TNK, holding that although disclosure of his past appointment and brief would have been appropriate, neither the circumstances relied upon nor the failure to disclose warranted setting aside of the award. In reaching this conclusion, the Svea Court relied on the disclosure and challenge provisions of the Swedish Arbitration Act, rather than the SCC Rules. It was also relevant the circumstances were on the Orange List of the IBA Guidelines. The Court of Appeal stressed that the assessment of the impugned acts and circumstances was to be undertaken from an objective point of view\textsuperscript{317}. Importantly, the Court expressed the view that the ‘requirements of impartiality should be interpreted equally irrespective of the arbitrator’s professional background and should not be lowered in cases where the reason for challenge is not known until after an awards has been made’\textsuperscript{318}. This is to be contrasted with the practice of German, French and Swiss courts, where post-award allegations of bias are subjected to a more stringent standard (and are therefore less likely to succeed)\textsuperscript{319}. Despite the dismissal of the challenge the \textit{dicta} of the Court of Appeal in \textit{Rapla v TNK Trade} illustrates the tendency of Swedish courts to strictly police arbitrator bias.

\textsuperscript{314} SCC Arbitration 078/200
\textsuperscript{315} See decision of the Svea Court of Appeal, Stockholm, Sweden, on 7 December 2006, in Case No. T 5044-04
\textsuperscript{316} See decision of the Svea Court of Appeal, Stockholm, Sweden, on 7 December 2006, in Case No. T 5044-04
\textsuperscript{317} ‘Judgment by the Svea Court of Appeal, Stockholm, Sweden, on 7 December 2006, in Case No.T 5044-04’, (SCC Institute), available at www.sccinstitute.com
\textsuperscript{318} Ibid, p.3
\textsuperscript{319} See for example German BG decision dated 4 March 1999, ZIP 859 (1999).
5. Continental Conclusions

The leading European seats have a common Roman legal heritage. Their laws of procedural fairness all recognise the Latin maxim *nemo judex in sua causa*. It has been observed that, where Roman law tolerated breaches of *nemo judex*, modern European legal systems tend to treat the rule as an absolute prohibition. The writer has suggested that the post-World War Two advent of Human Rights law caused the elevation of this rule. To that end, the writer prefaced his study of the European seats with a short analysis of Strasbourg Jurisprudence on the issue of impartiality and independence. It has been observed that the Strasbourg Court applies a test for ‘objective bias’ that closely resembles that laid down by the House of Lords in *Sussex Justices*. The writer has pointed to the prevalence of this ‘reasonable apprehension’ test as an explanation for the increased rate of bias challenge in Europe. The ‘Gough Clause’ – which the writer will propose more fully in Chapter 8 of this thesis – was put forward and tested against *Suovaniemi v Finland*, the leading EHR Court decision of waiver in arbitration, as a possible cure for this procedural ailment.

All of the leading European seats observe the rule that ‘no man may be a judge in his own cause’ and apply it to arbitrators, either as a result of their posited laws of arbitration or jurisprudence developed in municipal courts. They call it ‘Subjective Bias’. The rule of ‘Objective Bias’ (the Continental equivalent to the Anglo-American notion of ‘Apparent Bias’) is similarly universal. The force of both rules has increased with the elaboration and development of Strasbourg Jurisprudence. But this is where the common ground ends. While the municipal laws of most of the seats surveyed in this chapter impose the same standards of independence and impartiality on arbitrators as they do on judges, it is arguable that Swiss law does not. Swiss law is silent on impartiality, referring only to a lack of independence as a ground for challenge. French arbitration law takes the same approach. In these seats the requirement of impartiality is instead derived from public law, jurisprudence and doctrine in these states, and the notion of ‘independence of mind’. But despite this common statutory approach, the record suggests that Swiss and French outcomes differ considerably: a French court is much more likely to remove an arbitrator than a Swiss court hearing the same matter. Dutch courts belong somewhere near the French: case law makes it clear that Netherlands courts police the requirement of impartiality and independence quite strictly.
At the other end of the scale are Swedish courts, which are even more likely to find actionable bias than their French and Dutch counterparts. Whether this is the result of Sweden having an arbitration law that actually lists the situations where bias will be made out, or the traditions of Swedish ‘moral authority’ and ‘neutrality’, remains to be seen. Then there are Germany and Austria, both Model Law states, which have arbitration laws that recognise both heads of Article 12 (impartiality and independence). The removal provision in the Belgian Judicial Code is the same, although the BJC is not a Model Law statute. Case law shows that the courts of these seats are less likely to find for the challenger than a court hearing the same matter in France or Sweden. This is especially likely in Germany where post-award bias challenges are evaluated against a ‘grave and obvious partiality or dependence’ standard. The arbitration laws of Switzerland and Belgium allow full Party Autonomy: the parties may contract out of judicial supervision and review. These laws of Belgium and Switzerland must therefore be seen as the most resistant to bias, and, it has been submitted, the most likely to accept the writer’s ‘Gough Clause’. The case law surveyed in this chapter makes it clear that the Black Arts are flourishing in Europe. With this in mind, parties seeking to mitigate the threat of bias challenges by going to arbitration in Belgium or Switzerland and contracting for a higher test.
CHAPTER 4

The American Way

If a lack of bias is defined to mean the total absence of preconceptions in the mind of a judge, then no one has ever had a fair trial and no one ever will

- Justice Frank in Re Linahan (1943)

1. Introduction

American lawyers are schooled in an esteemed tradition of rights-driven Constitutionalism. American trial procedures are strongly competitive, even when compared to other Common Law states. The arrival of large American law firms in the 1980’s saw the projection of many distinctly American practices and procedures onto ICA. This process corresponded with the emergence of the Black Art of bias challenge in international arbitration. In Chapter 8 the writer will examine the causal relationship between the influx of the Anglo-American technocrats and the rise in bias challenges. In the meantime, this chapter has a slightly broader focus, being the American law of bias challenges. By way of preface, the right to a fair hearing before an impartial tribunal is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. An equivalent of the Rule in Dimes was endorsed in 1927 in Tumey v Ohio, when the US Supreme Court considered Prohibition-era state laws that empowered city mayors to try certain liquor-related offences. Any fine imposed was divided between the state and the city, with the latter using the income stream derived from the fines imposed to pay the officials involved. The damning feature of this model was that the mayor received fees in addition to his salary, but because these fees were drawn from fines, the mayor only got paid when he convicted. The Supreme Court unanimously held that subjecting a defendant to trial before a judge having ‘a direct,

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1 Re Linahan, 138 F 2d 650 (2nd cir. 1943) per Frank J at 651
personal, pecuniary interest in convicting the defendant’ was a breach of the due process guarantee in the Fourteenth Amendment to the United States Constitution. In 1968, the *ratio* in *Tumey v Ohio* guided the Supreme Court to its conclusion in the leading US case on arbitrator bias, *Commonwealth Coatings*. This chapter will show that, in all US federal appeals circuits except the Ninth, Justice White’s the narrow reading of the Federal Arbitration Act expression ‘evident partiality’ is preferred, with the result that it is properly difficult to get an arbitral award set aside for apparent bias.

The United States is a complicated federation of fifty states, each with its own state and federal courts, the latter supervised by eleven different appeal circuits beneath a single Supreme Court. American arbitration law is firmly dualist: State arbitration and contract laws will govern arbitration agreements and awards when Federal law is not applicable. A clear notion of the scope of US Federal arbitration law seems to be wanting; an observation that is borne out by examination of appeal court judgments that grapple with the question of applicable law. The expansion of the Constitutional notion of ‘interstate commerce’ has certainly increased the coverage of federal arbitration law in recent years. Although a number of states have *sui generis* international arbitration statutes, interstate and international arbitrations are generally governed by the Federal Arbitration Act (FAA) and the common law that has developed around it. The dualism of the US *lex arbitri* is comparable to the arbitration law of Canada, were the majority of the provinces have dualist Model Law arbitration acts that stand beneath an otherwise monist Model Law Federal arbitration statute. Complex dualism demands that the writer start this chapter with state law.

2. State arbitration law

All US states have commercial arbitration laws, either in the form of free standing statutes or chapters of their state codes of civil procedure. In 1955, forty nine US states adopted the

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3 *Tumey v Ohio*, 273 US 510
6 See for example *Prince v California Fair Plan Ass’n*, Not Reported in Cal. Repr. 3d, WL 1330484 (June 15, 2004)
7 In *Allied-Bruce Terminix* 513 U.S. 265 (1995) the Supreme Court held that the FAA applies to any transaction involving or affecting interstate commerce, even if the parties did not mention interstate commerce at all. Local activities which may have minor connection to on interstate commerce will be subject to the FAA.
8 The eleven states with international arbitration acts are New York, Florida, Connecticut, Georgia, Hawaii, Maryland, Ohio, Oregon, Texas, California and North Carolina.
9 Above note 4, p.39
Uniform Arbitration Act, and twelve states have adopted the Revised Uniform Arbitration Act 2000\(^\text{10}\). RUAA Section 12 expressly requires that the arbitrator give disclosure and make ‘a reasonable inquiry’ into matters likely to affect his impartiality or independence; RUAA Section 23 uses the same ‘evident partiality’ standard for \textit{vacatur} as FAA Section 10(a)(2). This shared wording makes decisions under FAA Section 10(a)(2) persuasive in \textit{vacatur} applications brought under the RUAA Section 12, an inter-relation that has exposed state challenge jurisprudence to the unwieldy \textit{Commonwealth Coatings} ratio.

The RUAA does not address the subject of international arbitration, but that does not mean its application to an international matter is beyond the realms of possibility. The Prefatory Note to the RUAA neatly sums up the interplay of state and federal arbitration law:

[the FAA] covers any commercial agreement to arbitrate and the resultant arbitration award unless the matter involves only American citizens and has no reasonable relationship to any foreign country and the courts have broadly applied the statute. Therefore, it is unlikely that state arbitration law will have major application to an international case. There are two instances where state arbitration law might apply in the international context: (1) where the parties designate a specific state arbitration law to govern the international arbitration and (2) where all parties to an arbitration proceeding involving an international transaction decide to proceed on a matter in state court and do not exercise their rights of removal under [the FAA] ....and the relevant provision of state arbitration law is not preempted by federal arbitration law or the New York Convention. In these relatively rare cases, the state courts will refer to the RUAA unless the State has enacted a special international arbitration law\(^\text{11}\)

Eleven US states have their own \textit{international} arbitration laws; UNCITRAL considers five of these states to be Model Law seats\(^\text{12}\). Two of the US Model Law states – California and Texas – warrant special consideration in this chapter because they have Model Law Plus arbitration laws that provide non-exhaustive lists of circumstances that \textit{must} be disclosed under Model Law Article 12.

\(^{10}\) Hereinafter referred to as the ‘RUAA’

\(^{11}\) Prefatory Note to the 2000 Revision of the RUAA, available at 
http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm

\(^{12}\) The Model Law US states are California, Connecticut, Illinois, Oregon and Texas
2.1 Texas

The Texas law of international arbitration is Chapter 12 (Arbitration and Conciliation of International Commercial Disputes) of the Civil Practice and Remedies Code (TCPRC). Section 172.209 deals expressly with conflict of interest for conciliators\textsuperscript{13}; Model Law Plus TCPRC Section 172.056 provides a comprehensive (but non-exhaustive) list of the circumstances which must be disclosed by an arbitrator before they enter onto the reference\textsuperscript{14}. Under s.172.056(A)(1) the arbitrator must disclose within 21 days of appointment if he or she:

(a) has a personal bias or prejudice concerning a party;
(b) has personal knowledge of a disputed evidentiary fact concerning the proceeding;
(c) served as an attorney in the matter in controversy;
(d) is or has been associated with another who has participated in the matter during the association;
(e) has been a material witness concerning the matter;
(f) served as an arbitrator or conciliator in another proceeding involving a party to the proceeding; or
(g) has a close personal or professional relationship with a person who:
   (i) is or has been a party to the proceeding or an officer, director, or trustee of a party;
   (ii) is acting or has acted as an attorney or representative in the proceeding;
   (iii) is or expects to be nominated as an arbitrator or conciliator in the proceeding;
   (iv) is known to have an interest that could be substantially affected by the outcome of the proceeding; or
   (v) is likely to be a material witness in the proceeding;

Under sub-section (2)(a) the appointee must disclose if they (either individually or as a fiduciary) or their spouse or child has a financial interest in (i) the subject matter in

\textsuperscript{13} Section 172.209 of the Texas Civil Practice and Remedies Code states ‘except as provided by rules adopted for the conciliation or arbitration, a person who has served as conciliator may not be appointed as an arbitrator for or take part in an arbitration or judicial proceeding in the same dispute unless each party consents to the participation’.
controversy; or (ii) is a party to the proceeding. Under sub-article (2)(b) the appointee must disclose ‘any other interest that could be substantially affected by the outcome of the proceeding’. Sub-Article (3) requires disclosure where ‘the person, the person's spouse, a person within the third degree of relationship to either of them, or the spouse of that person:

(a) is or has been a party to the proceeding or an officer, director, or trustee of a party;
(b) is acting or has acted as an attorney in the proceeding;
(c) is known to have an interest that could be substantially affected by the outcome of the proceeding; or
(d) is likely to be a material witness in the proceeding.

Disclosure is non-waivable in respect of sole arbitrators15, and chairmen16. The disclosure obligation is ongoing17: if new circumstances arise the affected arbitrator would seem to have the same 21 days period to disclose them to the parties18.

2.2 California

The equivalent Model Law Plus section of the California Code of Civil Procedure is (CCCP) s.1297.121. The circumstances listed in the California Code are substantially the same as those in the Texas Code. The California code obligation to disclose is similarly mandatory and non-waivable for sole arbitrators and chairs19; the principal difference between the two state laws is that the Californian code uses a shorted disclosure window of 15 days20. A good example of the operation of the challenge provisions of Californian arbitration law is the matter of *Guseinov v Burns*.

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15 TCPRC s. 172.209(B)(1)
16 TCPRC s.172.209(B)(2)
17 TCPRC s.172.209(C)
18 The same rules apply to conciliators.
19 CCP s.1297.122
20 CCP s.1297.121
This 2006 challenge arose out of an arbitration conducted under the California Arbitration Act\textsuperscript{21}. The material facts were that the arbitrator had previously served as a \textit{pro bono} mediator in an unrelated case in which counsel for the Claimant had acted. The Claimant’s challenge was dismissed at first instance. It went up on appeal to the California Court of Appeals\textsuperscript{22}. The Court of Appeals was required to address the threshold questions of what matters an arbitrator is compelled to disclose under the CAA and whether there were grounds for disqualifying the arbitrator for non-disclosure. The Appellant asserted that the lower court should have vacated the award because the arbitrator did not disclose his professional relationship with the Claimant’s counsel or his record of service as a dispute resolution neutral. The Appellant argued that non-disclosure of either fact would cause a reasonable person to doubt the arbitrator’s impartiality.

The Court of Appeals rejected these arguments. The Court of Appeals held that the test for impartiality is objective, and is to be framed as a question of ‘whether the relationship would create an impression of bias in the mind of a reasonable person’\textsuperscript{23}. The California Court of Appeal applied a deferential standard in determining whether the arbitrator had a duty to disclose the particulars of his record as a mediator and his friendship with counsel\textsuperscript{24}. The Court of Appeals applied these standards to each of the Appellant’s contentions individually, finding that none were grounds for annulment of the arbitral award. The reasoning was that, because the arbitrator had not received any form of compensation for his work as a mediator, he lacked the pecuniary interest necessary for disqualification. The Court of Appeals cited \textit{Commonwealth Coatings} as authority for the proposition that ‘ordinary and insubstantial business dealings do not necessarily require disclosure’\textsuperscript{25}.

The court decided that the single prior contact (via the uncompensated mediation) did not create a ‘professional relationship’ within the meaning of s.1297.121 of the CAA. There were no facts that would cause a reasonable person to entertain a doubt whether the arbitrator was impartial because (1) the arbitrator had not been paid for his prior services; (2) he had no independent recollection of the mediation proceedings; (3) the mediation had occurred one

\textsuperscript{21} Hereinafter referred to as the ‘CAA’; the CAA is comprised of section 1280 \textit{et seq} of the CCCP. In \textit{Guseinov v Burns}, the claims in the underlying dispute were brought in both contract and tort.

\textsuperscript{22} \textit{Guseinov v Burns}, 145 Cal. App. 4\textsuperscript{th} 944, Dec 15 2006

\textsuperscript{23} \textit{Guseinov v Burns at 957}

\textsuperscript{24} \textit{Guseinov v Burns at 957}

\textsuperscript{25} \textit{Guseinov v Burns at 957}
year prior to the existing arbitration; and (4) the mediation was the only previous contact between the arbitrator and the Claimant’s attorney (there was no ongoing relationship present). The court disagreed with the Appellant’s classification of the arbitrator as a ‘witness’ to the prior proceedings; the arbitrator had indeed testified but only in connection with a motion to disqualify him which was unrelated to the merits of the dispute. Lastly, on the issue of disclosure the court noted that the arbitrator had orally disclosed his involvement in the previous dispute ten months prior to the application for his disqualification. The Appellant raised no objection at that time. The result was that the court was not required to consider whether this act satisfied the CAA requirements for disclosure because the right to plead it as a breach had been waived by conduct. The appeal was dismissed.

Prince (2004)

Prince involved a dispute between a homeowner and his insurance policy provider, the California Fair Plan Association (CFPA). The arbitration clause in the insurance contract provided for a three member panel with party arbitrators and a ‘neutral’ chairman. Prince designated Leon Lamprecht and the CPFA selected Eugene Twarowski. The party appointees selected Thomas Menalo as Chairman of the tribunal. In June of 1997, in a document titled ‘Disclosure Statement of Appraiser’ Twarowski disclosed that he had been used by CFPA as an appraiser seven times, and by parties insured by them nine times, in the previous year. Prince objected to Twarowski’s service as arbitrator on the ground that he had failed to give full disclosure as required by the CAA, and further that he was not a ‘disinterested appraiser’ as required by the California Insurance Code. The Superior Court denied Prince’s petition and the arbitration went ahead.

In 1999, Lamprecht and Menalo signed an award which set the replacement cost of the house at $322,880. Twarowski did not sign the award. Between 1999 and 2001, Menalo was replaced by retired state court Judge Bruce Sottile as a result of CFPA’s allegations of bias. In June of 2001, before any hearings on the appraisal had commenced, Prince’s attorney requested that Twarowski disqualify himself due to the 16 appraisals he had completed for the CFPA in 1996-1997. Twarowski responded that he had actually appeared as CFPA’s appraiser in closer to forty matters, although many of those matters never proceeded to

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26 *Guseinov v Burns* at 961
27 Prince’s home was damaged in an earthquake and he commenced arbitration when he was dissatisfied with the $102,471 paid out by CFPA.
arbitration. Nothing more transpired regarding arbitrator Twarowski. On 18 October 2001 Twarowski and Judge Sottile signed a final award. Prince moved to vacate on the basis of Twarowski’s ‘extensive and profitable, but undisclosed, financial relationships with CFPA.’

Prince also alleged that he had made a timely demand that Twarowski disqualify himself. The trial court found no evidence of bias on Twarowski’s part and held that Prince had waived the right to challenge. The motion for vacatur was dismissed. Prince appealed.

Issues of governing law were raised in the appeal. The California Court of Appeals held that the CAA governed the proceedings at hand because the appraisal clause in the contract constituted an ‘agreement’ within the meaning of California state law. The court concluded that it was required to vacate the award if it found the arbitrator making the award had failed to disclose ‘within the time required for disclosure a ground for disqualification of which [Twarowski] was then aware.’ The court went on to hold that even if Twarowski’s previous engagements as an appraiser were grounds for disqualification his giving disclosure three times in a four-year period meant he could not possibly have ‘failed to disclose’ within the meaning of California law; the court also rejected the Appellant’s argument that Twarowski was required to disqualify himself given his prior service as a CFPA appraiser. Prince’s contention was that these previous engagements gave rise to reasonable doubts. The Court of Appeal held that even if Twarowski had been the neutral arbitrator for the panel he would not have been required to disqualify himself. The court referred to CAA section 1281.9 (a)(1), under which a neutral arbitrator must disclose

whether or not he or she has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years, has participated in, discussions regarding such prospective employment or service with a party to the proceeding.

The court interpreted this provision of the CAA to mean that only ‘inducements offered by future service’ were relevant when considering an allegation of arbitrator bias under the CAA. Past employment as an appraiser was not enough to disqualify an individual from

28 Prince v California Fair Plan Ass’n, Not Reported in Cal. Reprtr. 3d, WL 1330 484 (June 15, 2004)
29 Prince at 484
30 CCCP s. 1281.9, subd. (a)(1); emphasis added
31 Prince at 484
acting as an arbitrator in future insurance dispute resolution proceedings\textsuperscript{32}. The court decided that the post-1997 revisions to the CAA only allow an award to be vacated where an arbitrator has failed to disclose a ground for disqualification, not where he should have (but did not) disqualify himself\textsuperscript{33}.

2.3 The ‘Sunkist Distinction’

Perhaps the most interesting feature of America’s dualist arbitration law is that, in contrast to most national laws and institutional rules\textsuperscript{34}, in domestic proceedings US courts distinguish between the level of impartiality required of party-appointed arbitrators and ‘neutral’ Chairmen\textsuperscript{35}. The \textit{Prince} case shows how this approach guides state courts\textsuperscript{36}; the party arbitrator distinction first received judicial approval in \textit{Cia de Navagacion Omsil SA v Hugo Neo Corp}, where the court acknowledged the status of party-appointed arbitrators as ‘an amalgam of judge and advocate’\textsuperscript{37}. Not all circuits agree with the \textit{Sunkist} approach, and it is only taken in challenges brought under state law, meaning it will only be available to courts reviewing arbitrator conduct in domestic arbitral proceedings and will not apply to inter-state and international matters governed by the FAA\textsuperscript{38}. The words ‘or either of them’ in FAA s.10 make it clear that the same level of impartiality and independence is expected of every member of the tribunal under Federal arbitration law\textsuperscript{39}.

The Code of Ethics for Arbitrators in Commercial Disputes, jointly adopted by the AAA and the American Bar Association in 1977, confirmed the reasoning of the New York court in \textit{Hugo Neo}. In sync with the IBA, in 2004 the AAA/ABA published a new version of the 1977 Code of Ethics; the 2004 revision of the AAA/ABA Code of Ethics was recently treated as persuasive by the Ninth Circuit Court of Appeals in \textit{New Regency Productions Inc., v Nippon}

\textsuperscript{32} The Court identified two other facts as pertinent. The earthquake that gave rise to the claim created the need for tens of thousands of appraisals, making it unrealistic that a qualified appraiser for an earthquake-related case would have no ties to the insurance company that was party to the proceedings. Secondly, Twaroski had worked as an appraiser both \textit{for} and \textit{against} the CFPA.

\textsuperscript{33} \textit{Prince} at 484

\textsuperscript{34} including UNCITRAL, ICC, IBA, \textit{et al}

\textsuperscript{35} Above note 4, p.628

\textsuperscript{36} \textit{Prince} at 484

\textsuperscript{37} \textit{Cia de Navagacion Omsil SA v Hugo Neo Corp.}, 359 F. Supp. 898 (S.D.N.Y. 1956)


\textsuperscript{39} Section 10 of the FAA sets forth the grounds for annulment of a domestic award. These grounds include ‘evident partiality ... in the arbitrators, or either of them’
Herald Films, Inc\textsuperscript{40}. The Tenth Canon of the 2004 AAA/ABA Code exempts party-appointed arbitrators from certain rules of conduct prescribed under other Canons. Under Canon X of the AAA/ABA Code, a party-appointed arbitrator is not expected to be neutral and, unless the parties or the rules applicable to the arbitration provide otherwise, is not obliged to comply with the same standards as the third or ‘neutral’ arbitrator. Under Canon X, the party-appointed arbitrator is freed from the general duty of impartiality imposed by Canon V except that the party-arbitrator is allowed to be predisposed towards the party which appointed him\textsuperscript{41}; provided the arbitrator has put the other party on notice of his intention to do so, he may communicate with his appointing party about the case\textsuperscript{42}. At all times, however, the party-arbitrator is bound to act with fairness, integrity and in good faith, and may not do anything to harass witnesses or delay the proceedings\textsuperscript{43}. The rules of the leading international arbitral institutions reject this Canon of the AAA/ABA Code of Ethics\textsuperscript{44}. The 1997 revision of the AAA International Arbitration Rules, which removed the ‘non-neutral arbitrators’ option in international arbitral proceedings, reflects this institutional disapproval. In Sunkist Soft Drinks Inc. v Sunkist Growers, Inc., the Eleventh Circuit Court of Appeals accepted that a party-appointed arbitrator ‘may be predisposed or sympathetic’ to the position of the party that appointed them\textsuperscript{45}. The AAA domestic rules only seem to require the chairperson to be neutral\textsuperscript{46}; in a three member tribunal convened under state law, with two party-appointed arbitrators and a neutral third, only the chair will be held to the Commonwealth Coatings standard. This is not an absolute rule, and the parties may agree that the same standard apply to both party arbitrators and their chairman. There is authority for a similar approach in Swiss arbitration law\textsuperscript{47}, and the laws of certain Arab states also recognise a Sunkist-type distinction\textsuperscript{48}. As will observed in Chapter 7, it is apparent from the challenge decision in

\begin{itemize}
\item No.05-55224 DC No.CV-04-09951-AHM (Opinion, September 2007)
\item AAA/ABA Code of Ethics Canon X, Item E
\item AAA/ABA Code of Ethics Canon X, Item C(2)
\item AAA/ABA Code of Ethics Canon X, Item A(1)
\item See for example Article 1 of the IBA Rules; for the ICC: Final Report on the Status of the Arbitrator, ICC Bulletin, Vol. 7, No. 1 (1996) at p.27; in Belgium see CEPANI Rules Articles 3-6
\item Sunkist Soft Drinks Inc. v Sunkist Growers, Inc., 10 F.3d 753 (11\textsuperscript{th} Cir. 1993)
\item Koch, C., ‘Standards and Procedures for Disqualifying Arbitrators’ (2003) 20 J Int. Arb 4 at 342, where the learned author observes (at note 29) that AAA Rule 15 only uses the word ‘neutral’ in connection with the chairperson
\item Something like the Sunkist distinction is recognised by the courts of the United Arab Emirates, for example.
\end{itemize}
Amco Asia that ICSID jurisprudence also accepts a slightly lower standard of independence for party appointed arbitrators.\textsuperscript{49}

The merits of the Sunkist distinction continue to be debated amongst members of the ICA community. It is sometimes said that the judicial practice of holding party arbitrators to a slightly lower standard of impartiality and independence is better accepted in the Common Law world than it is in the Civil.\textsuperscript{50} This is a view bred from observation of the American system: the truth is that today the courts of most Common Law states (including England) do not accept the Sunkist distinction. Undeniably, however, amongst ICA lawyers there is a practice of appointing people who you know will like your client’s case, and this practice is by no means limited to the United States. Recently, an Australian lawyer gave a good example:

We had a construction dispute in Asia recently. We wanted to go against the respondent’s Japanese parent company, which was a non-signatory to the build contract containing the arbitration clause. We decided that arguing that the parent was bound under the Group of Companies Doctrine was our best bet of dragging them in, so we appointed a Swiss arbitrator who we knew was open to our argument.\textsuperscript{51}

In such a situation, the appointing lawyers and the arbitrator know exactly what they are doing: the lawyers had the whole thing planned; and, certainly by the time he hears their argument on jurisdiction, the arbitrator will know why he was appointed, and he will react accordingly. In a three-member party-made tribunal, some predisposition is inevitable. In the UK, Martin Hunter stepped into the realm of the ‘unspoken’ when he described how he appoints party arbitrators:

what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition toward my client, but with the minimum appearance of bias.\textsuperscript{52}

\textsuperscript{49} Amco Asia v Indonesia, ICSID Case ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (24 June 1982), unreported, p.7
\textsuperscript{50} El-Kosheri, M., Youssef, K., ‘The Independence of International Arbitrators: An Arbitrator’s Perspective’, ICC Bulletin 2007 (Special Supplement), p.49
\textsuperscript{51} Private conversation between the writer and Mr Gordon Smith, Special Counsel, Allens Arthur Robinson, Perth, 18 March 2009
\textsuperscript{52} Hunter, M., (1987) Arbitration at 222-3
Jacques Werner has described the party-arbitrator as ‘a friend, who must be independent enough to award against the party who appointed him should the merits of the case warrant it, but who will ensure that all the arguments of his party get a thorough and fair hearing’\(^{53}\). At Columbia University, Professor Hans Smit teaches his students that the only consideration for a lawyer appointing a party-arbitrator is how sympathetic they are to your client’s case\(^{54}\). But it can go too far, and the party-arbitrator can become like an advocate\(^{55}\). This is bad for arbitration, but as a risk it is kept in check by the Smithian self-interest of the parties: Craig, Park and Paulsson have made the point that the use of biased, party-appointed arbitrators is counter-productive because, from the perspective of the other arbitrators, the presence of an ‘arbitrator advocate’ on the panel discredits the case of the party that appointed them\(^{56}\). Custom, therefore, steps in at the extreme, and so should the law, \textit{but not before}. The \textit{Sunkist} distinction between party appointed and ‘neutral’ arbitrators is eminently sensible, and reflects ‘the prevailing thinking…that a balance should be sought between the ideal of independence and the realities of the world of arbitration’\(^{57}\); \textit{Sunkist} simply acknowledges what is already accepted in practice: there is a difference between positive bias and general sympathy for the party that appointed you\(^{58}\). The writer is not saying that party arbitrators should be immune from bias challenges; the writer is saying only that party arbitrators are not by custom, and should not be by law, held to the ‘absolute’ standard of impartiality and independence posited by \textit{Sussex Justices}. In Chapter 8, the writer will tender a compromise: \textit{Gough} for party arbitrators; \textit{Porter v Magill} for ‘neutral’ chairs. To impose the same standard on all members of the tribunal is against logic and reason. In the writer’s opinion, courts that flatly deny the \textit{Sunkist} distinction deny the existence of a custom that is both legitimate and well settled in ICA. This suggests they are either out of their depth or in denial.

\(^{55}\) Above note 50, p.49
\(^{57}\) Above note 50, p.49
3. Federal arbitration law

United States arbitration law is principally derived from the Federal Arbitration Act\textsuperscript{59}. Boston Professor William Park recently described the FAA as ‘a statute of ancient vintage that might be called either venerable or antiquated depending your perspective’\textsuperscript{60}. The core of the FAA (being the provisions now contained in Chapter 1) was adopted by US Congress in 1925; the New York Convention was implemented in 1970 as FAA Chapter 2, and the Panama Convention five years later as Chapter 3. Congress added two new sections in 1988, concerning the Act of State Doctrine and appeals against decisions on arbitration agreements respectively. The FAA long predates the UNCITRAL Model Law, and the federal republic of the United States is not a Model Law seat \textit{per se}. The United States is, however, a very well developed arbitral jurisdiction: US laws on ICA have been harmonised with international practice (including practice as framed by the Model Law) by Supreme Court action in the mid 1980’s\textsuperscript{61}. As a result, US federal common law is the source of much of the modern content of American arbitration law, including the requirement that arbitrators disclose circumstances likely to affect their impartiality or independence. But recent experience shows that this body of case law is difficult to use: although the three most recent bias cases (being \textit{Positive Software}, \textit{AIMCOR} and \textit{New Regency}) confirm the federal common law rule of disclosure, they diverge in ways which ‘significantly impair the ability of arbitrators to understand their disclosure and investigation responsibilities’\textsuperscript{62}.

Broadly speaking, Model Law standards of impartiality, independence and disclosure are recognised in US federal law. Section 10(a)(2) of the FAA allows for arbitral awards to be set aside where there was ‘evident partiality or corruption in the arbitrators’\textsuperscript{63}. In the context of this study, the most important difference between the UNCITRAL Model Law and US federal arbitration law is that the FAA makes no allowance for the mid-proceeding bias challenges or applications for the removal of arbitrators: in an international arbitration seated in the USA, if a party suspects bias they must wait for the award before they can make their challenge in form of a motion for \textit{vacatur}.

\textsuperscript{59} 9 U.S.C.
\textsuperscript{60} Park, W. W., ‘Arbitral Jurisdiction in the United States: Who Decides What?’ [2008] Int. ALR 11 at p.33
\textsuperscript{62} Kantor, M., ‘Arbitrator Disclosure: An Active But Unsettled Year’ [2008] Int ALR 11 at 21
\textsuperscript{63} FAA s.10(a)(2)
3.1 The ‘Vacatur Only’ Rule

US courts have consistently held that, under the FAA, vacatur is the only remedy for arbitrator bias or a failure to disclose\(^\text{64}\). As Louis Epstein has observed, this ‘vacatur only’ rule would function satisfactorily if the FAA did not require that a party must assert an objection to avoid waiving it\(^\text{65}\): the threat of challenge becomes a Sword of Damocles, dangling over the heads of the arbitrators for the remainder of the proceeding. This, of course, damages the arbitral process. Consciously or subconsciously, the arbitrators may become more sympathetic to the aggrieved party’s case out of a desire to avoid the challenge process that will follow if they award against them; and if an award is made and then set aside for bias, the parties will have significant costs thrown away. The counter argument is that ‘vacatur only’ minimises judicial intervention, and prevents obstruction of the arbitral process by barring the parties from taking challenges to state courts. US courts have taken this side: in *Insurance Co. of North America v Pennant Insurance Co* the court said that allowing challenges mid-proceeding ‘could have the disadvantage of enmeshing district courts in endless peripheral litigation and ultimately vitiate the very purpose for which arbitration was created’\(^\text{66}\). Whilst the writer agrees that challenges are bad for arbitration – indeed, this is the point of this thesis – the plain fact is that challenges *do* occur; forcing the parties to wait for the award is Ostrich policy: it prefers the risks of procedural irregularity and the duplication of costs to the reality of bias challenges. In the writer’s view, a better way would be for the FAA to adopt a modern approach, along the lines of the Model Law, and allow mid-proceeding challenges; US courts could then maintain the relatively strict ‘evident partiality’ tests developed since *Commonwealth Coatings*. This combination of statute and common law would do more to limit peripheral litigation than the current system: if the lawyers know that challenges have low prospects of success when they get to court, logic dictates that they will try them less. In Chapter 8, the writer will reason this proposition out.

Chapter 2 of the FAA governs the enforcement and recognition of awards rendered by tribunals sitting outside the US, where challenges may (as a general rule) be launched mid-

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\(^{65}\) Epstein, L., Arbitrator Independence and Bias: The View of a Corporate In-House Counsel’ *ICC Bulletin 2007* (Special Supplement), p.64

proceeding. At US federal common law, bias is a ground for non-recognition of foreign arbitral awards under both the compositional irregularity (Art V(1)(d)) and public policy (Art V(2)(b)) exceptions contained in the New York and Inter-American enforcement conventions. It is settled that the due process guarantee, and the case law that has developed around it, extends to arbitral tribunals. The writer has, however, found that commentators disagree as to whether the US law of arbitrator bias is closer to that of England or Europe: on the one hand, in 2003, Lew, Mistelis and Kroll listed the United States as a jurisdiction where an equivalent of the ‘real danger’ test is in force; on the other hand, in his 2004 treatise on procedural law in ICA, Professor Petrochilos seems to take the view that ‘United States law is moving in the opposite direction [to England post-1996] to approach the standard prevailing in Europe’. This divergence in opinion is attributable to a lack of clarity in US case law: there is only one Supreme Court authority on arbitrator bias, and undesirable variation in circuit court readings of the controlling ratio. Key components of the test for bias remain unclear. Case law provides a confusing prognosis, for example, on whether the judge-arbitrator analogy is alive in the United States: there is authority for the proposition that standards equal to, higher, and even lower than those applicable to state court judges bind arbitrators sitting in the US. The position is unclear, but it seems from the obiter of Justice White in Commonwealth Coatings that a slightly lower standard is applicable to arbitrators. This was the conclusion reached by the Second Circuit Court of Appeals in Morelite Construction, where the court read Commonwealth Coatings as binding authority for the proposition that ‘the standards for disqualification of arbitrators [are] less stringent that those for federal judges’. But, as the cases surveyed below demonstrate, other US appeals courts have disagreed with the Second Circuit in Morelite. What is clear is that US courts will

69 Above note 5, p.139
70 Commonwealth Coatings Corp v Continental Casualty Co. 393 US 145 (1968) where the Supreme Court commented in obiter ‘we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the facts and are not subject to appellate review’
71 Pitta v Hotel Association of New York City, Inc.,806 F.2d 419, 423 (2d. Cir. 1986)
72 Commonwealth Coatings per White J at 340 where His Honour commented in obiter ‘the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function’; see also Morelite Construction Corp v NYC District Council Carpenter’s Benefit Funds, 748 F.2d 79 (2d Cir. 1984). In Andros Compania Maritima v Marc Rich & Co., 579 F.2d 691 (2d Cir. 1978) the Court of Appeals concluded that ‘the Court [in Commonwealth Coatings] did not decide that the standards of judicial decorum apply equally to arbitrators’. See also Merit Insurance Co v Leatherby Insurance Co., 714 F.2d 673 (7th Cir.1983), cert. denied, U.S. 104 S.Ct. 529, 78 L.Ed.2d 711 (1983)
73 Morelite Construction at 83, emphasis added
vacate awards rendered by decision makers with an actionable pecuniary or non-pecuniary interest in the cause – the clearest basis for ‘evident partiality’ is a material and undisclosed financial interest in the outcome of the proceedings. As the record reveals, apparent bias challenges have proven more ‘troublesome’ for US courts.

**Commonwealth Coatings (1968)**

The sole and controlling Supreme Court decision on arbitrator bias is *Commonwealth Coatings Corp v Continental Casualty Co*. This matter involved an undisclosed business relationship between the Chairman (the ‘neutral arbitrator’, the use American parlance) of the arbitral tribunal and a party. The material facts of the matter were that, prior to the arbitration, the Chairman (a consulting engineer) consulted one of the parties in relation to project the subject of the dispute. The Chairman’s total fees as consulting engineer were $12,000; the Chairman did not disclose his prior relationship with the party. The three arbitrators rendered a unanimous award in favour of the party the Chairman had consulted, and it was not until after the award that the losing party became aware of this. Only the failure to disclose was pleaded; actual bias was not argued in the action against the award. The Supreme Court set aside the award on the basis that the FAA section 10(a) requirement of impartiality had not been met.

### 3.2 Struggling with the ratio in Commonwealth Coatings

Appeals courts have struggled to arrive at a general standard for arbitrator bias from *Commonwealth Coatings*. The reason *Commonwealth Coatings* is a difficult judgment to apply is that the five judges who made up the majority reached their common conclusion on different grounds: this is why *Commonwealth Coatings* has been labeled a ‘plurality plus’ decision. Justice Black delivered the Supreme Court’s judgment. Black J stated the rule as being that ‘the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of bias’.

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74 Middlesex Mutual Insurance Co. v Levine, 675 F.2d 1197 (11th Cir. 1982), cited in Born, above note 4, p.872
75 Morelite Construction Corp per Kaufman J at para 10
77 Robertson, A.R., ‘The United States Court of Appeals for the Fifth Circuit holds that the 'Reasonable Impression of Bias’ standard is to be interpreted narrowly’ (2007) 11 VJ (2) 131 at 294
78 Commonwealth Coatings at 149
79 Commonwealth Coatings at 150
automatic disqualification was triggered by non-disclosure of a material dealing. Justice Black was joined by four of his brothers, but a fifth vote was required for majority.

Justice White ultimately agreed with Justice Black, but did so in the form of a concurring opinion (in which he was joined by Justice Marshall). Significantly, White J made further remarks, and these extra remarks have proven to be the most problematic aspect of the Commonwealth Coatings judgment. Justice White began his concurring opinion with the words ‘While I am glad to join my Brother Black’s opinion in this case, I desire to make these additional remarks’. White J went on in his opinion to say:

the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges…[arbitrators are not] automatically disqualified by a business relationship with the parties before them if [the parties] are unaware of the facts but the relationship is trivial

His Honour was careful to instruct arbitrators to err on the side of disclosure, seeing the question of triviality as a matter for the court rather than the arbitrator’s discretion. Justice White’s concurring opinion was based upon the finding that the arbitrator’s undisclosed relationship was not trivial: the fees rendered by the Chairman were a non de minimis sum, and the dealing with the party was accordingly objectionable. Over the last forty years, in applications for vacatur under the FAA, US federal courts have regularly been asked which member of the majority produced the ratio in Commonwealth Coatings: Black or White? The significance of this task lies in the fact that, whereas Justice Black’s expression of the automatic disqualification rule was not expressed as being subject to de minimis, Justice White’s opinion did account for mere trifles. Although lower courts usually defer to the opinion of Justice White, courts and commentators continue to lament the ‘disarray’ created by Commonwealth Coatings. A good example can be found in the Morelite Construction case, where the US Court of Appeals for the Second Circuit described the ratio in Commonwealth Coatings as one of ‘ongoing uncertainty’.

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80 Commonwealth Coatings at 150
81 Above note 62, at p.21
82 Morelite Construction per Kaufman J at para 10
Morelite Construction (1984)

The underlying dispute in this matter was between a builder and a union. Morelite applied to the District Court for orders disqualifying Arbitrator Campbell on the grounds that his father was the Vice-President of the United Brotherhood of Carpenters and Joiners of America, the international union of which the Claimant was a local chapter. Canella J denied the motion and the matter proceeded. In June of 1983 Campbell handed down an award in favour of the UBCJA. In September 1983 Morelite moved for vacatur pursuant to FAA section 10, again claiming that the position of Campbell’s father precluded Campbell from acting impartially as sole arbitrator. Despite admitting that he was ‘troubled by the relationship’ Canella J denied Morelite’s motion and granted the UBCJA’s cross-petition for confirmation of the award. In March of 1984 final judgment was entered in favour of the Benefit Fund and UBCJA. Morelite appealed.

Tellingly, the Court of Appeals for the Second Circuit began its judgment with the words ‘In deciding this appeal, we are once again called upon to address the elusive standards under which an arbitrator's award may be vacated pursuant to Section 10 [FAA]. After searching for the ratio in Commonwealth Coatings, and weighing the ‘competing interests inherent in the use of arbitration’, the Court of Appeals described the policy tension as follows:

If the standard of “appearance of bias” is too low for the invocation of Section 10, and “proof of actual bias” too high, with what are we left? Profoundly aware of the competing forces that have already been discussed, we hold that “evident partiality” within the meaning of [FAA] 9 USC. Sec. 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.

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83 Morelite Constructions entered into a collective bargaining agreement with The District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America (UBCJA), under which Morelite undertook to make contributions to the UBCJA Benefit Fund. The agreement provided for arbitration in the event of a dispute. In 1980 the Union audited Morelite’s books and discovered that contributions were unpaid. Arbitral proceedings were commenced by the UBCJA. Morelite unsuccessfully petitioned for a stay of arbitration. By order of the District Court the Trustees of the New York City District Council Carpenters Benefit Funds were joined as co-claimant in the arbitration. Mr Patrick M. Campbell Jr was appointed as sole arbitrator.

84 Morelite Construction per Kaufman J at para 1

85 Morelite Construction per Kaufman J at para 16

86 Morelite Construction per Kaufman J at para 19; emphasis added
Applying their common human experience, the Court of Appeals held that, even though there was no evidence of how close the arbitrator and his actually father were, or how close their views on the merits of the dispute were, they were bound by their ‘strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers’\(^87\). The judgment of the District Court was reversed and the award set aside\(^88\).

Other US appeal circuits have followed the Second Circuit in *Morelite Constructions* and used a ‘reasonable impression’ approximation of the rule of apparent bias\(^89\). Most recently in *Positive Software*\(^90\), the Court of Appeal for the Fifth Circuit concluded that the *ratio* in *Commonwealth Coatings* was to be found in the judgment of Justice White. The majority in *Positive Software* found that the standard that flows from the judgment of Justice White is that where non-disclosure occurs:

> an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceedings. The ‘reasonable impression of bias’ standard is thus to be interpreted practically rather than with the utmost rigor\(^91\)

It is clear, therefore, that some U.S courts have preferred a practical approach to the apparent bias of arbitrators. Policy considerations familiar to the reader have informed this approach.

### 3.3 US public policy

The *ratio* in *Commonwealth Coatings* has been described as a superior court ‘declaration of public policy’\(^92\). The force of the rule of automatic disqualification for non-disclosure seems to have waned in recent years, corresponding with the pro-enforcement shift in US public policy. Generally speaking, the pro-enforcement trend began in the late 1970’s. Apparent bias became more difficult to make out in an enforcement context as American judicial interpretations of the New York Convention Article V(2)(b) ‘public policy’ exception

\(^{87}\) *Morelite Construction* per Kaufman J at para 21

\(^{88}\) *Morelite Construction* per Kaufman J at para 23

\(^{89}\) *Sheet Metal Workers etc. v Kinney Air Conditioning Co.*, 756 F.2d 742, 745-46 (9th Cir. 1988)

\(^{90}\) *Positive Software Solutions, Inc v New Century Mortgage Corporation* 476 F.3d 278 (5th Cir. 2007) Cert.denied S.Ct., 2007 WL 1090443 (U.S.)

\(^{91}\) *Positive Software* at 283

hardened. In the landmark decision in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du. Papier*, the Court of Appeals for the Second Circuit made the US position clear when it held that foreign arbitral awards may only be denied enforcement where the same would violate the ‘most basic notions of morality and justice of the forum state’. The reason for this shift was that at this time US were becoming concerned with reciprocity under the New York and Inter-American arbitral awards enforcement conventions. In *International Produce* the Court voiced its concern that the public policy defence should not be too easily invoked ‘lest foreign courts frequently accept it as a defence to enforcement of arbitral awards rendered in the United States’. Ensuring the finality of arbitration as an international commercial dispute resolution mechanism was, it seems, a countervailing policy consideration for the Court of Appeals in *International Produce*. The enforcing Court in *International Produce* held that the appearance of bias was not enough to vacate the award. Increased international capital flows, and observations of the in-country benefits of the same, must also have played their part in the emergence of pro-enforcement policy in the United States. It remains to be seen whether these policy considerations will weather the storm of the Global Financial Crisis.

**Fertilizer Corp (1981)**

Where another state’s law has been chosen as *lex arbitri* and issues of procedural fairness arise, the ethical and professional standards of the *situs* will be taken into account by American courts as a result of the application of conflict of laws principles. For example, in *Fertilizer Corp*, Indian rules of impartiality and independence were considered. In 1976 an award was made against IDI. Fertilizer Corp of India (FCI) petitioned an Indian court for confirmation of the award, and IDI commenced for *vacatur* in another Indian court. FCI then filed for *exequatur* in the US District Court for the Southern District of Ohio under the New York Convention. The Ohio court exercised its discretion to stand the matter down pending determination of the action for *vacatur* in India. Amongst other objections (including non-

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93 The United States is also party to the Inter-American Convention, Article 5(2)(b) of which provides a public policy exception to recognition and enforcement.  
95 *International Produce Inc. v A/S Rosshavet*, 638 F.2d 548 (2d Cir. 1981)  
96 Above note 4, p.869; the background facts were that, in 1962, Fertilizer Corp (FCI) contracted with IDI for the design and construction of a nitro-phosphate fertilizer plant in India. A dispute arose over the daily output of the Bombay plant and the parties submitted to arbitration.
retroactivity of the New York Convention) ICI argued that the public policy of the United States would be offended by the enforcement of the award because it was rendered in circumstances of apparent bias. The arbitrator appointed by ICI had served as counsel for ICI in two previous matters and had failed to disclose this to the FCI. FCI submitted that this failure to disclose was fatal to the enforcement action, regardless of the fact that there was no actual bias against them. The Court held that the failure to disclose had not tainted the award because the lex arbitri of the arbitration did not require disclosure and, in any event, the three arbitrators were unanimous in their ruling against FCI.

Andros Compania (1978)

The record shows that Andros Compania is often cited as authority for the pragmatic, even tolerant approach to the independence and impartiality of arbitrators. The challenge in Andros Compania arose out of a disputed claim for demurrage under a charter party agreement. Marc Rich’s appointee, Captain George Stam, died before the proceedings commenced. Marc Rich appointed Jack Berg as his replacement party arbitrator. Manfred Arnold, manager of the Maritime Division of the National Bank of North America was selected by the party arbitrators as the chairman. Disclosure was given and the matter went ahead. An award was handed down in favour of Andros for US$109,028.

Andros petitioned the District Court for the Southern District of New York for orders of confirmation. Marc Rich countered with a motion for vacatur, arguing that full disclosure had not been given by Chairman Arnold. The affidavits in support alleged that Mr Arnold had failed to disclose the fact that he ‘had a close personal and professional relationship with Lloyd C. Nelson, one of the principals of Orion & Global, the firm which actually operates the vessel’. Lengthy affidavits of reply were filed. Brient J of the District Court denied the request for vacatur, confirmed the award and ordered costs against Marc Rich. Marc Rich appealed. The Court of Appeal for the Second Circuit was careful not to take a dogmatic approach to the application of the Commonwealth Coatings standard, preferring instead a

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97 India only became party to the NYC in 1961. The US ratified the NYC in 1970. ICI argued that because the arbitration agreement was made in 1961, eight years before the US became a party to the Convention. The Court dismissed this argument on the basis that, at the time the award was made, both the rendition state and the enforcing state were parties to the NYC

98 Marc Rich chartered the tanker to carry a cargo of crude oil from West Africa to two ports on the Peruvian coast. Marc Rich denied liability for the full amount of demurrage and the matter was referred to arbitration in accordance with the Society of Maritime Arbitrators Arbitration Rules (1974).
‘case-by-case’ approach to the evaluation of allegations of arbitrator bias.\textsuperscript{99} The Court dismissed the appeal, holding

it can fairly be concluded that the relationship between Arnold and Nelson was a professional one, growing out of their service as arbitrators. There was no "business relationship" in the ordinary sense between them or between their employers.\textsuperscript{100}

From the decision in \textit{Andros Compania} it can be gleaned that courts under the Second Circuit will treat the \textit{Commonwealth Coatings} standard as being subject to certain realities of commercial dispute resolution, including \textit{de minimis} professional engagements and prior dealings.\textsuperscript{101}

\textbf{Lucent Technologies (2003)}

The operation of the rules of disclosure and the \textit{Commonwealth Coatings} test for ‘evident partiality’ can be seen in the case of \textit{Lucent Techs. Inc. v. Tatung Co.} Lucent commenced arbitration against Tatung (a Taiwanese corporation) on its claim for unpaid royalties due under a patent license agreement.\textsuperscript{102} The disputes clause in the license agreement provided for AAA International rules arbitration with a three member tribunal. Lucent appointed J. David Luening and Tatung named Ed Fiorito; Leuning suggested Roger Smith as chair, and Fiorito agreed. Disclosure was given pursuant to Article 7(1) of the AAA International rules. Leuning disclosed that he had been retained as counsel by Lucent (through their lawyers Kirkland & Ellis) on unrelated matters between April 1998 and December 1999. Smith also disclosed that he was counsel for a firm that also did work for Lucent. Disclosure was made to the AAA, but it seems that Tatung never received the copy disclosure documents from the institution. They raised no objection and the matter proceeded.

After two years an award was made against Tatung in the sum of $12,551,613 (plus interest). Lucent petitioned in the Southern District of New York for confirmation of the award and Tatung sought orders of \textit{vacatur}. Tatung’s request for \textit{vacatur} pleaded as grounds the fact that the arbitrators Leuning and Smith had failed to disclose the fact that they had both

\textsuperscript{99} Andros Compania, cited in Born, above note 4, p.628
\textsuperscript{100} Andros Compania per Feinberg J at para 71
\textsuperscript{101} This was certainly the opinion of the majority of the Court of Appeal for the Fifth Circuit in Positive Software
\textsuperscript{102} Lucent Technologies Inc. v Tatung Co., Case No. 03-7741
separately been retained by Lucent as patent licensing specialists in the past, and that they owned a plane together between 1974 and 1990. Applying Commonwealth Coatings the District Court confirmed the award and denied the Tatung’s motion to vacate. Rakoff J described the application as ‘a classic example of a losing party seizing upon a pretext for invalidating the award’. His Honour held that nothing about the relationship between Leuning and Lucent ‘provides strong evidence of partiality by the arbitrator that would justify vacating the award’. Leuning’s co-ownership of a plane with the chairman was ‘too insubstantial’ to warrant setting aside. Tatung appealed.

The Court of Appeals for the Second Circuit affirmed the decision. The Court of Appeals held that Tatung’s failure to learn of an arbitrator’s prior relationship with Lucent did not require vacatur where the arbitrator had previously disclosed the relationship to the arbitral institution and the information was available to both parties. The Appellant was not entitled to assume that the arbitrator had not submitted a disclosure to the AAA and could have inquired about the disclosure at any time. The airplane ownership was distant in the past and de minimis. On the issue of previous associations, the Court of Appeal cited its decision in Morelite Construction where it commented in obiter that ‘specific [legal practice] areas tend to breed tightly knit professional communities. Key members are known to one another, and in fact may work with, or for, one another, from time to time’. The court referred to its 1981 decision in International Produce, where the court dismissed an application for vacatur based upon prior association challenge in a maritime arbitration. In International Produce the Second Circuit recognised that

arbitrators in important shipping arbitrations have typically participated in many prior maritime disputes, not only as arbitrators but also as parties and witnesses. They have therefore almost inevitably come into contact with a significant proportion of the relatively few lawyers who make up the New York admiralty bar.

The Court of Appeals took the view that patent licensing was a very specific area and connections and prior associations of the kind in the matter at hand were perfectly normal.

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103 Lucent Technologies at 405
104 Lucent Technologies at 405
105 Lucent Technologies at paragraph 22 of the judgment of Feinberg J
106 638 F.2d 548, 552 (2d Cir. 1981)
107 International Produce at 84
**Positive Software (2004)**

*Positive Software* suggests that the Fifth US Circuit Court of Appeals (the jurisdiction of which includes Texas) is now aligned with the six other US appeals circuits that have adopted a more stringent requirement than a mere ‘appearance of partiality’\(^{108}\). The arbitration in *Positive Software* also related to intellectual property rights: Positive Software claimed that New Century (and five others) infringed its patent in a piece of finance software called ‘LoanForce’. A total of $38 billion was claimed in damages. Positive Software and New Century submitted their dispute to arbitration under the AAA Rules in 2003. Consistent with institutional appointment procedure, the parties ranked the arbitrators on the list provided by the AAA; a sole arbitrator was appointed on this basis. The arbitrator notified the AAA and the parties that he had no past relationships with the parties or their lawyers.

The hearing was conducted and the sole arbitrator handed down an award in favour of New Century. Aggrieved by the ruling, Positive Software then investigated the sole arbitrator’s background and discovered that he had failed to disclose a previous relationship with counsel for New Century. The relevant relationship was professional: the arbitrator and the lawyer had been employed by two different firms that had both represented Intel Corporation in a complex patent litigation proceeding eight years earlier. Arbitrator and counsel never met, spoke, or appeared together in those proceedings. Intel Corporation was represented by seven different law firms in the proceedings. Arbitrator and counsel were two of approximately thirty five lawyers involved. The only aspect of the proceedings that linked the arbitrator to the lawyer was the fact that both of their names were on pleadings filed in the matter. Positive Software applied to the District Court for the Northern District of Texas for *vacatur*. The sole arbitrator’s failure to disclose was pleaded as evidence of his lack of impartiality.

The District Court held that the sole arbitrator’s failure to disclose his significant prior relationship with counsel for New Century had created an appearance of partiality that required *vacatur*\(^{109}\). New Century appealed this decision. A panel of the Fifth Circuit dismissed the appeal. The Fifth Circuit panel’s opinion was that the prior relationship ‘might

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\(^{109}\) *Positive Software* at 865
have conveyed an impression of possible partiality to a reasonable person'. Both courts construed the FAA s.10(a) expression ‘evident partiality’ broadly. Neither court found actual bias on the part of the sole arbitrator. It was the fact that the arbitrator had failed to disclose the prior association, and had by this failure created an impression of possible partiality, that motivated the Fifth Circuit to uphold the District Court’s vacatur. New Century petitioned for rehearing en banc. In rehearing the appeal the full court of the Fifth Circuit was required to answer two threshold questions of key importance to this chapter:

(1) Is the proper approach to the interpretation of the FAA section 10(a) expression ‘evident partiality’ narrow (per White J in *Commonwealth Coatings*) or broad (per Black J)?

(2) If the broad interpretation of FAA s.10(2) is proper, will the remedy of vacatur be appropriate where there is a mere appearance of bias caused by non-disclosure?

The court held 11-5 that the proper approach was to interpret FAA s.10(a) *narrowly*. The court followed the binding statement of the rule of disqualification for non-disclosure made by Justice White in *Commonwealth Coatings*. The full Fifth Circuit court held that ‘the Federal Arbitration Act does not mandate the extreme remedy of vacatur for non-disclosure of a trivial past association’. The court found that *de minimis* was a feature of the *ratio* in *Commonwealth Coatings*, commenting that Justice White’s opinion ‘fully envisioned upholding awards when arbitrators fail to disclose insubstantial relationships’. Following Justice White, the Fifth Circuit court found that the arbitrator’s relationship with counsel for New Century was trivial and the fact that it was not disclosed did not entitle Positive Software to vacatur. The majority noted that even if Justice White’s opinion was not the *ratio* – and the stricter position taken by Justice Black bound them instead – *Commonwealth Coatings* was distinguishable on the facts. That case involved a party-arbitrator relationship that was commercially significant and directly related to the project in dispute. The relationship *Positive Software* was, in contrast, ‘tangential, limited and stale’.

110 *Positive Software* at 495
111 It is prudent to simplify here: a broad approach to FAA s.10(a) makes the mere appearance of bias in an arbitrator grounds for vacatur; a narrow approach makes it harder to succeed in apparent bias. Justice White preferred the narrow approach in *Commonwealth Coatings*. Justice Black preferred the broad reading.
112 *Positive Software* at 278
113 *Positive Software* at 281
114 *Positive Software* at 285
The majority took into account a number of public policy grounds in deciding against a broad interpretation of ‘evident partiality’. Firstly, the majority expressed concern that a ‘mere appearance’ standard for *vacatur* (which would be consistent with a broad approach to FAA s.10(a)) would jeopardise the finality of arbitration, in so far as:

losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made. Expensive satellite litigation over nondisclosure of an arbitrator’s ‘complete and unexpurgated business biography’ will proliferate

Secondly, the majority observed that a broad approach to FAA s.10(a) would hold arbitrators to a higher ethical standard than United States judges. The court noted that ‘had the same relationship occurred between an Article III [federal] judge and the same lawyer, neither disclosure nor disqualification would have been forced or even suggested’. Finally the majority saw the ‘mere appearance’ reading of FAA s.10(a) as posing a threat to expertise.

Arbitration would lose the benefit of specialised knowledge, because the best lawyers and professionals, who normally have the longest list of potential connections to disclose, have no need to risk blemishes on their reputations from post-arbitration lawsuits attacking them as biased.

Public policy is a mountain with slippery slopes. The heads advanced by the majority are well conceived regardless of their possible formal weaknesses – there is no denying that, at least where crafty procedural lawyers are concerned, *success promotes attempts*. This is especially so where vast sums of money (and prospective legal fees) are involved. Although these policy grounds were put in support of a decision made on appeal against *vacatur* of a domestic award, they are equally valid for international matters. In fact, even before *Positive Software*, there was good authority for the proposition that American notions of due process should not be applied inflexibly where arbitration is concerned.

115 *Positive Software* at 285
116 *Positive Software* at 285
117 *Positive Software* at 286
**AIMCOR (2008)**

Applied Industrial Material Corp (AIMCOR) went to arbitration with Ovalar Makine Ticaret ve Sanayi, A.S. over a contractual dispute, with AIMCOR as claimant and Ovalar as respondent\(^{118}\). The three member tribunal was chaired by a Mr Fabrikant, CEO and President of Seacor, a large company with 50 offices worldwide. The hearings were split into liability and quantum; before the liability hearing began Fabrikant advised that he had no matters to disclose. Shortly after, in September 2003, the arbitrators were told that a third party (Oxbow) had taken over AIMCOR. Again, Fabrikant advised he had no matters to disclose. Just before the liability phase was completed in April 2005, Fabrikant advised that it had come to his attention that the St Louis office of Seacor had done a deal with Oxbow for the carriage of petroleum coke, but that he had not been involved in the transaction. No party objected, and the decision on liability was made 2:1 in favour of AIMCOR. Frabikant’s vote was instrumental in the award on liability. Before the quantum hearing began, Ovalar engaged new counsel. Counsel requested that Fabrikant withdraw, but the Chairman refused. Counsel for the respondent then conducted an investigation of the relationship between AIMCOR’s new parent and the Chairman’s company. It turned out that Seacor had been carrying coke for Oxbow since 2004, and had earned $275,000 for its services. On the basis of this undisclosed commercial relationship, Ovalar moved for *vacatur* in the Federal District Court. The matter went on appeal to the Court of Appeals for the Second Circuit.

The Second Circuit Court of Appeals confirmed their 1984 position in *Morelite Construction*, holding that the proper standard for ‘evident partiality’ under the FAA is ‘where a reasonable person would have to conclude that an arbitrator was partial to one party’\(^{119}\); significantly, the Court of Appeals also distinguished the FAA standard from the standard applicable to US federal judges\(^{120}\). As Mark Kantor has noted, the standard applied in AIMCOR is higher than the bars set by Article 12(2) of the Model Law and General Standard 2(c) of the IBA Guidelines\(^{121}\); in the writer’s opinion, the *Morelite/AIMCOR* test comes very close to a requirement that actual bias be shown before the award will be set aside. The writer sees high post-award standard as a function of the ‘*Vacatur Only*’ rule. On the question of disclosure,

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\(^{118}\) *Applied Industrial Material Corp (AIMCOR) v Ovalar Makine Ticaret ve Sanayi, A.S.*, 492 F.3d 132 (2d. cir 2007)

\(^{119}\) *AIMCOR* at para 137-8, emphasis added

\(^{120}\) *AIMCOR* at para 138

\(^{121}\) Above note 62, at p.25
the Court of Appeals held that under *Commonwealth Coatings* an arbitrator is bound to disclose and investigate potential conflicts of interest, and that both obligations are ongoing. The Court framed the duty to investigate in the following terms:

Where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict [which may reveal information that must be disclosed under *Commonwealth Coatings*] or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.

*AIMCOR* is the first Second Circuit decision to address the scope of the duty to investigate. The majority were careful to add that they were not creating a free-standing duty to investigate, and that mere failure to investigate will not be enough on its own to warrant *vacatur*; if the arbitrator fails to investigate a potential conflict and then fails to disclose, these failures will be indicative of ‘evident partiality’. Because both duties were found to have been breached by Fabrikant, and the amount made by Seacor in its deals with Oxbow was not *de minimis*, the Court of Appeals ordered that the award be set aside.

*National Shipping (1992)*

In *National Shipping* the court had occasion to consider the applicability of American bias standards to foreign arbitral awards, finding relevant considerations to include the law of the seat, the institutional rules chosen by the parties, custom and curial law. The *National Shipping* matter was submitted to arbitration before a three member tribunal. National appointed Manfred W. Arnold, Transamerican appointed Donald J. Bilski. Arnold and Bilski selected John P. Palmer as Chairman. The proceedings were conducted and an award was handed down in favour of Transamerican. National then moved to vacate the award against it, alleging that Arbitrator Bilski lacked impartiality.

According to National, during the arbitration Bilski engaged counsel for Transamerican (Richard E. Repetto) to represent him in an unrelated arbitration matter, a fact which Bilski did not disclose. In his disclosure statement Bilski declared that ‘with regard to the law firms

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122 *AIMCOR* at para 138
123 *AIMCOR* at para 138-9
124 *National Shipping co. of Saudi Arabia v Transamerican Shipping Corp.*, 1992 U.S. Dist. Lexis 18725 (S.D.N.Y. 1992), cited in Born, above note 4, p. 869; the dispute in *National Shipping* related to a claim brought under a contract for the carriage of rice from Texas to Saudi Arabia. There was a primary claim for outstanding freight and a counter claim for losses incurred by shortfall in quantity.
involved, both are well known to me...[the Respondent’s lawyers] are on my company’s approved list and I do send them legal work on a regular basis. National argued that this did not constitute adequate disclosure under the FAA. Repetto asserted in an affidavit that he did not act as Bilski’s attorney in the later arbitration but merely drafted a letter to the parties involved in his capacity as Chairman of the Committee on Maritime Arbitration of the Maritime Law Association. Repetto stressed that he received no compensation and took no further action in connection with that matter.

The District Court relied upon Justice White’s opinion in Commonwealth Coatings. The court rejected a requirement of a showing of ‘outright chicanery’ or proof of actual bias, preferring instead an assessment of the ‘totality of the circumstances in deciding the existence of evident partiality’. The procedural fact of non-disclosure was not enough. Edelstein J took the view that the actual relationship must be assessed before a finding of evident partiality can be made. His Honour found relevant considerations to be the local commercial practices of the seat of arbitration, the arbitrator’s financial interest in the arbitration, the nature of the relationship between arbitrator and the allegedly favoured party, and whether the allegedly improper relationship existed during the arbitration. Using these criteria the court held that Bilski’s connection to the later arbitration proceeding did not warrant vacatur. Edelstein J found that while there was a professional relationship between Bilski and Repetto, there was no attorney-client relationship between them and therefore no business relationship that could lead to Bilski having a pecuniary interest in the second matter. The court in National Shipping took notice of the fact that maritime law is a small, specialised field where ‘practitioners have frequent professional contact’. The court held that common membership of a Bar Association, or the arbitrator and the attorney having some other non-pecuniary professional relationship, does not justify a finding of evident partiality under FAA s.10.

ANR Coal (1999)

In ANR Coal, the Court of Appeals for the Fourth Circuit surveyed US case law and concluded that the applicant needed to show that there was a real risk of a lack of impartiality.

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125 National Shipping, cited in Born, above note 4, p.869
126 National Shipping per Edelstein J at para 12
127 National Shipping per Edelstein J at FN3
128 National Shipping per Edelstein J at para 12
129 National Shipping per Edelstein J at para 16
130 National Shipping per Edelstein J at para 16
on the part of the arbitrator. This matter arose out of a contract for the purchase of coal between ANR Coal and Cogentrix. The disputes clause provided AAA Rules arbitration before a three member tribunal. The parties made their appointments, but the party arbitrators were initially unable to agree upon a Chair. The AAA struck several names from the list based upon their objections. One of the replacements listed was Mr Wilburn Brewer, partner at a South Carolina law firm that had represented Carolina Power in electrocution cases. ANR objected to Brewer’s placement on the list for this reason. The AAA rejected this challenge. ANR did not use any of its preemptory strikes on Brewer, and he was eventually selected because he received the highest average ranking. ANR filed no further challenges to Brewer because, it later said, ‘given there was no assurance the challenge would be granted, a failed challenge could potentially offend the ‘neutral’ arbitrator as a challenge to his integrity’. The hearing was conducted and an award was handed down against ANR (with Brewer in the majority). After the award was rendered ANR discovered that Brewer’s firm had represented Carolina Power not only in electrocution cases but also in cases involving the right to deliver electric service. ANR petitioned for vacatur on the basis of Brewer’s alleged lack of impartiality. The District Court vacated the award and Cogentrix appealed.

The Court of Appeals for the Fourth Circuit overturned the judgment. The Court of Appeals dismissed ANR’s first contention that Brewer’s failure to fully disclose his relationship with Cogentrix itself warranted vacatur of the arbitral award. ANR’s contentions relied heavily on Commonwealth Coatings, but the court in ANR Coal felt that ANR’s arguments were based on misinterpretation of that authority. The court viewed the nature of the undisclosed relationship between the parties in Commonwealth Coatings as imperative to the outcome, not the mere fact that said relationship was undisclosed. In fact, the court viewed the fact that the arbitrator had not disclosed a ‘repeated and significant’ relationship that existed ‘over a period of four of five years’ as the central material fact in Commonwealth Coatings. The Court of Appeals for the Fourth Circuit cited the Supreme Court dicta that an arbitrator does not have a duty to reveal ‘all information regarding his past or present relations with a

132 As a result of renegotiations with its end purchaser (Carolina Power) Cogentrix sought to decrease the volume purchased from ANR. ANR deemed this to be a violation of the terms of their sales contract and initiated arbitral proceedings.
133 ANR Coal per Motz J, at para 8
134 ANR Coal per Motz J, at para 19
135 ANR Coal at para 19
party"\textsuperscript{136}. In this sense the Fourth Circuit Court of Appeals displayed a clear preference for the narrow interpretation of impartiality as set forth by Justice White in \textit{Commonwealth Coatings}.

The Fourth Circuit Court of Appeals also rejected ANR’s contention that Brewer’s failure to disclose the extent of his relationship to Cogentrix was evidence of his lacking impartiality requiring \textit{vacatur}. In dismissing this head of argument the Court of Appeals relied on its 1995 decision in \textit{Consolidated Coal}. In \textit{Consolidated Coal} the Court of Appeals for the Fourth Circuit used the following four-factor test to determine whether an arbitrator had demonstrated evident partiality under the FAA:

\begin{enumerate}
\item the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding;
\item the directness of the relationship between the arbitrator and the party he is alleged to favour;
\item the connection of that relationship to the arbitration; and
\item the proximity in time between the relationship and the arbitration proceeding”\textsuperscript{137}.
\end{enumerate}

The Court of Appeals added an objective standard for evaluating partiality, phrased as a question of whether ‘a reasonable person could assume the arbitrator had improper motives’\textsuperscript{138}. The court held that the relationship between Brewer and Cogentrix was not direct or personal enough to warrant a finding that Brewer lacked impartiality. The court found that there was no evidence that an unfavourable finding in the arbitral proceeding in question would have lead to costs being passed on to Brewer’s client Carolina Power. The Court of Appeals looked deeper into the circumstances of the matter as a whole, concluding that ANR had not met its ‘heavy’ burden of meeting the ‘onerous’ standard of proof set forth in the controlling cases\textsuperscript{139}. Further, the Court of Appeals found that all four parts of the \textit{Consolidation Coal} test must be equally weighed; the mere satisfaction of one factor - such as proximity in time - will not be enough on its own to demonstrate a lack of impartiality.

\textsuperscript{136} \textit{ANR Coal} at para 19
\textsuperscript{137} \textit{Consolidated Coal Co. v Local 1643, United Mine Workers of America}, 48 F. 3d 125, 130(4th Cir. 1995) per Russell J
\textsuperscript{138} \textit{ANR Coal} per Motz, J, at para 28
\textsuperscript{139} \textit{ANR Coal} per Motz, J, at para 28
ANR Coal therefore affirms the preference of the Fourth Circuit for the narrow interpretation of ‘evident partiality’ employed by Justice White in Commonwealth Coatings.

Schmitz v Zilveti (1976)

US courts have proven themselves reluctant to vacate awards on the basis of prior firm representation of a party. As a general rule the previous association must be known to the arbitrator in order for their failure to disclose it to be actionable - this general proposition is derived from the 1976 Anaconda case\(^{140}\). The challenge in Schmitz v Zilveti was quite different. It arose out of an arbitration conducted under the National Association of Securities Dealers (NASD) Code of Arbitration Procedure (1990). Section 23(a) of the NASD Code requires that arbitrators must disclose (1) any direct or indirect financial or personal interest in the outcome, (2) any financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias; and (3) any personal relationships with any party, its counsel, or witnesses. NASD Code s. 23(b) provides that ‘persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in [section 23(a)]\(^{141}\).

The challenged chairman (Mr John Conrad) was a partner of a law firm that had represented the parent company of Zilveti, Meris, and Prudential-Bache Securities in at least nineteen cases over a period of 35 years. The most recent representation ended approximately 21 months before the arbitration at hand commenced. The District Court applied Commonwealth Coatings and the general rule of knowledge to conclude that Conrad was not aware of the conflict of interest and had no duty to disclose it. The Court of Appeals for the Ninth Circuit disagreed with the lower court. The Court of Appeals stated the law as being that evident partiality will only be made out where (1) an actual conflict of interest exists, or (2) the arbitrator knows of but fails to disclose information which would lead a reasonable person to believe that a potential conflict exists. In the instant matter the Court of Appeal addressed the exception to the general Anaconda rule of knowledge as follows:

Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality. As Appellants argue, an arbitrator may have a


\(^{141}\) National Association of Securities Dealers (NASD) Code of Arbitration Procedure (1990), s.23(b)
duty to investigate independent of its Commonwealth Coatings duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under Commonwealth Coatings. Conrad was under a duty to investigate by virtue of NASD Code s. 23(b). He failed to discharge this duty and, although he lacked actual knowledge of the conflict he had constructive knowledge sufficient for his non-disclosure to cause a reasonable impression of partiality under Commonwealth Coatings. The Court of Appeals set aside the award.

The ratio in Schmitz v Zilveti is consistent with General Standard 7(c) of the IBA Guidelines – it creates a common law constructive knowledge exception to the more general actual knowledge rule laid down in Anaconda. The Anaconda requirement of actual knowledge is most significant where large law firms and corporate clients are involved. Whilst the constructive knowledge exception to Anaconda is only binding on courts under the Ninth Circuit, because this circuit is the largest (with appellate jurisdiction over Western US states of Arizona, Nevada, Idaho, Montana, Washington state, Oregon, California, Alaska, Hawaii and the Pacific territories) the availability of the rule in Schmitz v Zilveti is relatively wide. In other circuits, however, the rule in Anaconda stands: barring any special duty to investigate, there will be no order of vacatur unless the arbitrator actually knew of the association when he or she entered onto the reference.

New Regency (2007)
New Regency Productions and Nippon Herald Films entered into an agreement for Nippon Herald to distribute a number of films in Japan. In 2003 a dispute arose, with Nippon Herald alleging breach of the distribution agreement. The matter went to arbitration under the arbitration rules of the American Film Marketing Association (AFMA), and by the list procedure specified in the AFMA Rules, the parties jointly selected attorney William J Immerman as their sole arbitrator. In July 2004, Immerman rendered an award in favour of New Regency, the Respondent in the arbitration. The arbitration concluded in December 2004. When New Regency sought confirmation of the award, Nippon Herald countered with a motion for vacatur. The basis of the motion was that Immerman failed to disclose that,

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142 Schmitz v Zilveti, 30 F.3d 1043 (9th Cir. 1994) per Wiggins J at para 23
143 Schmitz v Zilveti per Wiggins J at para 26
144 Anaconda at 109-12
145 New Regency Productions, Inc. v Nippon Herald Films, Inc 501 F.3d 1101 (9th Cir. 2007)
during the proceedings, he took a position as ‘Senior Executive Vice President and Chief Administrative Officer’ at a company (Yari Film Group) that was negotiating a finance and co-production agreement with New Regency for a film called ‘The Night Watchman’. The film was a significant project for Yari Group and New Regency – Keanu Reeves was signed in the lead role. The court accepted that Immerman had no knowledge of the deal when he gave disclosure at the beginning of the arbitration, or at any subsequent material time.

The Ninth Circuit Court of Appeals found that, via his position at Yari Group, Immerman had a substantial interest in a firm which was doing more than trivial business with a party to the dispute; the rule in Commonwealth Coatings was therefore triggered. The Court of Appeals noted that Schmitz v Zilveti functioned to exclude ‘actual knowledge’ as an element of ‘evident partiality’: it was no excuse that Immerman did not actually know of the Night Watchman deal – under the ‘constructive knowledge’ exception expressed in Schmitz v Zilveti, Immerman was deemed to have known; Immerman had breached both his AFMA Rules duty to investigate potential conflicts, and his federal common law duty to disclose.

What motivated the court was the fact that Immerman had not disclosed his new employment at Yari Group - considering AIMCOR the Ninth Circuit Court of Appeals concluded that if Immerman had given disclosure, the parties would reasonably have expected him to check for conflicts between them and his new employer. For these reasons, the Court of Appeals set aside the award.

Where other federal appeals circuits have approved the narrow approach to ‘evident partiality’ per Justice White in Commonwealth Coatings, it is apparent that the Ninth Circuit has gone in a different direction: in New Regency, the Ninth Circuit read the FAA ‘evident partiality’ standard relatively broadly, with the result that an undisclosed (and uninvestigated) transaction between the arbitrator’s new employer and a third party attracted vacatur. Much like Schmitz v Zilveti, the outcome in New Regency must be seen as exceptional. In the other circuits, for the award to be set aside the arbitrator must have been personally involved with the matters in which his firm was related to the party, and those matters must have had some connection to the dispute at hand. The pecuniary interest must also pass a test for remoteness: challenge will not be upheld, nor disqualification ordered, where the relevant

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146 New Regency, para 1109
pecuniary interest can only be affected by factors outside the decision maker’s control\(^{148}\). Decision makers who stand to benefit commercially from a decision against a business rival will be disqualified and their awards set aside\(^{149}\). Blood and marital relationships to parties are similarly objectionable\(^{150}\), although probably only to the third degree\(^{151}\). Sexual relationships with a lawyer for one of the parties will certainly cause justifiable doubts to arise – in the *Mission Insurance* case (an insurance arbitration) *vacatur* was ordered after it was revealed that the arbitrator had spent two of the nights of the arbitration in the hotel room of a female lawyer who acted for the successful party\(^{152}\). Much like in the *Catalina & Norma*, a judge who appears prejudiced against a party because of their ethnicity will be disqualified on the basis of default party preference\(^{153}\).

Substantive outcome preference - or prejudgment of the merits - will only be actionable as a non-pecuniary sub-form of bias where there has been a significant degree of involvement with the merits of a case\(^{154}\). Prior involvement of a decision maker in a matter of similar facts will rarely be cause for review, and a mere expression of opinion will not be enough to disqualify\(^{155}\). Decision makers hearing matters involving their former clients may be successfully challenged for the appearance of bias, but this rule does not extend to the clients of the decision maker’s former partners\(^{156}\). It may be of some comfort to users of hybrid Mediation-Arbitration processes that US courts have not been willing to find partiality where there is a staged combination of adjudicatory and other functions in a single decision maker (eg. where the decision maker has investigated a matter before they judge it)\(^{157}\). Finally, because there is no *Pinochet* equivalent in US law the American rule of Automatic Disqualification for non-*de minimis* interest in the cause does not extend to non-pecuniary interests.


\(^{149}\) *Gibson v Berryhill*, 411 US 564 (1973); see also *Lucas v State; ex rel Board of Medical Registration and Examination* 99 NE 2d 419 (Ind 1951)

\(^{150}\) *Low v Town of Madison*, 60 A 2d 774 (Conn 1948); *Taylor v County Commissioners of Worcester*, 105 Mass 225 (1870)

\(^{151}\) *Moody v City of University Park*, 278 SW 2d 912 (Ct Civ App Tex 1955)


\(^{153}\) *Berger v US*, 225 US 22 (1921), where the trial judge remarked ‘one must have a very judicial mind, indeed, not to be prejudiced against German Americans in this country’

\(^{154}\) *American Cyanamid Company v FTC*, 363 F 2d 757 at 768 (6th Cir. 1966)

\(^{155}\) *O’Carroll v CAB*, 144 F 2d 993 (DC Cir 1944)

\(^{156}\) *State of New Hampshire ex rel Thomson, State Board of Parole*, 342 A 2d 634 (NH 1975)

4. Proposed changes to the FAA

America is changing again, and both sides of US politics have recently proposed changes to the Federal Arbitration Act. Starting from the left, in 2007 Democrat Senator Russell Feingold (Wisconsin) introduced the Arbitration Fairness Act Bill\textsuperscript{158}. Senate and House hearings were held on the Bill in 2007, and the Commercial and Administrative Law Subcommittee of the House of Representatives Judicial Committee endorsed the proposal. Despite expectations of swift passage, the Bill is stalled in the House of Representatives\textsuperscript{159}. If passed, the Arbitration Fairness Act (AFA) will overturn the doctrines of Kompetenz-Kompetenz and Separability. The AFA will also go a long way towards overturning the Mitsubishi Doctrine in that it will significantly narrow US rules of arbitrability: under the AFA arbitration agreements will be invalid where they relate to employment, consumer and franchise disputes, as well as disputes arising under any statute intended to protect civil rights or regulate transactions between parties of ‘unequal bargaining power’\textsuperscript{160}. Needless to say, such measures will not advance the practice of arbitration in America. According to the Washington Post, the AFA ‘goes too far’\textsuperscript{161}; the writer strongly agrees.

From the right, Republican Senator Jeff Sessions (Alabama) sponsored the Fair Arbitration Act Bill\textsuperscript{162}. The Bill was introduced on 17 April 2007. It focuses on complaints and denials of rights in arbitration, its stated purpose being ‘to establish fair procedures for arbitration clauses in contracts’\textsuperscript{163}. To that end, it will overhaul the US laws of arbitrator appointment, disclosure and challenge. Firstly, the Fair Act will ban \textit{ad hoc} arbitrations, with S.2(b)(2)(C) requiring that

\begin{quote}
the arbitration shall be administered by an independent, neutral alternative dispute resolution organization to ensure fairness and neutrality and prevent \textit{ex parte} communications between the parties and the arbitrator
\end{quote}

\textsuperscript{158} H.R.3010
\textsuperscript{159} Kantor, M, ‘Legislative Proposals Could Significantly Alter Arbitration in the United States’ (2008) 74 Arbitration 4 at 444
\textsuperscript{160} Ibid at p.445
\textsuperscript{161} Ibid at p.446
\textsuperscript{162} S.1135
\textsuperscript{163} Fair Arbitration Act (2007) S.1135 IS. 110\textsuperscript{th} Congress, 1\textsuperscript{st} Session
Given this prohibition it is somewhat surprising that the Fair Act also appears to ban the institutional appointment of arbitrators, with S.1(b)(2)(B) providing that ‘each party shall have a vote in the selection of the arbitrator’\textsuperscript{164}. The mandatory language of this provision suggests that the party-arbitrator system will be imposed on all users if the Fair Arbitration Act Bill gets up. Secondly, the Fair Act will impose much broader disclosure requirements on arbitrators than those applicable under the FAA. Fair Act S.1(b)(2)(B)(iii)(I) bars arbitrators from appointment if they have a ‘personal or financial interest in the results of the proceedings’; S.1(b)(2)(B)(iii)(II) prevents the appointment of persons who have ‘any relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias’. The combined effect of these provisions is to elevate appearance over fact, and extend \textit{nemo judex} (and the rule in \textit{Tumey v Ohio}) from the dispute into the domain of its ‘results’. Confirming these outcomes is the fact that Fair Act S.1(b)(2)(B)(iii) makes the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes applicable \textit{de jure}. It is notable that the word ‘shall’ prefaces all of these sub-sections, suggesting that the Fair Act’s stricter rules of impartiality and independence are intended to be non-waivable. If this is the case then the Bill will also ratchet back US notions of party autonomy in the arbitral process: ‘neutrality’ will become the guiding consideration in appointment, and the parties will no longer be able to waive party familiarity in favour of expertise.

If either bill becomes law, it will damage the practice of arbitration in the United States. Frankly, the AFA will make the US a seat to be avoided: without \textit{Kompetenz-Kompetenz} and the Doctrine of Separability the arbitral process cannot function efficiently. The Fair Arbitration Act will reverse \textit{Commonwealth Coatings} and the jurisprudence that has developed illuminated its \textit{ratio}, introducing an appearance-driven test and the strict disclosure and conflicts of interest rules of the ABA/AAA Code of Ethics. Although the future of both Bills is uncertain, the politics of the Global Financial Crisis – which include a ‘rethinking’ of corporate self-regulation – will likely give strength to proposals to reform US arbitration law. The United States could do a lot better than the FAA, but these kinds of changes would not be steps forward.

\textsuperscript{164} Ibid at p.447; emphasis added
5. Conclusion

US federal arbitration law relies heavily on common law supplementation – the FAA is out of date. The ‘Vacatur Only’ Rule is evidence of the Act’s age: in the arbitration laws of nearly every other country there is a provision which creates a procedure for challenge and removal mid-proceeding. But, on the up-side, Vacatur Only has produced a rich tapestry of precedent: from the cases considered in this chapter we can conclude that most United States appeal courts are skeptical of allegations of arbitrator bias, so much so that the United States probably can be said to be a jurisdiction where something like the ‘real danger’ test is in force. It is clear from the jurisprudence that where bias challenges are run against arbitral awards, US courts will read the FAA expression ‘evident partiality’ narrowly consistent with the concurring judgment of Justice White and his brothers in Commonwealth Coatings. The only exception is the Ninth Circuit, where the tendency is to ‘deemphasize Justice White’s narrowing language’\textsuperscript{165}. The decision in New Regency illustrates this exceptional preference.

Where foreign awards are concerned, the prevailing narrow reading of FAA s.10 (a)(2) is complimented by the narrow reading of the New York Convention public policy exception. US courts have been construing public policy narrowly since the mid 1970s, at which time the federal judicial policy of promoting arbitration as a dispute resolution method in cross-border commerce emerged. This chapter has shown that US courts tend to display an anti-vacatur, pro-enforcement bias where questions of impartiality and independence are raised post-award. This approach makes eminent sense: by protecting the arbitral product they are safeguarding the process. But recent legislative proposals suggest that the high-water mark of the Mitsubishi Doctrine – and the pro-arbitration, pro-enforcement rules that come with it – may have already passed. If the ‘Fair Arbitration Act’ becomes law, the United States will become a seat in which the practice of the Black Art of bias challenge is aided by a test for bias that incorporates the Second Arm of Sussex Justices.

\footnote{\textit{Positive Software}, para 283}
CHAPTER 5

Competing Tests in the Asia Pacific

[the ‘real danger’ test in Gough] went a long way to towards substituting, for the doctrine of disqualification by reason of an appearance of bias, a doctrine of disqualification for actual bias modified by the adoption of a new standard of proof

- Justice Dean in Webb v The Queen (1994)¹

1. Introduction

This chapter is concerned with procedural fairness in ICA in the Anglo influenced Model Law states of the Asia Pacific region. It commences with a short restatement of the law identified in Chapter 2. This preface on English law is necessary for two reasons. First, England is the parent jurisdiction of the Model Law states surveyed in this chapter. Second, a fine point of English law is the focus of this chapter: when a challenge is run in the courts of these states, what test will be applied to determine whether the arbitrator lacks impartiality or independence? Is the question one of an informed observer’s ‘reasonable apprehension’, or does the objector bear a heavier burden of proving a ‘real danger’ or ‘real possibility’ of bias? It has been observed in Chapter 2 that between 1993 and 2002 English courts preferred the ‘real danger’ test laid down in Gough. In Porter v Magill this was revised to a requirement that the applicant show a ‘real possibility’. As shall be observed in the survey of national laws that follows, the Courts of Hong Kong and Malaysia have followed the House of Lords. But Australia and Singapore have retained the ‘reasonable apprehension’ test laid down in Sussex Justices². So have Canada³ and South Africa⁴; New Zealand uses the ‘real possibility’

¹ [1994] 181 CLR 41
² In Sussex Justices the clerk of the court was a solicitor in the firm acting in a civil claim against the same Defendant in relation to the accident that gave rise to the criminal prosecution.
³ Mugesera v Canada (Minister of Citizenship and Immigration) [2005] 2 SCR 91; Szilard v. Szasz [1955] SCR 3; see also Drymer, S.L., Manevich, A., ‘Impartiality and Arbitrator Bias; The View from Canada's 14 Jurisdictions’ (Trans-national Dispute Management) Vol 5 Issue 4 (July 2008)
test\(^5\), as does Brunei\(^6\). In Chapter 8 the writer will argue that the *Gough* ‘real danger’ test, or failing that the ‘real possibility’ test used in *Porter v Magill*, is the most appropriate for challenges to arbitrators and that the superior courts of Australia, Singapore and Canada should abandon *Sussex Justices* in its favour. If for public policy reasons they are unwilling to do so, then they should follow the courts of Hong Kong and New Zealand and use *Porter v Magill* for arbitrators.

2. **Summary of the English Position**

In Chapter 2 the writer traced the Common Law blood line of the ‘real danger’ test and observed that the *ratio* in *Gough* no longer binds English courts. Two decisions are responsible for this: *Re Medicaments*\(^7\) and *Porter v Magill*\(^8\). The stricter ‘real danger’ test proposed by Lord Goff of Chieveley in *Gough* was considered by the Court of Appeal in *Re Medicaments*. After its review of the authorities, the Court of Appeal opted to modify and rephrase the test for apparent bias as a question of ‘whether the relevant circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased’. Whilst *Re Medicaments* ushered back in the hypothetical, fair minded observer (thereby breaking the First Arm of *Gough*), the Court of Appeal only modified Lord Goff’s ‘danger’ to ‘possibility’. As was noted in Chapter 2, the Second Arm of *Gough* survived *Porter v Magill*.

In *Porter v Magill* the House of Lords approved the *Re Medicaments* test for apparent bias, thereby ending the jurisprudential life of the First Arm of *Gough* and the ‘real danger’ expression of its Second Arm.\(^9\) In England, bias challenges to arbitrators are now tested against *Porter v Magill*. In Chapter 2 it was observed that versions of the ‘real danger’ test have been applied to arbitrators in a number of decisions since 1993\(^10\), the most notable of

\(^4\) President of the Republic of South Africa v. South African Rugby Football Union [1999] 4 SA 147; BTR Industries South Africa (Pty)Ltd v Metal and Allied Workers’ Union 1992 (3) SA 673 (A)
\(^5\) Muir v Commissioner of Inland Revenue [2007] NZCA 334
\(^6\) His Royal Highness Prince Jefri Bolkiah & Ors v State of Brunei Darussalam & Anor [2007] UKPC 62
\(^7\) [2001] 1 WLR 700
\(^8\) [2002] 2 AC 357
\(^9\) *Porter v Magill* per Lord Hope at 494
which are *Saudi Cable*\(^{11}\) and *Rustal Trading* (both applying *Gough*)\(^{12}\), and *Norbrook Laboratories*\(^{13}\) and *ASM Shipping* (both applying *Porter v Magill*)\(^{14}\).

3. **Approaches to Bias in the Asia Pacific**

This chapter has a limited geo-jurisdictional scope: it covers only those states of the Asia Pacific of the Common Law family that have adopted the UNCITRAL Model Law – writer will refer to these countries as ‘Anglo-Model Law’. For this reason, it does not deal with other Common Law states in the region, such as Brunei (where *Porter v Magill* prevails)\(^{15}\), which have not made arbitration laws on the UNCITRAL template. The geographic scope of this chapter also excludes South Africa, which, like Australia, has kept the *Sussex Justices* test\(^{16}\). The writer’s intention in the chapter is two-fold: first, to shows that the law of bias is an example of undesirable variation within Model Law seats (ie. challenge provisions of uniform *lex arbitri* informed by non-uniform Common Law rules of apparent bias), and second, to frame the argument for the ‘real danger’ test made in Chapter 8.

At this point, it is worth outlining the key features of the Model Law *vis-à-vis* challenges to arbitrators:

**Article 4: Waiver of Right to Object** - the effect of this Article is that, if it comes to the attention of a party that a mandatory provision of the Model Law (such as Article 18 – Equal Treatment) has not been complied with, then that party must state their objection or they will be deemed to have waived their right to object. In the context of this thesis, Article 4 will operate to bar a party from challenging an arbitrator where they become aware of circumstances that justify doubts as to the arbitrator’s impartiality or independence, but fail to speak up.

**Article 11: Appointment of Arbitrators** - when a state adopts the Model Law, it must designate a court or other authority in its enactment of Article 6 to perform the role of appointing authority under Article 11. Most Model Law states designate a tier of their

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\(^{11}\) [2000] All ER (Comm) 625  
\(^{12}\) [2000] 1 Lloyd’s Rep 14  
\(^{13}\) [2006] EWHC 1055 (Comm)  
\(^{14}\) *ASM Shipping* [2005] APP.L.R.10/19  
\(^{15}\) *Prince Jefri* [2007] UKPC 62  
\(^{16}\) *South African Rugby* [1999] 4 SA 147; *BTR Industries* 1992 (3) SA 673 (A)
courts, but some (such as Singapore and Hong Kong) designate arbitration institutions to perform this function (in these examples, SIAC and HKIAC respectively). Either way, when the default appointment process is activated, the challenge provisions of the Model Law (Articles 12 and 13) apply *tellequel*, and the parties may challenge the default appointees as they would challenge party-appointees or sole arbitrators.

**Article 12: Grounds for Challenge** - when an arbitrator is appointed, he or she must disclose and matters likely to give rise to justifiable doubts as to his or her impartiality or independence. This disclosure obligation is ongoing, meaning if things come up during the proceedings, the arbitrator must promptly give fresh disclosure to the parties. Once disclosure is given, the arbitrator can only be challenged for new matters, or old matters which were not disclosed (or matters of which the challenger was legitimately unaware when they agreed to the arbitrator). This rule draws on the waiver provision at Article 4. Additionally, the arbitrator may also be challenged if they are not qualified to decide the dispute.

**Article 13: Challenge Procedure** - party autonomy extends to the challenge process, subject to the ‘within thirty days’ right of the parties to seek final review of the challenge decision by the court or other authority specified in Article 6 (which is the same court or authority that exercises the default appointment function in Article 11). The parties can, for example, contract in and out of time limits for the challenge; agree who will decide the challenge (especially important in *ad hoc* proceedings in Model Law states); and how the submissions will be made (oral, written, or both). In this thesis, the writer will say that this autonomy extends to the ‘Gough Clause’ – the parties may exercise their right to procedural freedom at Model Law Article 13(1) and contract into a higher ‘real danger’ test for bias.

**Article 18: Equal Treatment of Parties** - the parties must be treated equally in the arbitration, and *audi alterem partem* must be respected throughout the proceeding: if the parties are not treated equally, or one party is not given the opportunity to fully ventilate its case, then the aggrieved party will be entitled to have the award set aside under Article 34. Actual bias necessarily constitutes unequal treatment; the mere appearance of bias is not unequal treatment, but will be actionable in the form of an Article 12 ‘justifiable doubts’ challenge. As was observed by the Ontario Court of Appeal in *Noble China*, the
equal treatment provision of the Model Law is mandatory and non-derogable, meaning it will stand no matter what arrangement is made to the contrary\(^\text{17}\).

**Article 34: Set Aside the Award** – either party may apply for the award to be set aside where there is actual or apparent bias on the part of an arbitrator. The exclusive grounds upon which the application may be made are itemised at Article 34(2)(a); apparent bias may constitute an actionable compositional irregularity under Article 34(2)(a)(iv) – this was the plea in the Hong Kong case of *Logy Enterprises*, for example\(^\text{18}\). In addition (or the alternative), the court may *sua sponte* set the award aside on the basis of objective (subject matter) non-arbitrability, or offence to public policy. As has been observed, the recognition and enforcement of an award rendered by a biased arbitrator is against *procedural* public policy in all Model Law states, and will attract a writ of *vacatur*.

It is worth making a final prefacing remark on precedent: in Anglo-Model Law states, the decisions of other Anglo-Model Law states are often treated as persuasive, but generally not binding. A decision of the Australian Federal Court on Article 12 of the Model Law would, for example, carry persuasive weight in a challenge application to a Singapore court. This is because the wording of the two acts (being, in this example, the Australian *International Arbitration Act 1974* and the Singapore *International Arbitration Act 2002*) is the same; if the facts of the two challenges were the same (or very similar), then the Australian decision would be treated as highly persuasive by the Singapore court. The affect of this regional judicial inter-relation is that all of the decisions surveyed in this chapter form part of a single, broad body of jurisprudence. The key point of this chapter is that, although they may (and, in the writer’s opinion *should*) follow one another, they are not: the Anglo-Model Law seats of the Asia Pacific have gone their own way on the test for arbitrator bias.

### 3.1 AUSTRALIA

Australia received the English laws and customs of procedural fairness in the period 1788 to 1988\(^\text{19}\). The High Court of Australia has interpreted the ‘judicial power’ in Chapter III of the

\(^{17}\) *Noble China Inc v Cheong* (1998) 43 OR (3d) 69

\(^{18}\) *Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co* [1997] 2 HKC 481

\(^{19}\) That is not to say that Australian law and British law were identical in this period – the *Colonial Laws Validity Acts (An Act to Remove doubts as to the Validity of Colonial Laws 28 & 29 Vict c.63)* provided that

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Constitution of Australia (1901) as operating to guarantee impartiality and the appearance of impartiality throughout the Australian court system. The Australian judicial system was severed from England by the passage of the *Australia Acts* 1986 (Cth). The rule of automatic disqualification for pecuniary interest laid down in *Dimes* is part of Australian law. It seems to remain in its ‘original’ form, free standing and separate from the principles of apparent bias. Both the *Sussex Justices* and *Gough* streams entered Australian law. Although something like a ‘real danger’ was accepted for a time after the dicta of the High Court in *R v Stevedoring Industry Board* Australian courts have generally preferred the rules laid down in *Sussex Justices*. Australian courts have demonstrated a good deal of pragmatism in their application of the *Sussex Justices* standard which is, it has been held, ‘to be observed in the real world of litigation’.

In *Webb v The Queen*, the High Court of Australia had occasion to consider the then-recent House of Lords decision in *Gough*. The High Court departed from *Melbourne Stevedoring* and held that the test for apparent bias in Australia is ‘whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’. It is implicit in this ruling that the Court also rejected the *Gough* approach to review ‘through the eyes of the court’. The High Court of Australia’s view reflects the primacy of Lord Hewart’s dictum in *Sussex Justices* that ‘justice must be done and be seen to be done’, and the policy of promoting and preserving public confidence in the administration of justice. In *Johnson* the High Court confirmed the applicability of the ‘reasonable apprehension’ standard laid down in *Sussex Justices* (and the

Australian Parliaments, like those of all the dominions of the British Crown, had legislative autonomy and, where there was a conflict with an Imperial Statute, the colonial law would prevail.

21 or ‘real apprehension in the sense of high probability’; see the joint judgment of Dixon CJ, Williams, Webb and Fullagar JJ at 116.
23 *Vakuata v Kelly* (1989) 167 CLR 568 per Brennan, Deane and Gaudron JJ at 570, followed by Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd* (BC200402171, NSWSC 5 April 2005)
24 *Webb v The Queen* [1994] 181 CLR 41; see also *Grassby v The Queen* (1989) 168 CLR 1 at 20; applied in *DJC v Burg* [1998] VSCA 139 at 16. In rejecting *Gough in Webb* Dean J commented ‘it [the ‘real danger’ test] went a long way to towards substituting, for the doctrine of disqualification by reason of an appearance of bias, a doctrine of disqualification for actual bias modified by the adoption of a new standard of proof (ie. a real likelihood or possibility rather than probability in the sense of more likely than not).’
25 It is notable that this aspect of *Gough* was not followed by the House of Lords in *Porter v Magill* and that the ‘reasonable man’ has returned to English law.
26 *Sussex Justices* per Lord Hewart CJ at 259
absence of the ‘real danger’ test) to matters of apparent bias under Australian law\textsuperscript{27}. Canadian courts have also rejected \textit{Gough}\textsuperscript{28}.

As in England, Australian law does not distinguish between judges and arbitrators in the standard of impartiality that is required. In arbitration as in litigation before a court, the principles of natural justice require that any interest that is more than \textit{de minimis} must be disclosed. Failure to do so will expose any subsequent award to \textit{vacatur} by the competent courts of the seat. In terms of standards, arbitrators are subject to the ‘reasonable apprehension’ test enunciated by the High Court in \textit{Watson} and \textit{Webb}. This was confirmed by the Victorian Court of Appeal in \textit{Gascor}\textsuperscript{29} where the court stated that the test for whether an arbitrator was biased was that of the reasonable apprehension of a fair minded lay observer with knowledge of the material facts\textsuperscript{30}. In \textit{Gascor}, the arbitrator had decided technical issues in favour of the sellers in an earlier arbitration, and the buyer claimed that substantially the same technical issues were live in the dispute which gave rise to the challenge; the arbitrator had also been counsel in an earlier matter (which also involved an on-shore gas terminal) in which he had criticised expert witnesses which the buyer intended to call. The Victorian Court of Appeal refused to remove the arbitrator, and dismissed the appeal.

Australian arbitration law is dualist – the Uniform Commercial Arbitration Acts of the states\textsuperscript{31} govern domestic arbitral proceedings, and the \textit{International Arbitration Act 1974 (Cth)}\textsuperscript{32} governs international commercial arbitrations in which Australian law is \textit{lex arbitri}\textsuperscript{33}.

\textsuperscript{27} \textit{Johnson v Johnson} (2000) 201 CLR 488; this has bound Australian states courts since - \textit{Johnson} was followed, for example, by the New South Wales Court of Appeal in \textit{ICT Pty Ltd v Sea Containers Ltd} [2002] NSWSC 77 (22 February 2002). See also \textit{Ace Constructions & Rigging Pty Ltd v ECR International Pty Ltd} (Local Court of New South Wales, 26 October 2007), where the \textit{Sussex Justices} test was applied to an adjudicator in a construction contract dispute.

\textsuperscript{28} The \textit{Commission for Justice and Liberty v The National Energy Board} [1978] 1 S.C.R. 369, approved by the Ontario Court of Appeal in \textit{Benedict v Her Majesty the Queen in Right of Ontario} (2000) 51 O.R. (3d) 147. See also \textit{Szilard v Szasz} [1955] S.C.R. 3, where the arbitrator and his wife were joint tenants with one of the parties on an investment property.

\textsuperscript{29} \textit{Gascor v Ellicott} [1997] 1 VR 332, per Tagdell AJ at 340 and Ormiston AJ at 348-52, cited with approval by the High Court in \textit{Sea Containers}; followed by the Supreme Court of Western Australia in \textit{Pindan Pty Ltd v Uniseal Pty Ltd} [2003] WASC 168.

\textsuperscript{30} It is notable that in the \textit{Gascor} appeal Tadgell JA (with whom Brooking JA agreed) commented in \textit{obiter} ‘Although the criterion of apprehension of partiality or prejudice is possibility, not likelihood, a reasonable apprehension is to be established to the court’s satisfaction: it is a reasonable and not a fanciful or fantastic apprehension that is to be established…’ (see paragraph 342 of the judgment of Tadgell JA).

\textsuperscript{31} 1984-5

\textsuperscript{32} Hereinafter referred to as the ‘IAA’ or the ‘Australian Act’

\textsuperscript{33} The IAA also covers enforcement and recognition of foreign arbitral awards.
The state Acts define ‘misconduct’ as including partiality and bias\textsuperscript{34}, and allow supervising courts to remove\textsuperscript{35} arbitrators and set aside their awards\textsuperscript{36} where misconduct has occurred. As an UNCITRAL Model Law statute\textsuperscript{37} the IAA incorporates the Article 12 rules for the impartiality and independence of arbitrators. The effect of this incorporation of Article 12 is that, in contrast to the state arbitration laws which do not create express disclosure obligations for arbitrators, the Federal Act requires disclosure of circumstances that are likely to give rise to ‘justifiable doubts’\textsuperscript{38}. Bias will also render foreign arbitral awards unenforceable - section 19(b) of the IAA defines the expression ‘public policy’ as used in Model Law Articles 34 and 36 as including the observance of the principles of natural justice. Australian institutional rules tend to employ UNCITRAL standards for appointment, disqualification and removal\textsuperscript{39}.

When a challenge is brought under the International Arbitration Act, it is clear that Australian courts read the ‘justifiable doubts’ ground at Article 12(2) of the Model Law in a manner consistent with the Sussex Justices standard. This is because the requirement of impartiality and independence is a monist aspect of Australian arbitration law. The standards of procedural fairness in domestic and international arbitration are those laid down by Article 12. In Gascor the Victorian Supreme Court held that bias is approached the same way whether the dispute is international or domestic\textsuperscript{40}. Binding the court in Gascor was the case of Gas and Fuel Corporation, where the Supreme Court of Victoria followed Lord Hewart CJ, and held that a reasonable suspicion of bias will be made out where the party or a member of the public would reasonably consider the arbitrator did not or would not decide the dispute in a fair and unprejudiced manner\textsuperscript{41}. The ratio in Gascor is the leading statement of law in Australia. In 1995 the Supreme Court of Western Australia applied it to remove an arbitrator who failed to disclose that he had run a short course on construction contracts for

\textsuperscript{34} See for example s.4(1) of the Commercial Arbitration Act 1984 (NSW)
\textsuperscript{35} Commercial Arbitration Act 1984 (NSW) s.44(a)
\textsuperscript{36} Commercial Arbitration Act 1984 (NSW) s.42(2)
\textsuperscript{37} The UNCITRAL Model Law forms Schedule 2 to the IAA.
\textsuperscript{38} Section 21 of the IAA allows the parties to contract out of the Model Law; see American Diagnostica Inc v Gradiopore (1998) 44 NSWLR 312. If the parties to an international arbitration contract out of the Model Law the lower disclosure obligations created by the relevant state Act will apply to their arbitrators.
\textsuperscript{39} See the arbitration rules of ACICA, IAMA, AMTAC, WAIDM et al
\textsuperscript{40} Gascor v Ellicott [1997] 1 VR 332
\textsuperscript{41} Gas and Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd [1978] VR 385
one of the parties: *Giustiniano Nominees*\(^{42}\). By their approval of *Gascor*, state courts continue to follow *Sussex Justices*.

**Sea Containers (2002)**

This case involved an application for removal of an arbitrator under s.44 of the New South Wales *Commercial Arbitration Act (1985)*. The underlying dispute related to a shipbuilding contract. The arbitrators (a retired judge and a barrister) in this case required that the parties commit to the payment of a cancellation fee to account for the prospect of their dispute not proceeding to a hearing\(^{43}\). At a preliminary conference the Plaintiff’s solicitors refused to agree to cancellation fees, arguing that payment and security had not previously been required and that there were no grounds for their demanding a commitment to a cancellation fee. The Defendant agreed to the arrangements proposed by the arbitrators, including the cancellation fee. After a series of verbal and written exchanges between the panel and the solicitors for the Plaintiff the proceedings continued. Before the merits hearing commenced the Plaintiff applied to the court for removal of all three arbitrators, pleading an apprehension of bias arising out of the discussions over fees.

The matter came on before Justice Gzell of the New South Wales Supreme Court. Gzell J prefaced his decision by confirming the force of the *Sussex Justices* test as applied in *Gascor* and *Johnson*\(^{44}\). His Honour was careful to acknowledge that the authorities did not point to an inflexible principle as to when a cancellation fee can be demanded, noting that ‘what constitutes misconduct of apprehended bias will depend upon the facts in each case’\(^{45}\). The test applied was that in *Johnson*: ‘whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide’\(^{46}\). Mr Clifford, the Managing Director of the Plaintiff – who was present at the directions hearing - filed affidavits attesting to his personal apprehension of bias. Although Gzell J noted that Mr Clifford’s evidence was not determinative, His Honour found that it was consistent with an objective evaluation of the events\(^{47}\). Gzell J held that ‘each of the arbitrators misused his position in applying pressure to

\(^{42}\) *Giustiniano Nominees Pty Ltd v Minister for Works* (1995) 16 WAR 87

\(^{43}\) *Sea Containers* at 78

\(^{44}\) *Sea Containers Ltd* at para 27

\(^{45}\) *Sea Containers* at para 32

\(^{46}\) *Sea Containers* at para 27

\(^{47}\) *Sea Containers* at para 44
the parties to agree to a cancellation fee and that constituted misconduct in terms of s.44(a) of the [New South Wales] Act. All three arbitrators were removed.

**Du Toit (1993)**

Another instance of the reasonable apprehension test being applied in a domestic arbitration context is *Du Toit v Vale & Ors*. *Du Toit* involved an application for *vacatur* based on technical misconduct by failure to disclose prior association with a party. The alleged misconduct lay in the arbitrator’s failure to disclose the fact that he had sat as a member of a building industry disciplinary tribunal that had suspended the building license of the defendant builder four years earlier. The defendant builder (as applicant for *vacatur*) gave evidence that, although he recognised the arbitrator as a member of the Builder’s Registration Board (and alluded to this when he spoke to the arbitrator after the preliminary conference) it was only after the award was made and inquiries were conducted that he realised that the arbitrator was a member of the Builder’s Registration Board that suspended him. In contrast, the arbitrator – who took the ‘unusual step’ of appearing as a Respondent in the proceedings for *vacatur* – admitted that he recognised the defendant builder at the preliminary conference. The arbitrator’s ‘defence’ was implied waiver: as a result of their having a short conversation in which the builder asked if the arbitrator was still a member of the Registration Board, the arbitrator wrongly assumed the builder was fully aware and had consented to the arbitrator acting.

Scott J found that the arbitrator was under an obligation to disclose his prior knowledge of the defendant builder, and that by not doing so he was guilty of technical misconduct under s.42(1) of the *Commercial Arbitration Act 1985* (WA). Key to this finding was the fact that the builder was not aware that the arbitrator was actually a member of the panel that suspended his license at the time he spoke to him. The builder could not waive his right to object because he was not fully aware of the circumstances of his previous association with the decision maker. Scott J held (at 156) that

> the award made by the arbitrator in this case should be set aside because an impartial observer with knowledge of the facts in all the circumstances of this case, would, in my view, undoubtedly entertain a reasonable apprehension that the arbitrator might

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48 *Sea Containers* at para 42
49 *Du Toit v Vale & Ors* (1993) 9 WAR 139
not bring an impartial and unprejudiced mind to the resolution of the questions involved in this case.

_Du Toit_ was decided by applying the formulation of _Sussex Justices_ that was used by the High Court of Australia in _Livesey v The New South Wales Bar Association_ 50.

**Livesey (1983)**

_Livesey_ is best known as authority for the proposition that the reasonable apprehension of bias is to be applied through the eyes of a ‘fair minded observer’, and indeed it is from this rule that the judgment’s general value is derived. But in the context of this chapter the decision is of special significance. _Livesey_ was an appeal on what the writer has termed ‘professional familiarity’ prejudgment bias. Two of the appeal court judges who heard Livesey’s appeal had earlier sat in an appeal against a Barrister’s Admission Board decision in which his witness Ms Bacon had been denied admission to the Bar on the basis that she lacked good character 51. Despite the issue being raised, neither judge disqualified themselves. The High Court upheld the appeal.

There is _obiter_ in _Livesey_ which suggests that the ‘reasonable apprehension’ test may not be an absolute rule. In upholding the appeal the High Court held:

> where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact [emphasis added] 52.

There is some strength to the proposition that where it is not suggested that there are special circumstances of consent, _Sussex Justices_ will apply. _Livesey_ therefore leaves open the

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50 _Livesey v The New South Wales Bar Association_ (1983) 151 CLR 288
51 _Livesey_ at 300
52 _Livesey_ at 300
application of a lower standard (such as *Gough*) where ‘special circumstances’ exist. It is submitted that arbitral proceedings constitute special circumstances.

**Pindan v Uniseal (2003)**

But case law shows that notwithstanding the *obiter* in *Livesey* it will be a ‘reasonable apprehension’ that will be conclusive in bias challenges brought in arbitral proceedings. No higher standard will be applied by an Australian court. This is evident from *Pindan Pty Ltd v Uniseal Pty Ltd*. In *Pindan* the Supreme Court of Western Australia applied *Sussex Justices* to an application for *vacatur* based on an apprehension of bias arising from party communications with an arbitrator. During the course of the proceedings Uniseal wrote to the arbitrator to explain why it was having trouble paying his fees. In his written reply the arbitrator said that he ‘sincerely sympathise[d]’ with Uniseal’s cash position. Pindan applied for *vacatur* and removal of the arbitrator (whose award on quantum was pending).

The Court held that communication between the arbitrator and counsel for Uniseal did not give rise to an actionable apprehension of bias. Pindan also argued prejudgment bias caused by the exposure of the arbitrator to communications in which a ‘without prejudice’ offer of settlement was made by Uniseal. Although his office received it, the arbitrator never read the letter, and ordered it to be destroyed. Subsequent correspondence with the parties referred to an unsuccessful attempt to settle. McKechnie J held that, in the circumstances, an apprehension of bias was not caused by the arbitrator’s knowledge of the fact of the offer being made and rejected. His Honour was careful to acknowledge that the letter offering settlement ‘would have inevitably raised a reasonable apprehension of bias had the arbitrator seen it and in that event I would have no hesitation in acting [to set aside and remove the arbitrator]’. His Honour went on in *obiter* (at 15) to stress that ‘this finding is not intended to extend to facts in other cases’.

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53 *Pindan Pty Ltd v Uniseal Pty Ltd* [2003] WASC 168, per McKechnie J at para 9: ‘I am unable to see anything in the nature of prejudgment or bias in the actions of the arbitrator. His expression of sympathy for the position is no more, I think, than a polite comment but does not of itself indicate anything out of the ordinary.’

54 This offer was not accepted and the facts suggest it may actually have been ignored.

55 *Pindan* 168 per McKechnie J at para 11; His Honour was careful to acknowledge that the letter offering settlement ‘…would have inevitably raised a reasonable apprehension of bias had the arbitrator seen it and in that event I would have no hesitation in acting [to set aside and remove the arbitrator]’. His Honour went on in *obiter* (at 15) to stress that ‘this finding is not intended to extend to facts in other cases’. Substantive knowledge of an unsuccessful offer of settlement may give rise to a reasonable apprehension of bias, but the arbitrator must (it seems) have read the communication in which the offer was made. Mere knowledge of the fact that an offer was made will not be enough. In reaching conclusions McKechnie J approved *Gascor v Ellicott* [1997] 1 VR 332.
Substantive knowledge of an unsuccessful offer of settlement may give rise to a reasonable apprehension of bias, but the arbitrator must (it seems) have read the communication in which the offer was made. Mere knowledge of the fact that an offer was made will not be enough. In reaching conclusions McKechnie J approved Gascor; Pindan was later followed in Ace Constructions. The reasonable apprehension standard was also applied to arbitrators in Aussie Airlines\textsuperscript{56} and Cook International\textsuperscript{57}.

3.2 HONG KONG

Like Australia, the Hong Kong Special Administrative Region (HKSAR) of the People’s Republic of China is an UNCITRAL Model Law jurisdiction\textsuperscript{58}. The lex arbitri of Hong Kong is the Arbitration Ordinance (HKAO)\textsuperscript{59}, together with those rules of Common Law that have remained in force after (or have been adopted since) the return of Hong Kong to the PRC in 1997. As shall be observed, Hong Kong retains a strong jurisprudential link with the Crown Courts. This is confirmed by the fact that Hong Kong courts have followed Gough.

Because of its status as a ‘seat within a seat’ Hong Kong law requires closer attention than the other seats in this study. The HKAO is a dualist arbitration law – there are separate regimes for international and non-international arbitrations. International arbitrations are governed by the Model Law as adopted by the HKAO. The domestic regime is based upon English law, including the English Arbitration Act 1996. Hong Kong is an important seat for ICA. The seat has a well developed institutional framework as a result. The Hong Kong International Arbitration Centre (HKIAC) is the leading arbitral institution. The HKIAC Domestic Arbitration Rules (1993) are regularly used for local disputes. Article 3.2 of the Hong Kong Domestic Arbitration Rules requires that an arbitrator must be both impartial and independent. There is a relatively high degree of inter-operability between the HKIAC domestic rules and the Arbitration Ordinance. The HKIAC is, for example, the appointing authority under Model Law Plus s.12 of the HKAO. The same function is delegated the SIAC under Singapore’s Model Law Plus arbitration act.

\textsuperscript{56} Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd (1991) 65 FCR 215
\textsuperscript{57} Cook International Inc v BV Handelmaatschappij Jean Delvaux and Braat, Scorr & Meadows [1985] 2 Lloyd’s Rep 225
\textsuperscript{58} The Macau Special Administrative Region (MSAR) is also Model Law.
\textsuperscript{59} Chapter 341 of the Laws of Hong Kong, hereinafter referred to as the ‘HKAO’.
HKAO Section 2GA identifies the general responsibilities of the tribunal in the conduct of arbitration proceedings. Subsection (1)(a) requires *inter alia* the tribunal ‘to act fairly and impartially as between the parties’. This requirement is mandatory and cannot be excluded by contract. Section 40E is specific to Mainland Awards, setting out exhaustively the grounds upon which enforcement of a Mainland PRC award may be refused. Section 40E(2)(e) provides that Hong Kong courts may refuse to enforce a Mainland Award arbitral award where the composition of the tribunal, or the procedure it followed, was not in accordance with the agreement of the parties or the law of the PRC. Sub-section (3) listed offence to public policy as a ground for refusal to enforce a Mainland Award. Section 44(2)(e) is the non-specific equivalent of section 40E(2)(e) – refusal is open where tribunal composition or arbitral procedure were not in accordance with the agreement of the parties or ‘the law of the country where the arbitration took place’. As has been noted in Chapter 1, public policy is an additional ground for refusal to enforce an award rendered in a New York Convention state. The public policy of the HKSAR will be offended where fundamental principles of procedural fairness are not observed. The principle of conflict of interest is within the public policy of Hong Kong.

HKAO Section 26(1) deals with applications for the removal of named arbitrators. HKAO s.26(1) provides

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing

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61 Mainland Awards are defined by s.2 of the HKAO as meaning arbitral awards rendered inside the territory of mainland China by a recognised Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China (Added 2 of 2000 s.3).

62 HKAO s.44(2)(e)

63 HKAO s.44(3). The expression ‘Convention Award’ is defined at s.2 HKAO as being exclusive of awards made in China and its territories.

64 See for example the comments made in *obiter* by Liu JA in *Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co* [1997] 2 HKC 481 at 487
the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality [emphasis added]

The effect of this provision is to limit the availability of implied waiver/collateral estoppel arguments against the challenge. It is consistent with the interpretation of the ‘equal treatment’ provision (Article 18) of the Model Law as mandatory and non-waivable. This in turn suggests that Hong Kong law ranks procedural fairness above Party Autonomy in ICA. The strength of this reading is, however, weakened by the fact that Hong Kong courts are generally resistant to applications based on arbitrator bias.

Hong Kong courts have followed Gough and displayed a preference for the ‘real danger’ test for apparent bias. The Revised Commentary on the HKIAC Domestic Arbitration Rules confirms this, referring explicitly to Gough in its discussion of the Article 3 requirement of impartiality and independence. The same standard is applicable in international arbitral proceedings. In Logy Enterprises Ltd the Hong Kong Court of Appeal followed Gough, and subsequent decisions of the Court of Final Appeal have followed the Porter v Magill formulation of Gough’s ‘real danger’ test.

**Logy Enterprises (1997)**

Logy Enterprises involved an appeal against the concurring lower court decisions of Leonard and Sears JJ to grant leave to enforce an arbitral award handed down by a three member tribunal convened under the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (1994). The matter began as a claim by Haikou against Logy for damages for short shipment of steel wire rods. Pursuant to the CIETAC Rules each party nominated an arbitrator from the CIETAC list. CIETAC appointed the chairman. Haikou’s nominee was unable to act. At the direction of Haikou CIETAC appointed a replacement. CIETAC rules arbitration took place in Beijing on 5 December.

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66 Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co [1997] 2 HKC 481; Hong Kong Court of Appeal (Liu, Bokhary, Nazareth JJ.A.) 22 May 1997

1994. On 24 March 1995 the tribunal found for Haikou, ordering that Logy pay damages. Logy failed to pay and Haikou commenced enforcement proceedings in Hong Kong. Leonard J granted leave to enforce the CIETAC award. Logy applied to set aside the order made by Leonard J.

Logy argued that the composition of the tribunal was not in accordance with the law of the seat (the PRC), and that Hong Kong courts should refuse enforcement under HKAO s.44(2)(e). The facts led in support of Logy’s application were that the replacement arbitrator appointed by CIETAC was a Director of the Inspection Technology Section of the Import and Export Commodity Inspection Bureau (CCIB). A certificate issued by the Haikou branch of this Chinese government agency was an exhibit in the hearing. Logy pointed out that Article 2 of the CIETAC rules provided that CIETAC should act independently and impartially in resolving disputes’, and that Article 53 of the CIETAC rules states that a CIETAC tribunal shall independently and impartially make its award in accordance with the principle of fairness and reasonableness. Logy argued that the replacement arbitrator’s position in the CCIB, coupled with the fact of the CCIB-rendered certificate being material to the conclusion reached by the tribunal, gave rise to bias or a conflict of interest. Logy argued that the enforcement of an award vitiated by bias would be contrary to the public policy of the PRC and Hong Kong.

Sears J refused to set aside the order granting leave made by Leonard J. His Honour was motivated by the fact that the replacement arbitrator’s role at the CCIB was limited to the inspection of import and export commodities related to safety, hygiene and environmental protection. Following Gough Sears J found no real danger that the replacement arbitrator was biased, and that as a result the application must fail. Logy went to the Hong Kong Court of Appeal. Central to the case of the Appellant was that the tribunal had made blatant and irrational errors which could only be explained by bias. Counsel for Logy put it that the tribunal had failed to take into account certain items of evidence, and had failed to address that part of Logy’s defence which relied upon the price clause of the agreement. The strength of the Appellant’s inference of bias required some determination of the strength of these allegedly neglected aspects of the Appellant’s case. The Appellant was, therefore, effectively asking for de facto merits review of the award. The HKAO strictly limits the power of the

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68 CIETAC Rules 28 (disclosure of personal interest) and 29 (removal where a party has ‘justified reasons to suspect [an arbitrator’s] impartiality and independence) were also referred to.
Liu JA held the Appellant had failed to discharge the burden of proving that the composition of the tribunal was against PRC law, or that there was a real danger of bias on the part of the replacement arbitrator. The arbitrator’s position in the CCIB did not give rise to any real danger of bias. Accordingly, His Honour dismissed the appeal. Nazareth VP agreed, finding that no breach of the CIETAC rules had been shown to have occurred. His Honour expressed the view that the ‘tenuous interest’ of the replacement arbitrator in verifying the CCIB inspection certificate was ‘anything like a personal interest’.

Bokhary JA agreed with Liu JA, finding that there was on the evidence presented no real danger of bias, and no resulting offence to the public policy of the PRC or Hong Kong. In his averments to the rules chosen by the parties Bokhary JA commented in obiter that

Article 28 of the CIETAC Arbitration Rules, which in effect disqualifies any arbitrator who has a personal interest in the case, is in harmony with the Common Law rules (declared in R v Gough) that any real danger of bias on the part of an arbitrator disqualifies him’ [citation omitted].

CIETAC Article 28 provides for removal where a party has ‘justified reasons to suspect [an arbitrator’s] impartiality and independence’. It is clear from the judgment of the Court of Appeal that Gough is law in Hong Kong. The truly separate position of the Rule in Dimes is also recognised in Hong Kong. As Bokhary JA observed Dimes and Gough are different grounds of attack; personal interest being founded upon the Rule in Dimes and a real danger of bias being founded on the stricter reading of the rule of apparent bias laid down in Gough.

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69 Logy Enterprises per Liu JA at 489
70 Logy Enterprises at 487
71 This can be gleaned from the judgment of Bokhary JA where His Honour summarized the findings of the judge at first instance: ‘…the judge was not persuaded that the arbitrator under attack had any personal interest in the case or, which comes to the same thing, that there was any real danger of bias on his part’. Bokhary JA went on at 488 to identify the causes of the Appellant as separate: ‘It is for the Appellant to make out its case on the question of a personal interest or, which comes to the same thing here, on that of a real danger of bias’. Success on either case would produce the same thing: judicial refusal to enforce.
72 The separation of these causes of action is critical to the writer’s argument that the real danger standard should be for arbitrators: because the rule of disqualification for non de minimis interest in the cause is separate and distinct from the principle of apparent bias there is nothing to be lost be adopting a Gough standard for arbitrators. Moving from a ‘reasonable suspicion’ to a ‘real danger’ standard for apparent bias is something a
China Harbour (2007)

China Harbour is the most recent instance of arbitrator bias being pleaded in a Hong Kong court. In China Harbour the Hong Kong Court of Appeal confirmed the Porter v Magill\(^73\) expression of the Gough test\(^74\). China Harbour involved an application for vacatur based on apparent bias. The facts were that, some six years before the award was handed down, the arbitrator (a barrister) had advised the applicant on the matter. At the arbitral hearing the arbitrator and his former client had not recognised one another, although the arbitrator had asked the applicant whether he looked familiar to him. The applicant’s reply was in the negative and the hearing was conducted. A final award was handed down on 17 January 2005. The applicant was the judgment debtor. When he realised his former association with the arbitrator he applied to have the award against him set aside on a number of grounds, including apparent bias.

After repeated dismissal the applicant ended up at cassation. The Court of Final Appeal dismissed the matter\(^75\). The Court held that the arbitrator was not obliged to check his files from six years earlier, and that he was entitled to assume that both parties considered him suitable to act. Chief Justice Li agreed with his brother in the lower Court of Appeal that the policy favouring the finality of arbitration required dismissal of the applicant’s claim\(^76\).

3.3 SINGAPORE

Singaporean arbitration law is Model Law dualist. Domestic arbitral proceedings are governed by the Arbitration Act 2001. International proceedings fall under the International Arbitration Act 2002\(^77\). The International Arbitration Act is a Model Law statute\(^78\). The statutory provisions concerning the impartiality and independence of arbitrators are the same state can do without prejudice to the existence of the Rule in Dimes. The writer will expand on this point in Chapter 8.

\(^73\) [2002] 2 AC 357

\(^74\) Suen Wah Ling v China Harbour Engineering Co. [2007] BLR 435 HK CA, para 9 of the judgment of Li CJ, where His Honour approved the decision of the Hong Kong Court of Final Appeal in Deacons v White & Case Ltd Liability Partnership & Ors (2003) 6 HKCFAR 322 following Porter v Magill.

\(^75\) China Harbour per Li CJ at para 8

\(^76\) China Harbour per Li CJ at para 7

\(^77\) Cap 143A, 2002 Rev.Ed

\(^78\) The International Arbitration Act governs ‘International Arbitrations’ as defined by Article 1(3) of the UNCITRAL Model Law. Part II of the International Arbitration Act relates to the Model Law.
as in the other Model Law states surveyed above. The leading Singaporean decision on challenge for apparent bias is *Turner (East Asia)*.

**Turner (East Asia) (1988)**

The challenge in *Turner* arose out of a construction dispute. The arbitration clause in the sub-contract between the parties provided for a sole arbitrator with Singapore law as *lex arbitri* and *lex contractus*. The parties could not agree and, on the Respondent’s *vide* originating summons the court appointed a Mr Smith on 9 April 1987. Turner’s solicitors raised a question of whether the arbitration was a domestic arbitration for the purpose of Singaporean law. Turner’s solicitors also raised an issue relating to the application of the Singapore Legal Profession Act. In correspondence between the arbitrator and the solicitors for Turner the arbitrator used language that was ‘sarcastic, to the point of being hostile’ to express his opinion that these questions were posed as dilatory tactics. Turner applied for removal of Arbitrator Smith under section 17(1) of the Singapore Arbitration Act, alleging misconduct.

The challenge was heard by Chao Hick Tin JC of the Supreme Court of Singapore. After noting the ‘conflict in authorities’ His Honour applied the *Sussex Justices* ‘reasonable suspicion’ test. In his review of the divergent Commonwealth authorities Chao Hick Tin JC cited with approval the decision of Ackner LJ in *R v Liverpool City Justices*.

Following *Liverpool City Justices* the test was applied as a question of whether ‘a reasonable and fair minded person sitting in court and knowing all the relevant facts [would] have a reasonable suspicion that a fair trial for the applicant was not possible’.

It is important to note that *Turner* pre-dates Singapore’s adoption of the Model Law and would not be binding upon a Singaporean court considering a challenge under the current Arbitration Acts. It may be that in such a situation today the Singapore court would apply *Porter v Magill*. In *Tang Liang Hong v Lee Kuan Yew* the Singapore Court of Appeal used a ‘real danger’ test. But more recently in *Re Shankar* the Court of Appeal stated that ‘it is settled law in Singapore having regard to several pronouncements of the Singapore Court of

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79 *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor (No. 2)* [1988] 2 MLJ 502 at 516

80 *Turner* at 512

81 *Turner* at 513, citing Ackner LJ in *R v Liverpool City Justices* [1983] 1 WLR 119

82 *Turner* at 503

83 *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97
Appeal that the “reasonable suspicion” test is the law of Singapore. The obiter of Chao Hick Tin JC in Turner (rejecting the ‘real likelihood’ test propounded in Camborne Justices) supports this conclusion. The safest position is, therefore, that in light of Turner and Re Shankar Singapore courts can be expected to apply the Sussex Justices reasonable apprehension test to bias challenges to arbitrators.

3.4 MALAYSIA

Malaysia is a recent addition to the Model Law family of arbitral jurisdictions. Prior to the coming into force of the new Act the lex arbitri of Malaysia was the Arbitration Act 1952. In Kuala Ibai Development the court found that bias was within the meaning of ‘misconduct’ as that term was used in the 1952 Act. This case remains the leading Malaysian authority on arbitrator bias.

The Arbitration Act 2005 came into force on 15 January 2006. The Malaysian equivalent of Model Law Article 12 is section 14(3)(a), which provides that an arbitrator may be challenged if ‘the circumstances give rise to justifiable doubts as to that arbitrator’s impartiality or independence’. Whilst there is no superior court authority for the proposition that an arbitrator is subject to the same standards of impartiality and independence as a state court judge, the writer has found nothing in Malaysian jurisprudence to suggest otherwise. This conclusion is supported by the fact that Malaysia is now a Model Law state and the subjection of arbitrators and judges to the same standard would be in keeping with the jurisprudence of the wider community of Model Law states.

The question of what principle of national law will inform a Malaysian court in its reading of the challenge provisions of the 2005 Act is a difficult one to answer. Some ‘crystal ball gazing’ is required. This is because there are few Malaysian cases on arbitrator bias. A serious challenge is sub judice at present. However, the wider body of case law on natural justice suggests a ‘real danger’ test would be applied. In fact, much like their counterparts

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84 Re Shankar Alan S/O Anant Kulkarni [2006] SGHC 194 at 76
85 Turner at 503
87 Act No.646
88 Private correspondence between the writer and Professor Sundra Rajoo SC, June 2008
89 Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] MLJ 1
in Zimbabwe, Malay courts have followed *Gough* quite strictly, and stand by it today. In *Dato’ Tan Heng Chew v Tan Kim Hor & Anor* the Federal Court considered the various formulations of the *Gough* test. Abdul Hamid Mohamad FCJ (with whom Shim CJ and Yaakob CJ agreed) held that Malaysian courts were bound to follow the ‘real danger’ test as result of the acceptance of *Gough* in *Majlis Perbandaran Pulau* 90, in which the Federal Court of Malaysia unanimously rejected the ‘real possibility’ revision of *Gough* laid down by the House of Lords in *Porter v Magill* 91.

### 3.5 NEW ZEALAND

New Zealand’s Model Law statute was enacted in 1996. The New Zealand Arbitration Act does not distinguish between domestic and international arbitration. As in the other states discussed in this chapter, under New Zealand law arbitrators are held to the same level of impartiality and independence as state court judges. The Rule in *Dimes* is treated as a separate principle of natural justice and has been applied to arbitrators and arbitral awards 92. In recent years there has been some variation in the New Zealand law of apparent bias. Although the Court of Appeal cited *Gough* with approval in *Auckland Casino Ltd. v. Casino Control Authority* 93, a revised test very close to *Sussex Justices* was used more recently in *Erris Promotions Ltd v Commissioner of Inland Revenue* 94. New Zealand now appears to prefer the ‘real possibility’ test; the Court of Appeal approved *Porter v Magill* in *Muir v Commissioner of Inland Revenue* 95. As a result, although there is no authority on point it is likely that, hearing an arbitrator bias challenge today, a New Zealand court would take a similar approach to that of the English Court of Appeal in *ASM Shipping* 96.

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90 *Dato’ Tan Heng Chew v Tan Kim Hor & Anor* [2006] FC (Civ. Ap. No. 02-6-2005(w)) at para 23  
91 *Dato’ Tan* at para 22  
92 See for example *Re Skene’s Award* (1904) 24 NZLR 591, a case decided under preceding law, where an arbitrator’s award was set aside where his partner had appeared in the proceedings and the partner billed the client a percentage of the amount awarded.  
93 [1995] 1 NZLR 142 (CA)  
94 (2003) 16PRNZ 1014  
95 [2007] NZCA 334  
96 [2005] APP.L.R.10/19
Section 11(d) of the Canadian Charter of Rights and Freedoms provides that every person has a right to trial before an independent and impartial tribunal. Canada is a complex confederation of fourteen provinces and territories, all of which have Model Law arbitration Acts. With the exception of Quebec, all of the Canadian provinces and territories have dualist arbitration laws (ie. their state laws regulate domestic and international arbitrations differently). Whilst the Federal Arbitration Act is monist, applying the same procedural rules to international, interstate and purely domestic arbitrations, commentators have noticed that Canadian courts exhibit hidden dualism where procedural fairness is at issue. Canadian practitioners Drymer and Manevich commented recently

Formally there would appear to be little or no difference between the standards of impartiality and fairness imposed on domestic and international arbitrations in Canada. Nonetheless, the attitude of the courts in applying those standards has differed considerably as between the two contexts.

As a predominantly Common Law country, Canadian laws of natural justice have been shaped by developments in England. The Rule in *Dimes* has long been accepted by the superior courts of Canada, and although Canadian courts have approved *Pinochet (No.2)*, Canadian authority properly distinguishes between the apprehension of bias and the principle of judicial disqualification propounded by the House in *Dimes*. The Canadian test for bias is that stated by De Grandpre J in *The Committee for Justice and Liberty v The National Energy Board*: ‘the apprehension of bias must be a reasonable one, held by a reasonable and right minded person in the community in which the matter occurred, applying themselves to the question and obtaining thereon the required information’. Canadian courts did not follow *Gough* and have not followed *Porter v Magill*. Some provincial arbitration acts appear to codify the *Sussex Justices* test; sections 15 and 46 of the Ontario Arbitration Act provide

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97 Canadian Charter of Rights and Freedoms (Schedule B to the Constitution Act 1982, appendices to revised States of Canada 1985)  
99 Ibid  
100 *Benedict v Her Majesty the Queen in Right of Ontario* (2000) 51 OR (sd) 147  
101 *Ebner* per Kirby J at 461  
102 *The Committee for Justice and Liberty v The National Energy Board* [1978] 1 SCR 369
that an arbitrator may be removed by the court, or their award set aside, where there is a reasonable apprehension of bias or the arbitrator has failed to conduct the arbitration with equality and fairness\textsuperscript{103}.

The ‘Model Law Plus’ monist Quebec Code of Civil Procedure provides that the arbitrator may be challenged if there is ‘reasonable cause to fear that the arbitrator will not be impartial’\textsuperscript{104}, or if the circumstances in which a judge may be challenged are shown to exist\textsuperscript{105}. Although not a Common Law seat, and thus technically outside the scope of this inquiry, Quebec deserves special attention in this chapter because its arbitration law allows the parties to contract out of the challenge procedure outlined in Model Law Article 13(1). In contrast to the enacting laws of other Model Law seats, the Quebec Code of Civil Procedure does not list Model Law Article 13 as a provision from which the parties may not derogate\textsuperscript{106}. Other Canadian jurisdictions have shown themselves to be tolerant to waiver.

\textit{Noble China (1998)}

In \textit{Noble China} the award was rendered in Ontario. The award debtor applied for \textit{vacatur}, alleging a breach of Ontario arbitration law equivalent of the Model Law Article 18 (Equal Treatment). The applicant also alleged racial bias on the part of the arbitrator. The arbitration agreement excluded state court review. The Court of Appeal was required to determine whether the parties’ waiver of the right to apply for \textit{vacatur} under the Ontario Act equivalent of Model Law Article 34 was effective. The General Division of the Court of Appeal held:

\begin{quote}
Article 34 does not contain any of the familiar mandatory language. [The Applicant] argues that the requirement of a full opportunity to present one’s case and equality of treatment are mandatory provisions of the Model Law under Article 18 and that violation of them constitutes grounds for setting aside an award. I accept this. [The Applicant] further argues that since the parties may not derogate from those fundamental principles in an arbitration agreement, it necessarily follows that they may not derogate from the only means under the Model Law for enforcing those principles. I accept the first part of the decision, but I do not accept the
\end{quote}

\textsuperscript{103} Arbitration Act, S.O. (1991) c 17, ss15, 46
\textsuperscript{104} QCCP, Article 234
\textsuperscript{105} QCCP, Article 942
\textsuperscript{106} Above note 98, p.7
second... Excluding recourse to the courts to set aside an award is not contrary to Article 18 nor contrary to any other mandatory provision of the Model Law.\textsuperscript{107}

Whilst the Ontario Court of Appeal did not rule on the allegation of bias in \textit{Noble China}, the above \textit{obiter} suggests that Ontario can be placed on the list of ‘maximum Party Autonomy’ states where full waiver of municipal court recourse is permitted. It has been observed that the \textit{lex arbitri} of Belgium, Switzerland, Tunisia and Turkey also allow the parties to exclude Article 34.\textsuperscript{108} \textit{Food Servers of America} suggests that British Columbia could also be added to this list. For reasons discussed above there may also be a case for the addition of Quebec.\textsuperscript{109}

\textbf{Szilard v Szasz (1955)}

Although there is no Canadian authority for the application of \textit{Sussex Justices} in an international arbitration, there is ample domestic authority to support the probability of its application. The leading decision on arbitrator bias is \textit{Szilard v Szasz}.\textsuperscript{110} The application was for disqualification of an arbitrator on the basis of his ongoing business association with a party. The material facts were that the arbitrator and his wife were joint tenants with the party on an investment property. The property was the subject of a joint mortgage. The Supreme Court of Canada applied the \textit{Sussex Justices} test. In the leading judgment Justice Rand held that ‘arbitration must be untrammeled by such influences as to a fair minded person would raise a doubt of that impersonal attitude which each party is entitled to’.\textsuperscript{111} The Court found that, although there could be no inference of bias from the fact of joint tenancy alone, the ‘probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, defeats the adjudication at its threshold’.\textsuperscript{112} In \textit{Holland v. City of Vancouver} Manson J of the Supreme Court of British Columbia applied \textit{Sussex Justices} to find for the existence of ‘prejudicial bias’ where the arbitrator had ignored the opinion of a state court.\textsuperscript{113}

Decisions applying the Model Law and New York Convention show that, in the event of a post-award bias challenge or bias defence to enforcement, Canadian Courts would read the NYC Article V(2)(b) public policy exception narrowly consistent with the pro-arbitration

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\textsuperscript{107} \textit{Noble China Inc v Cheong} (1998) 43 OR (3d) 69
\textsuperscript{108} Petrochilos, G, \textit{Procedural Law in International Arbitration} (Oxford University Press 2004), p.87
\textsuperscript{109} \textit{Food Servers of America (c.o.b. Amifresh) v Pan Pacific Specialties Ltd} (1997) 32 BCLR (3d) 255
\textsuperscript{110} \textit{Szilard v Szasz} [1955] SCR 3
\textsuperscript{111} \textit{Szilard v Szasz} per Rand J at 4
\textsuperscript{112} \textit{Szilard v Szasz} per Rand J at 6-7
\textsuperscript{113} \textit{Holland v. City of Vancouver} (1959) DLR 2d 616
public policy of the New York Convention. In *Quintette Coal* the Court of Appeal of British Columbia cited with approval the pro-arbitration *dicta* of Justice Blackmun of the United States Supreme Court in *Mitsubishi*\(^{114}\). The *Quintette Coal* decision has itself been approved by other provincial courts of appeal\(^{115}\). Canadian commentators have suggested that this *Mitsubishi* persuasion would cause Canadian courts to reject any bias defence to enforcement that did not demonstrate a violation of the most fundamental Canadian notions of justice\(^{116}\).

4. Regional Conclusions

In apparent bias challenges to arbitrators Hong Kong courts apply the *Porter v Magill* revision of the *Gough* ‘real danger’ test. A New Zealand court would likely do the same. Malaysian courts have approved *Gough* over *Porter v Magill*, though there is as yet no binding precedent for the application of either test to an arbitrator. Australian and Singaporean courts have rejected *Gough* and retained *Sussex Justices*. The writer has mentioned Canada and South Africa as examples of other Common Law states that have stayed with *Sussex Justices*. Despite the fact that, as fellow UNCITRAL Model Law states, Singapore and Australia have substantially the same laws for international arbitration as Hong Kong, Malaysia and New Zealand, they use the ‘reasonable apprehension’ test when an arbitrator is challenged for apparent bias. The Anglo-Model Law states of the Asia Pacific are not in harmony on the question of what test should be used to determined bias challenges to arbitrators. The law of bias is therefore an example of undesirable variation within Model Law seats: although all of the states surveyed in this chapter have arbitration statutes which are identical, and their decisions may carry persuasive weight, the Common Law that informs Model Law Article 12 is different seat-to-seat. Given that the stated objectives of the Model Law include the creation of a ‘unified legal framework’ for ICA, this disharmony is regrettable.

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\(^{114}\) *Quintette Coal Ltd v Nippon Steel Corp* (1990) 50 BCLR (3d) 207, citing with approval *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc.*, 473 US 614 (1985)

\(^{115}\) See for example *BTW Investments Ltd v Saskferco Products Inc* (1994) 119 DLR (4th) 577 at para 32

\(^{116}\) Above note 96, p.7
CHAPTER 6

Rules of Bias in the *Lex Mercatoria*

*Commercial law may be truly declared in the language of Cicero...to be in a great measure, not the law of a single country only, but of the commercial world*

- Justice Story in *Swift v Tyson* (1842)

1. Introduction

Whilst more comfortably seated in the Positivist camp than amongst adherents to Natural Law Theory, the writer accepts that there is such a thing as customary trans-national commercial law or *Lex mercatoria*. This chapter will not enter into the debate over the legitimacy of *lex mercatoria* or the significance of its contributions to the law and practice of ICA, suffice to say that there is a growing body of state court authority for the proposition that an arbitral tribunal may legitimately apply ‘internationally accepted principles of law governing contractual relations’\(^2\), especially where the applicable substantive national law does not provide clear guidance\(^3\). The primary purpose of this chapter is not to debate the *lex mercatoria* but rather to search for a single rule within it. To that end, the writer will in this chapter attempt to answer two questions:

1. Does the *lex mercatoria* include a rule against apparent bias?

2. If it does which of the three tests (*Sussex Justices, Porter v Magill* or *Gough*) most closely corresponds with the *lex mercatoria* test for apparent bias?

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1. 41 US (16 Pet.) 1, 19 (1842)
2. Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v R’as al-Khaimah National Oil Co [1987] 3 WLR 1023; *lex mercatoria* falls within the scope of English Arbitration Act 1996 s.46(1)(a)
The writer will begin by identifying the sources of *lex mercatoria*. The threshold question of whether *lex mercatoria* includes procedural rules will then be dealt with. The writer will show how a rule becomes a custom. The writer will then turn to the IBA Guidelines and show that there is growing acceptance of the IBA Rules and increasing interplay between them and municipal law. In order to distill from them a general approach to bias and show that they are *lex mercatoria* the writer will mimic the appendices to Berger’s seminal work *The Creeping Codification of the lex mercatoria* by marking up the waivable-Red, Orange and Green Lists of the IBA Guidelines with analogous state court decisions, provisions of municipal laws and institutional rules⁴. The writer will reach the conclusion that although the *Sussex Justices* elements are well represented in municipal and a-national sources, and the ‘reasonable apprehension’ test may on this basis have a good claim to *lex mercatoria*, the waivable-Red, Orange and Green Lists of the IBA Guidelines display tolerance for Party Familiarity that is much closer to the Second Arm of *Porter v Magill*, and possibly even *Gough*, than the Second Arm of *Sussex Justices*.

### 2. Procedural *lex mercatoria*

The *lex mercatoria* is created by and for the participants in international trade⁵. It is most commonly associated with substantive, rather than procedural law. Indeed, one of the current definitions of *lex mercatoria* is ‘non-national substantive rules’⁶. Supporting this is the fact that the vast majority of the international instruments identified as sources of *lex mercatoria* are substantive in nature. In his seminal contribution *The Creeping Codification of the lex mercatoria* (1999) Professor Berger identifies the sources of *lex mercatoria* as:

1. International Uniform Law⁷ (‘International sources’)
2. Municipal Law (‘Municipal Sources’)
3. Arbitral awards and case law from state courts (‘Jurisprudential Sources’)

⁴ See Annexure 1 of Berger, K.P., *The Creeping Codification of the lex mercatoria* (Kluwer, 1999), where each principle of *lex mercatoria* is stated and its international, municipal, jurisprudential and doctrinal equivalents listed. The writer mimics Berger with the greatest respect.
⁵ Above note 3, p.454
⁶ Ibid, p.451
(4) Legal Doctrine\(^8\) (‘Doctrinal Sources’)

There is undeniably a procedural dimension to the *lex mercatoria*. To a large extent it is overlooked by scholars of international commercial law. Its most basic manifestation is the methodical usage that, with the consent of the parties, an arbitrator may decide *ex aequo et bono* (or *amiables compositeur*), a customary rule that is often cited as the very basis for the availability of *lex mercatoria*\(^9\). Other procedural rules of *lex mercatoria* include:

(i) Absent choice of law the law with the closest connection to the contract prevails (the ‘Centre of Gravity Test’)\(^10\)
(ii) The *lex causae* may not be changed\(^11\)
(iii) Specialised laws prevail over general laws (*lex specialis derogate legi generali*)\(^12\)
(iv) Arbitral proceedings are not suspended if one of the parties goes bankrupt\(^13\)
(v) The burden of proof is on the Claimant or the party who advances a proposition affirmatively (*actori incumbit probatio*)\(^14\)

Most of the sources of *lex mercatoria* are silent on arbitration – neither the UNIDROIT Principles of International Commercial Contracts 1994 (UPICC) nor the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) discuss arbitration or arbitrators. Article 6:106 ( Determination by a Third Person) of the Principles of European Contract Law 1998 (PECL) provides for third party determination of prices or contractual terms but does not mention arbitration\(^15\). Besides actual arbitration rules and laws (such as the Model Law, the UNCITRAL Rules and possibly the ICC Rules) the best source is probably the International Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction 1987 (‘the Red Book’), which proscribes a two-tier dispute resolution procedure under the authority of a Dispute Adjudication Board (DAB)\(^16\) and ‘last-resort’ ICC Rules arbitration\(^17\). In drafting the UPICC the UNIDROIT Working Group accepted the Red Book

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\(^8\) Above note 4, p.278
\(^9\) Above note 3, p.457
\(^10\) Above note 4, p.289
\(^11\) Ibid, p.290
\(^12\) Ibid, p.302
\(^13\) Ibid, p.278
\(^14\) Ibid, p.302
\(^16\) FIDIC Red Book Clause 20
\(^17\) Ibid, Clause 20.6
as a source of trans-national commercial law\textsuperscript{18}. It is therefore arguable that the Red Book brings ICC disclosure rules into the \textit{lex mercatoria}\textsuperscript{19}. Indeed, it may be that the ICC Rules were already there. Whether it is ICC-shaped or not, there is certainly a disclosure obligation under \textit{lex mercatoria}. According to Yves Derains, former Secretary General of the ICC Court of Arbitration:

The arbitrator must inform the parties of any factors that might lead one of them to challenge him. He has to examine his conscience, and ensure that he does not run the risk of misjudgment in view of links with the parties or with the case. This is a real international custom or usage\textsuperscript{20}.

Alvarez and Donahey have expressed similar opinions\textsuperscript{21}. With this in mind, the writer would reverse engineer the disclosure custom, and say that equal treatment was \textit{lex mercatoria} first: today, the requirement that the arbitrator treat the parties equally is so well represented in municipal arbitration laws and institutional rules as to qualify for trans-national customary legal status\textsuperscript{22}. As John Austin would have had it (if he had really believed in customary law) these obligations would be empty if they were not accompanied by a sanction of some kind. There must be a corresponding \textit{lex mercatoria} rule which provides that an arbitrator may be challenged if they fail to disclose. The question is, therefore, not whether a challenge rule \textit{exists}, but what its formulation would most likely be. Answering this question requires that the writer offer an explanation of how a practice becomes a customary rule.

\begin{footnotes}
\item[18] Above note 4, p.151
\item[19] Article 7(1) of the ICC rules states that ‘every arbitrator must be and remain independent of the parties involved in the arbitration’. Article 11(1) confers the right to challenge an arbitrator ‘whether for lack of independence or otherwise’. Article 15(2) requires that ‘in all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case’. Where a party alleges a breach of this requirement, the ICC Court will evaluate the challenge. Proceedings before the ICC court are confidential.
\item[22] Equal treatment is required under UNCITRAL Model Law Art 18; ICC Rules Art 15(1); LCIA Rules Art 14.1; AAA International Rules Art 16(1); UNCITRAL Rules Art 15(1); WIPO Rules Art 38(b); ICSID Rule 50(1)(c)(iii); CAMCA Rules Art 17(1); SIAC Rule 17.2; Stockholm Rules Art 20(3); IACAC Rules Art 15(1); European Arbitration Rules Arts 7(4) and 11(4); Milan Rules Art 28; Finnish Rules Art 20; Zagreb Rules Art 20(1); Oslo Rules Art 10; CIETAC Ethical Rules Article 2
\end{footnotes}
3. Becoming a Rule of Customary Law

*Lex mercatoria* is a commercial, international species of customary law. A custom is a non-binding prescription of how to act in a certain situation. Customs develop where people accept them and see them as necessary\(^\text{23}\). They arise separate from posited laws and systems, in response to recurring states of affairs rather than coercive measures taken by the state. This is what Austrian economist Friedrich Hayek meant when he used the expression ‘spontaneous order’ (his ‘cosmos’). *Cosmos* is the order developed out of the non-coerced behaviour of the members of a group (who act in rational response to self motivated incentives). American Economic Legal theorist Francesco Parisi has said that customary laws are made up of two formative elements:

(a) Generality - a quantitative element (the actual existence of the norm as a social practice)

(b) *Opinio Juris* – a qualitative element (the acceptance of the practice as a prescription of necessary social behaviour)

For a norm to satisfy the first element, it must be general as a practice amongst members of a community. Generality does not mean universality – the norm may enjoy widespread *but not total* acceptance, and still qualify as a custom. And there is no minimum time limit applicable before a norm may qualify for consideration as a practice. Indeed, the complete lack of formalities and tangible objective sources is what separates customary law from posited law; there is no international constitution or Hart-type ‘Rule of Recognition’ that determines whether a custom passes the test for generality. As Hayek said, custom is *cosmos*, not *taxis*. If the spontaneous order of practices includes observation of a particular norm, then it will satisfy Parisi’s first formative element.

The second formative element is qualitative: is the norm necessary? This is what is known in public customary international law as *opinio juris ac necessitatis*. *Opinio* functions to distinguish between those customs that are behavioral regularities (non-essential patterns of human behaviour in a normative setting) and those that are internalised obligations (which

\(^{23}\) This section is taken from a legal theory lecture given by the writer on 10 October 2007 at Murdoch University, Perth, Western Australia.
are enforceable customs). When a behavioural regularity is a response to a social rule that satisfies opinion (ie. it is perceived as an essential norm of social conduct) then it will be an enforceable custom.

Some situations will be more conducive to the development of enforceable customs (ie. norms that satisfy Generality and Opinio). The more common it is for a set of facts to repeat itself, the more likely a custom is to develop about how people should behave when faced with it. The more common it is for people to ‘swap sides’, the more likely a norm is to enjoy Opinio - this is what is known as ‘Role Reversability’. Lon Fuller observed that game situations involving repeated role reversals facilitate the emergence and recognition of customary law: individuals who exchange roles in their social interactions have incentives to constrain their behaviour to socially optimal norms of conduct in consideration of reciprocal constrains undertaken by others. Game Theorists see similar things.

4. Sourcing a Challenge Rule in the lex mercatoria

With Parisi’s formative elements in mind we may test the various possible sources to see which one has the highest claim to being the lex mercatoria formulation of the rule against bias. In the preceding Chapter we have seen that the arbitration laws of UNCITRAL Model Law states adopt the Article 12 wording in their challenge provisions; Article 12 of the Model Law provides that ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence’. Article 10(1) of the UNCITRAL Arbitration Rules creates a very similar rule (as does General Standard 2 of the IBA Guidelines). ICC Rules Article 11(1) confers the right to challenge an arbitrator ‘whether for lack of independence or otherwise’. All forty-five Model Law states share this drafting, including states such as Germany, Austria, Hong Kong and Singapore whose significance as seats causes their state courts to produce a high volume of case law, with the result that the second Parisi element (Opinio Juris) is readily made out. This is important because the case law of state courts is a key source of lex mercatoria.

The arbitration laws of many non-Model Law states adopt the Article 12 standard. England is the leading example. The English Arbitration Act 1996 is not a Model Law statute, but its

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24 The writer has used the figure 45 as an approximation. The true figure may be higher depending upon the distinction between a state and a territory.
drafting was heavily influenced by the UNCITRAL instrument\(^{25}\). In Chapter 2 we saw that the English Act’s challenge provision is an imperfect adoption of Model Law Article 12, the difference being that the English section refers only to ‘impartiality’\(^{26}\). Similarly, whilst Belgium is not a Model Law state, the challenge provision of the Judicial Code (Article 1690) closely resembles Model Law Article 12\(^{27}\). Dutch courts use a ‘justifiable doubts’ test for impartiality and independence which draws on Article 12 of the Model Law and Strasbourg Jurisprudence\(^{28}\). In Chapter 4 the writer observed that the ICA laws of the United States – another significant non-Model Law seat - have been harmonised with Model Law standards of bias and disclosure as a result of Supreme Court action in the mid 1980’s\(^{29}\).

The principal exceptions are France, Switzerland and Sweden, each of which approach bias challenges differently. French courts apply NCCP Article 341 and only require independence. A ‘legitimate doubts’ test for apparent bias prevails in Switzerland\(^{30}\), the relevant source being SPIL Articles 180(1)(c) and 190(2) and the disqualification grounds for the judges under the new Federal Supreme Court Act. Swedish arbitration law is very strict on bias, listing circumstances where impartiality will be deemed lacking at Article 8 of the 1999 Act. France and Switzerland (and to a lesser extent Sweden) are leading seats, and their courts generate a great deal of arbitral case law. So although they are outnumbered by Model Law and ‘Article 12 states’, and therefore defeated on Generality, their unique challenge rules must be seen as legitimate competitors under Opinio Juris.

Overall, however, Model Law Article 12 succeeds on both Opinio Juris and Generality. It must be seen as the leading candidate - it is so well represented in municipal laws of the leading seats as to qualify for lex mercatoria on this basis alone. It is repeated in the UNCITRAL Arbitration Rules, which are the most widely used rules for ad hoc proceedings.


\(^{26}\) English Arbitration Act 1996 s.24(a) allows any party to an arbitral proceeding to apply to the court for removal of an arbitrator during arbitral proceedings on the basis ‘that circumstances exist that give rise to justifiable doubts as to his impartiality’.

\(^{27}\) Article 1690(1) reads ‘Arbitrators can be removed if the circumstances are such as to raise legitimate doubts as to their impartiality or independence’. This English translation of Article 1690 of the Belgian Code Judiciaire is taken from the English version of the judgment of the Brussels Court of First Instance in Eureko at 4

\(^{28}\) Decision of Supreme Court of the Netherlands of June 2007 in N. v Aegon Verzekering Leven

\(^{29}\) Dezalay, Y, Garth, B.G., Dealing in Virtue: International Commercial Arbitration and the Construction of a Trans-national Legal Order (University of Chicago, 1996), p.7; Model Law standards of impartiality, independence and disclosure are recognised as a result. Section 10(a) of the FAA allows for arbitral awards to be set aside where there was ‘evident partiality or corruption in the arbitrators’

\(^{30}\) SPIL Article 180(1)(c)
and taken up by the IBA Guidelines. It is submitted, therefore, that there is a challenge rule in the *lex mercatoria* and that its wording is that of Model Law Article 12 (or UNCITRAL Rule 10(1)). The next issue is what test for bias informs it – is it the Second Arm of *Sussex Justices, Porter v Magill* or *Gough*? In this thesis, the writer has shown that the *Sussex Justices* test is the most common test used by state courts to determine apparent bias in arbitrators. Although it competes with *Porter v Magill* across the Common Law world, because *Sussex Justices* is part of Strasbourg Jurisprudence it would seem to carry the day on both Parisi’s formative elements and *tronc common*. But the IBA Guidelines cast some doubt on this conclusion: although they refer to the First Arm of *Sussex Justices* (the vantage of ‘a reasonable and informed third party’), the situations which the Orange List identify as permissible suggest that a higher threshold may have been envisaged for the Second Arm; Finnish lawyer Matti Kurkela put it well when he said ‘the IBA Guidelines introduce “a Protestant” view of bringing common sense to the “orthodox hypocrisy” of being more papal than the Pope’.

Because they make less instances of conflict of interest actionable, the *Porter v Magill* and *Gough* test must be seen as complimenting ‘IBA Protestantism’.

5. Are the IBA Guidelines *lex mercatoria*?

As a ‘stateless’ body whose members include the most prominent practitioners of ICA, the International Bar Association is uniquely placed to provide guidance on conflicts of interest for arbitrators. To that end, in May 2004 it published a set of Guidelines on Conflicts of Interest in International Arbitration. The Working Party that drafted the IBA Guidelines was made up of 19 members, representing 14 jurisdictions. The IBA published Rules of Ethics for International Arbitrators in 1987: because they are broader in scope the Rules of Ethics are not replaced by the 2004 Guidelines; they are superseded on to the extent that they cover the conflicts of interest.

When the IBA Guidelines were drafted, it was hoped that they would be treated as persuasive authority by state courts and arbitral tribunals faced with conflicts of interest. For the most part, the IBA Guidelines have been well received by users of arbitration, those ‘users’ being firstly the parties; and secondly, arbitrators, arbitration institutions and state courts. That is

32 Introduction to the IBA Guidelines, para 8
33 Introduction to the IBA Guidelines, para 6
not to say, however, that they have enjoyed unanimous approval: one of the recurring objections to the IBA Guidelines is that their focus on ‘appearances’ has caused the practice of giving elaborate, American style ‘life story’ disclosure to increase in ICA; another criticism is that the Guidelines favour the same subjective test for apparent bias the whole way through the arbitration, and do not distinguish between the different stages of the proceedings\(^\text{34}\). Pierre Lalive was against detailed ethical codes which lack universality\(^\text{35}\). The writer agrees with some of these criticisms, but would like to put them to one side for the minute. In this chapter, the writer is concerned with identifying which test the IBA Guidelines carry into the \textit{lex mercatoria}.

The model of ethical (rather than strictly \textit{legal}) regulation of arbitrator conflicts of interest has developed out of necessity. In his 1998 study of the theory of arbitration, Oppetit remarked that, if the parties could not appoint arbitrators of their choice, then

\begin{center}
\begin{quote}
In the absolute, remedies would lie either in arbitration before a single judge, or in generalizing appointment of arbitrators unconnected with the parties: the adoption of such heroic measures is still doubtless a long way off...hence the current preference is to insist on the role of ethics\(^\text{36}\)
\end{quote}
\end{center}

Codes of ethics have a pedagogical and preventative purpose\(^\text{37}\). The IBA Guidelines are not legal provisions, and do not override national laws or rules chosen by the parties - they are prescriptions of ‘best practice’ for international arbitrators. As has been foreshadowed, the writer is of the opinion that the IBA Guidelines have a strong claim to being \textit{lex mercatoria}. Parties use them, and it is increasingly common for state courts to refer to them in challenge proceedings. In her 2006 statement to the IBA Section on Business Law, Judith Gill, Chair of the IBA Guidelines monitoring sub-committee, reported that the IBA Guidelines were in use in seven important jurisdictions in Western Europe and in the United Kingdom, the United States and Canada\(^\text{38}\).

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37 Canivet, G., Joly-Hurard, J., \textit{La deontologie des magistrats} (Dalloz 2004)

\end{flushright}
The first time the IBA guidelines were cited by a national court was in the decision of the District Court of The Hague in *Telekom Malaysia*. Today, the record is well balanced amongst Civil Law and Common Law states. Regarding the former grouping, in *Anders Jilkén v. Ericsson AB; Re Judge Lind* the Swedish Supreme Court used the IBA Guidelines in conjunction with the Swedish Arbitration Act to rule for disqualification. The Brussels Court of Appeal used them in *Eureko v Poland* (to dismiss the challenge), as did the Higher Regional Court of Central Frankfurt in *X v Y* (challenge dismissed). Common Law courts have also made use of the Guidelines in challenge hearings. Bound by *Porter v Magill*, Justice Morison of the English Commercial Court considered the IBA Guidelines in *ASM Shipping* (challenge upheld). The Fifth U.S. Circuit Court of Appeals relied in part on the IBA Guidelines in *Positive Software*, finding that the relevant circumstances were on the Green List (challenge dismissed). In *AIMCOR* the Second US Circuit Court of Appeals measured the arbitrator’s non-disclosure in accordance with the IBA Guidelines (*vacatur* granted). The IBA Guidelines also appear in the judgment of the Florida District Court in *HSN Capital LLC (USA) & Ors v Productora y Commercializador de Television SA de CV (Mexico)*, and were treated as persuasive by the Ninth US Court of Appeals in *New Regency Productions Inc., v Nippon Herald Films, Inc*.

The field in which the influence of the IBA Guidelines is strongest is certainly Investor-State Arbitration (ISA). The Guidelines play an important role when tribunals decide challenges in *ad hoc* and institutional ISA proceedings. As has been observed, the Green List was considered by the District Court of The Hague in *Telekom Malaysia* (challenge upheld). Similarly, the IBA Guidelines were used by the LCIA panel in the challenge to Arbitrator Kessler in *National Grid PLC v Argentina* (challenge dismissed). ICSID jurisprudence displays an increasing acceptance of the IBA Guidelines. There are a number of examples: in

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39 *Jilkén v. Ericsson* at 174
40 R.G. 2006/1542/A
41 Decision of the Higher Regional Court of Frankfurt am Main of 4 October 2007 in *X v Y* (English translation of judgment by Richard Kreindler, Kluwer Arbitration)
42 [2005] APP.L.R.10/19
43 337 F. Supp 2d 862 at 865 (N.D.Tex. 2004)
44 Unreported, in F. Supp. 2d, decision of 9 July 2007
45 Decided 5 July 2006 (US District Court, M.D., Florida)
46 No.05-55224 DC No.CV-04-09951-AHM Opinion, September 2007)
48 LCIA Case No. UN7949
EDF International SA & Ors v Argentina (Re Arbitrator Kaufmann-Kohler) the remaining members of the ICSID tribunal relied upon IBA Standard 7(c) to dismiss the challenge; in Hrvatska Elektroprivreda dd v Slovenia the ICSID panel used the IBA Guidelines to deal with an unprecedented objection to the participation of David Mildon QC as counsel for the Respondent (objection upheld).

Although there are instances of *sua sponte* reference, in most of the above cases the court or tribunal relied upon the IBA Guidelines because the parties referred to them in their submissions. As has been observed, *lex mercatoria* is *made by users for users*: it is, therefore, what the parties actually do that is most important when we determine whether or not a practice has a claim to the status of international customary commercial law. And it is evident that the parties do treat the IBA Guidelines as legal standards: in 2007 Geoff Nicholas and Constantine Partasides observed that the Guidelines ‘are now being referred to widely by parties challenging arbitrators, parties opposing the challenge to arbitrators and institutions that are deciding those challenges’. In fact, challengers appear to be using the IBA Guidelines in an increasingly formalistic manner, almost like a code. The challenge in Hrvatska Elektroprivreda provides a good example of this: the lawyers for the Claimant (HE) proposed disqualification rather delicately ‘having in mind the IBA Guidelines’; the lawyers for the Respondent wrote back rejecting the Claimant’s interpretation of the IBA Standard as ‘narrow’; the Respondent’s lawyers replied rejecting the Claimant’s reading of the IBA Standard as ‘narrow’. Similarly, in National Grid PLC v Argentina the challenger (Argentina, again) proposed disqualification on the basis of the IBA Guidelines (and *inter alia* the test in Commonwealth Coatings); the respondent (National Grid) argued that ‘Argentina was able to point to only one situation from the Orange List that might tangentially cover the issue’. If we apply the theory of Parisi, the fact that practitioners use the IBA Guidelines as if they were binding statements of law is *making them* binding statements of customary law.

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49 ICSID Case ARB/03/23; Challenge Decision dated 25 June 2008, para 69
50 ICSID Case ARB/05/24 (Decision Regarding the Participation of David Mildon QC), para 19
51 Nicholas, G, Partasides, C (2007) 23 Arbitration International 1 at p.2
52 Claimant’s letter to the Tribunal dated 28 April 2008, cited at para 4 of ICSID Case ARB/05/24 (Decision Regarding the Participation of David Mildon QC)
53 ICSID Case ARB/05/24 (Decision Regarding the Participation of David Mildon QC), pp.2-6
54 LCIA Case No. UN7949, para 15
Finally, the IBA Guidelines are being incorporated into the municipal arbitration laws of Model Law Plus states, giving them an important posited platform. The best example is the United Arab Emirates. Articles 12(1)(c) and (d) of the new Federal Arbitration Law of the United Arab Emirates (2008) are near perfect adoptions of items (c) and (d) of the Explanation to IBA General Standard 2\(^\text{55}\) - this is a sovereign entity adopting a provision of an industry code as its federal law. If this is anything more than a one-off, the status of the IBA Guidelines will be elevated significantly. Consistent with this development in the UAE is the trend towards the statutory recognition of arbitral institutions in the Model Law seats of the Asia Pacific. The arbitration laws of Singapore and Hong Kong, for example, contain Model Law Plus provisions which delegate authority to appoint arbitrators to the leading international arbitration institution in each seat (being SIAC and the HKIAC respectively). In late 2008 the Australian Attorney General announced that he was considering delegating both the power to appoint and to determine challenges to arbitrators to the Australian Centre of International Commercial Arbitration (ACICA). When an arbitral institution is delegated the function of an appointing authority, its institutional rules, codes of ethics and challenge jurisprudence creep into the law of the state in which it is seated. In the customary sense, the practices of its arbitrators also enter the equation. In the Hong Kong example, HKIAC appointment rules and practices legitimately inform Hong Kong arbitration law by operation of s.12 of the Hong Kong Arbitration Ordinance. The IBA Guidelines then also indirectly inform Hong Kong arbitration law because the majority of arbitrators on the HKIAC list are IBA members who observe the IBA Guidelines in practice. The same is true of Singapore and SIAC, and, likely in the future, Australia and ACICA. Elsewhere in the region, the Arbitrators and Mediators Institute of New Zealand has adopted the IBA Guidelines for use when acting as appointing authority\(^\text{56}\). The Guidelines also influenced CIETAC when it drafted its ethical rules for arbitrators\(^\text{57}\).

Arbitral institutions are a key conduit for the IBA Guidelines, and, in the New World at least, it is clear that the current is increasingly strong towards the law. In the Old World, however,  

\(^{55}\) Luttrell, S.R., ‘The Changing Lex Arbitri of the United Arab Emirates’ (2009) 23 ALQ 4/ Article 12(b) of the UAE Federal Arbitration Law 2008 reads ‘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’. Article 12(1)(c) reads ‘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.’

\(^{56}\) Above note 34 at p.108

\(^{57}\) Ibid
the progress of the IBA Guidelines has been markedly slower. The ICC expressed certain ‘in principle’ objections to the IBA Guidelines when they were published; Anne Marie Whitesell, who was ICC Secretary General when the Guidelines were drafted and passed by the IBA, explained the Chamber’s position in the following terms:

From the ICC’s perspective, there is a fundamental incompatibility between the [ICC] Rules and the IBA Guidelines. Article 7(2) of the Rules requires a subjective approach to disclosure, i.e. an ICC arbitrator is required to disclose in writing any facts or circumstances which might be of such a nature as to call into question his or her independence ‘in the eyes of the parties’. Hence, it is not possible in ICC arbitration to have a list of situations which are said to be objective and never to require disclosure as provided in the IBA Guidelines’ Green List\(^{58}\)

In practice, parties to ICC arbitrations do refer to the IBA Guidelines in appointment and challenge procedures, and the rate of reference seems to be increasing\(^{59}\). In 2004, very soon after their publication by the IBA, reference was made to the Guidelines in one arbitrator confirmation and one challenge\(^{60}\); one confirmation and two challenges in 2005; four non-confirmations and three challenges in 2006\(^{61}\). Additionally, between 2004 and 2007, the IBA Guidelines were referred to in three ad hoc UNCITRAL Rules arbitrations in which the ICC Court was asked to decide challenges\(^{62}\).

The writer’s opinion is that the IBA Guidelines qualify as lex mercatoria on the basis of their growing acceptance in the jurisprudence of state courts and arbitral institutions, and their representation in municipal arbitration laws. The Guidelines satisfy both of Parisi’s formative elements: a growing number of state courts and arbitral institutions treat them as persuasive, and because so many serving arbitrators are IBA members, the Guidelines have a good claim to both Generality and opinio juris. Hayek would have agreed. It has been observed in the Chapter 1 that the international arbitration community is a ‘mafia’ of individuals who exhibit a very high degree of Role Reversability (‘he who is counsel one day may be arbitrator the

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\(^{59}\) Ibid at FN 42, where the former Secretary General observes ‘in 2007, there would appear to have been an increase in references to the IBA Guidelines in ICC cases’

\(^{60}\) Ibid at p.37

\(^{61}\) Ibid

\(^{62}\) Ibid at FN 42
next’). The spontaneous order which has developed out of the non-coerced behaviour of the members of the international arbitration mafia (who act in rational response to the self-motivated incentives of future appointments to either Bench or Bar) has produced customary rules of bias and conflict of interest that reflect the tenets of the IBA Guidelines. Members of this closed community use the IBA Guidelines to ensure they are not breaching the customs of the group when they reverse roles. The context of this cosmos and the custom it generates is both trans-national and commercial. The IBA Guidelines are therefore lex mercatoria.

If the reader is willing to entertain the above submission, the writer can pose the final question of this chapter: which test for bias do the IBA Rules seem to prefer? General Standard 1 adopts the dual standard:

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.

The UNCITRAL Model Law’s ‘justifiable doubts’ test is used by the IBA in General Standard 2. As has been observed, UNCITRAL Model Law Article 12 and UNCITRAL Rule 10(1) are usually interpreted in a manner consistent with Sussex Justices. For example, in Challenge Decision of 11 January 1995 the panel held that ‘doubts are justifiable or serious [for the purposes of UNCITRAL Rule 10(1)] if they give rise to an apprehension of bias that is, to the objective observer, reasonable’.

This thesis has identified many other examples. The IBA Working Group clearly agreed with this approach. The Explanation to the General Standard 2 states:

(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

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63 General Standard (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).

64 Challenge Decision, 11 January 1995, para 24, 30
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 [emphasis added]

The hypothetical vantage point used in the elucidation to General Standard 2 is that of the ‘reasonable and informed third party’, and not the court. Gough’s First Arm is not recognized. This is confirmed by sub-item (b) of the Explanation to General Standard 2, which states:

In order for standards to be applied as consistently as possible, the working Group believes that the test for disqualification should be an objective one. The Working Group uses the wording ‘impartiality or independence’ derived from the broadly adopted Article 12 of the UNCITRAL Model Law, and the use of an appearance test, based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, to be applied objectively (a ‘reasonable third person test’)

The Working Group’s preference for the ‘reasonable third person’ takes up the First Arm of Sussex Justices. The Guidelines place high importance on the appearance of fairness, thereby confirming the applicability of Lord Hewart’s dictum in Sussex Justices that ‘justice must be done and be seen to be done’ to private dispute resolution processes. This suggests that the IBA favours the ‘reasonable apprehension’ test over the ‘real danger’ test. Supportive of this reading is the fact that the word ‘real’ has been deliberately left out of the Explanation to General Standard 2. A number of tribunals have followed the IBA Guidelines to a Sussex Justices result: for example, in National Grid the LCIA Division concluded that the standard was one of a third person’s ‘reasonable apprehension’65. It is worth noting that the LCIA division did not invoke this test sua sponte: Argentina cited Sussex Justices in support of its

65 LCIA Case No.UN7949, para 87
argument that Arbitrator Kessler had caused an appearance of partiality to arise by intervening during the examination of an Argentina expert witness\textsuperscript{66}.

The record shows that a tribunal applying the IBA Guidelines is more likely to dismiss a challenge than uphold it. It is apparent that the pure, strict form of the Second Arm of Sussex Justices is usually ‘watered-down’. The solution is Porter v Magill – it must be, otherwise the reasonable apprehensions of challengers would more often result in success and disqualification. The practice of cynical assessment of challenges – which is itself driven by customary forces including reciprocity and Role Reversibility (‘I could be next’) – is either informed by or corresponds with a higher threshold for disqualification than reasonable apprehension. When the IBA Guidelines are used, the First Arm of Sussex Justices is certainly observed, but alongside the Second Arm of Porter v Magill; the Second Arm of Porter v Magill is also evident in the Orange List.

6. The Lists

Unlike other ethical codes and guidelines for arbitrators (such as the AAA and ABA models), the IBA Guidelines create a twin duty to both disclose and investigate. Under the IBA Guidelines, the arbitrator has a duty to make reasonable inquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. This is General Standard 7(c). Matters which much be investigated and disclosed are those which would need to be investigated or disclosed ‘in the eyes of the parties’; the Working Party’s choice to use a different vantage point for investigation and disclosure (‘party vantage’, as compared to the ‘reasonable third person’ perspective which is applicable at the review stage) was ‘a well known effort by the IBA to reach out to the ICC’\textsuperscript{67}.

General Standard 2(b) requires that the arbitration decline appointment (or presumably stand down, if the matters have just come to his attention) where a reasonable third person, having the knowledge of the relevant facts, would have justifiable doubts as the arbitrator’s impartiality or independence. The IBA Guidelines identify circumstances that may expose arbitrators to challenges in bias. They include three colour-coded lists – Red, Orange and

\textsuperscript{66} LCIA Case No.UN7949, para 48 (FN 7)
\textsuperscript{67} Kantor, M., ‘Arbitrator Disclosure: An Active But Unsettled Year’ [2008] Int ALR 11 at p.26
Green. The Red List deals with situations where a conflict of interest exists. In recognition of the Doctrine of Party Autonomy (and its limits) the Red List is split in two. The ‘Non-Waivable Red List’ identifies conflicts of interest where the arbitrator must not act (or must resign, if they have already entered onto the reference). The situations in the ‘Waivable Red List’ must be disclosed, and the arbitrator may only act where the parties are fully aware and give their express consent. In the middle is the Orange List, which enumerates situations where a conflict may exist in the eyes of the parties depending upon the facts of the case. At the pre-appointment stage, Orange list matters are usually disclosed; in practice, once disclosed, the relevant Orange List circumstance turns red and the disclosing candidate will not be appointed. At the far end of the spectrum is the Green List: matters where no conflict of interest will exist and disclosure is not necessary. The Green List circumstances will never provide grounds for recusal or disqualification of arbitrators.

Below, each IBA list item is italicised and its lex mercatoria sources (being municipal laws, institutional rules and state court decisions equivalent to or applying it) are listed below it in bold.

1. NON-WAIVABLE RED LIST

1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.

   French NCCP Article 341; German CCP Article 41; CAS Ad Hoc Rules Article 12; Texas CPRC s.172.056(A)(1)(a); California CCP s.1297.121; Procola v Luxembourg (EHR Court decision of 28 September 1995)

1.2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties

   Morelite Construction 748 F.2d 79 (2d Cir. 1984)

1.3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

   Swiss BGG Article 34(1)(a); Swedish Arbitration Act (1999) Article 8(1); German CCP Art 41; NASD Code s.23(b)(2); Argentina Arbitration Act 768(2)(i); Indonesian Arbitration Law (No.30/1999) Article 12(1)(c); CIETAC Ethical Rules Article 5; Re Skene’s Award (1904) 24 NZLR 591

68 Above note 32 at p.96
1.4. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

NASD Code s.23(b)(1); Schmitz v Zilveti, 30 F.3d 1043 (9th Cir. 1994)

2. WAIVABLE RED LIST

2.1. Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

Swiss BGG Article 34(1)(b); German CCP Art 41; Texas CPRC s.172.056(A)(1)(c); California CCP s.1297.121; CIETAC Ethical Rules Article 3; Commonwealth Coatings 393 US 145 (1968); China Harbour [2007] BLR 435 HK CA

2.1.2 The arbitrator has previous involvement in the case.

Swiss BGG Article 34(1)(b); German CCP Art 41; Texas CPRC s.172.056(A)(1)(e); California CCP s.1297.121; CIETAC Ethical Rules Article 3; Commonwealth Coatings 393 US 145 (1968)

2.2. Arbitrator’s direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

Swiss BGG Article 34(1)(a); Argentina Arbitration Act 768(2)(i); Indonesian Arbitration Law (No.30/1999) Article 12(1)(c); Texas CPRC s.172.056(A)(2)(a)(ii); California CCP s.1297.121; NASD Code s.23(b)(1); CIETAC Ethical Rules Article 5; Szilard v Szasz [1955] SCR 3

2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

NCCP Art 341; Swedish Arbitration Act (1999) Articles 8(1) and 8(2); Indonesian Arbitration Law (No.30/1999) Article 12(1)(c); Texas CPRC s.172.056(A)(1)(g)(iv), s.172.056(A)(2)(a)(ii); California CCP s.1297.121; NASD Code s.23(b)(2)

2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Swedish Arbitration Act (1999) Articles 8(1) and 8(2); Argentina Arbitration Act 768(2)(ii); Texas CPRC s.172.056(A)(1)(g)(iv); California CCP s.1297.121; NASD Code s.23(b)(2); ANR Coal 173 F 3d 493 (4th Cir 1999)
2.3. Arbitrator’s relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

German CCP Art 41; CAS Ad Hoc Rules Article 12; Texas CPRC s.172.056(A)(1)(c); California CCP s.1297.121; NASD Code s.23(b)(2); Société des Equipements Industriels Stolz S.A. v. Ets. Letierce [1988] Rev Arb 316; Annahold Rev Arb 483 (1986)

2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

Eureko B.V. v Republic of Poland R.G. 2006/1542/A; NASD Code s.23(b)(2)

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

Texas CPRC s.172.056(A)(1)(d); California CCP s.1297.121; NASD Code s.23(b)(2); Re Skene’s Award (1904) 24 NZLR 591

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

NASD Code s.23(b)(2)

2.3.6 The arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

Texas CPRC s.172.056(A)(1)(d); California CCP s.1297.121; NASD Code s.23(b)(2); Schmitz v Zilveti, 30 F.3d 1043 (9th Cir. 1994); JCP Entreprises et Affaires [2002] Lyon (6 May 2002) 808; Jiklén v. Ericsson AB (Re Judge Lind) Case No. T2448-06 [2007] 3 SIAR; SCC Arbitration 60/1999; SCC Arbitration 60/2001

2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.

NCCP Article 341; German CCP Art 41; Swedish Arbitration Act (1999) Articles 8(1) and 8(2); Swiss BGG Article 34(1)(c); NASD Code s.23(b)(3); Argentina Arbitration Act 768(2)(ii); Indonesian Arbitration Law (No.30/1999) Article 12(1)(c); CIETAC Ethical Rules Article 5; Milan Presse [1999] Rev Arb
2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

NCCP Article 341; Swiss BGG Article 34(1)(c); Swedish Arbitration Act (1999) Articles 8(1) and 8(2); Argentina Arbitration Act 768(2)(ii); Texas CPRC s.172.056(A)(1)(g)(iv); California CCP s.1297.121; NASD Code s.23(b)(3); Szilard v Szasz [1955] SCR 3

3. ORANGE LIST

3.1. Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.


3.1.2 The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.


3.1.3 The arbitrator 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.

Schmitz v Zilveti, 30 F.3d 1043 (9th Cir. 1994); SCC Arbitration 120/2001

3.1.4 The arbitrator’s law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

SCC Arbitration 60/1999; SCC Arbitration 60/2001; Compania de Aguas de Aconquija SA v Argetina (Arb/97/3)(Challenge Decision 3 October 2001)

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.
3.2. Current services for one of the parties

3.2.1 The arbitrator’s law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.

Texas CPRC s.172.056(A)(1)(d); California CCP s.1297.121; Compania de Aguas de Aconquija SA v Argentina (Arb/97/3)(Challenge Decision 3 October 2001)

3.2.2 A law firm that shares revenues or fees with the arbitrator’s law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.

Texas CPRC s.172.056(A)(1)(d); California CCP s.1297.121; Argentina Arbitration Act 768(2)(i); Re Skene’s Award (1904) 24 NZLR 591

3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.

ANR Coal 173 F 3d 493 (4th Cir 1999)

3.3. Relationship between an arbitrator and another arbitrator or counsel.

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers’ chambers.

Texas CPRC s.172.056(A)(1)(d); California CCP s.1297.121; Laker Airways v FLS Aerospace [1999] 2 Lloyd’s Rep 45; Pilkington Plc v PPG Industries Inc (unreported, High Court Commercial Division, 1 November 1989); Nye Saunders v Alan E. Bristow (1987) 37 BLR 92; KFTCIC [1992] Rev Arb 568

3.3.3 The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration. Texas CPRC s.172.056(A)(1)(d); Swiss BGG Article 34(1)(b); Fletamentos Maritimos [1997] 2 LIL Rep 302

3.3.4 A lawyer in the arbitrator’s law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

TF (1998) 16 Bull ASA 634

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
Swedish Arbitration Act (1999) Article 8(2); Centroza v Orbis (Swiss Federal Court 26 October 1966)

3.3.6 A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

NCCP Article 341; Swiss BGG Article 34(1)(e); Texas CPRC s.172.056(A)(1)(g)(ii); California CCP s.1297.121; NASD Code s.23(b)(3)

3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

California CCP s.1297.121; Prince Unreported 3d, WL 1330484 (June 15, 2004)

3.4. Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator’s law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

Eureko R.G. 2006/1542/A

3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

Swedish Arbitration Act (1999) Article 8(2); Texas CPRC s.172.056(A)(1)(d); California CCP s.1297.121; Philipp Brothers [1990] Rev Arb 497; Du Toit (1993) 9 WAR 139

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

NCCP Article 341; Swiss BGG Article 34(1)(e); Swedish Arbitration Act (1999) Article 8(2); Texas CPRC s.172.056(A)(1)(g)(i); California CCP s.1297.121; NASD Code s.23(b)(3); H.A.R. v Austria (EHR Com decision 10 September 1998, No.40021/98); H v Belgium (EHR Court decision 30 November 1987); Andros Compania 579 F.2d 691; Ligier & Diffucia [1989] Rev Arb 505

3.4.4 If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties.

NCCP Article 341; Du Toit (1993) 9 WAR 139
3.5. Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.

Swiss BGG Article 34(1)(a); Swedish Arbitration Act (1999) Article 8(1); Argentine Arbitration Act 768(2)(i); Indonesian Arbitration Law (No.30/1999) Article 12(1)(c); Texas CPRC s.172.056(A)(1)(d); California CCP s.1297.121; CIETAC Ethical Rules Article 5

3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated whether in a published paper or speech or otherwise.


3.5.3 The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.


3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.


4. GREEN LIST

4.1. Previously expressed legal opinions

4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).

4.2. Previous services against one party

4.2.1 The arbitrator’s law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the Arbitrator

*Anaconda* 418 F.Supp.107, 109-12 (D.D.C.1976); *Compania de Aguas de Aconquija SA v Argetina* (Arb/97/3; Challenge Decision 3 October 2001)

4.3. Current services for one of the parties

4.3.1 A firm in association or in alliance with the arbitrator’s law firm, but which does not share fees or other revenues with the arbitrator’s law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.

4.4. Contacts with another arbitrator or with counsel for one of the parties

4.4.1 The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.

*Texas CPRC s.172.056(A)(1)(g)*; *California CCP s.1297.121*; *NASD Code s.23(b)(3)*; *Philipp Brothers [1990] Rev Arb 497*; *Hudault v Societe Generale de Surveillance SGS & Ors [2002] Rev Arb 208*; *SCC Arbitration 60/1999*

4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.


4.5. Contacts between the arbitrator and one of the parties

4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator’s availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.


4.5.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate
of one of the parties, have worked together as joint experts or in another professional capacity, including as arbitrators in the same case.


7. Conclusions

It is clear therefore the IBA Guidelines are supported by municipal and jurisprudential sources. But the fact of use is what is most important when the existence of a custom is considered: it is increasingly common to see the IBA Guidelines referred to by the parties and decision makers (both arbitral tribunals and municipal courts) in challenge proceedings. The record is split fairly evenly between Common Law and Civil Law seats. Challenges in ISA and ICSID proceedings are often decided using the IBA standards. The IBA standards are also being passed into municipal law by direct enactment (like in the UAE) and indirectly by delegation of appointment and challenge functions to arbitral institutions. The net effect of these developments is to elevate the status of the IBA Guidelines and their Lists. To recap briefly, the items of the Non-Waivable Red List are universally actionable, either under specific provisions of municipal laws, nemo judex in sua causa or the Rule in Dimes. The waivable-Red list shows that the IBA favours Party Autonomy and supports the availability of waiver and collateral estoppel. The Orange List is where the ‘Protestantism’ of the IBA Guidelines is clearest: case law shows that the situations on the Orange List can go either way. Best practice is to observe the lex mercatoria rule of disclosure at all times.

The previous chapters have shown that, where Orange List matters are pleaded the success of the challenge will largely depend upon the test for bias that is applied. Courts that apply Sussex Justices are much more likely to order disqualification in Orange List circumstances than courts which apply the Second Arm of Porter v Magill (or Gough). The best example is probably IBA item 3.1 (‘Previous services for one of the parties or other involvement in the case’) – applying the Strasbourg/Sussex Justices test, in Celtic v UEFA the ICAS upheld a challenge based on previous service as counsel, as did the Paris court in Marteu v CIGP; using higher thresholds in similar facts American courts have dismissed challenges (see for example Positive Software and Lucent v Tatung). The very fact that these matters are identified as ‘Orange List’ proves that the IBA Guidelines display a higher tolerance for bias than state courts that follow both arms of Sussex Justices. Whilst the Explanation to the
General Standard 2 shows that the IBA Guidelines recognise the first arm of *Sussex Justices* (‘reasonable and informed third party’ vantage), a broader reading of the lists shows that the Second Arm of *Porter v Magill* (‘real possibility’) probably prevails. The writer has argued that the IBA Guidelines are *lex mercatoria*; if they are then so is *Porter v Magill*. 
CHAPTER 7

Bias Challenges in Investor State Arbitration

No country in the world has ever won in international arbitration... Not the governments, not the nations, not the people. Only the companies win

- Bolivian President Evo Morales

1. Introduction

So far this thesis has focused on bias in private procedural settings. This is justified on the basis that, historically speaking, the majority of arbitrations have been conducted between private parties, usually in commercial contexts. The involvement of states in arbitral proceedings has, until relatively recently, mostly been limited to disputes with other states. There are exceptions, such as commercial arbitrations between private parties and state enterprises (such the ‘state trading entities’ of the Soviet era), in which states have appeared against companies. True inter-national arbitration – where two or more sovereign entities submit to the jurisdiction of an ad hoc or permanent tribunal to resolve a particular dispute - is well settled in the law of nations. There are many examples of state-versus-state arbitration in the historical record: the Greek city states regularly used arbitration to avoid war within their confederacy; the arbitration of disputes between princes was a well settled practice by the medieval period: the Pope was regularly judged the grievances of Catholic princes; in 1177 English King Henry II arbitrated the territorial dispute between the kings of Castile and Navarre. But it was after the development of trans-Atlantic trade and investment in the seventeenth century that the model of sovereign dispute resolution began to change.
The 1794 ‘Jay Treaty’¹, settled between England and the newly formed United States of America in the wake of the War of Independence to decide the boundary with Canada, also contained detailed provisions in which the outstanding claims of the signatories and their nationals were to be brought before two special commissions of three and five arbitrators; these mixed commissions produced 565 awards, most of which related to the seizure of privately owned American-flagged vessels by the British navy during the war². The Jay Treaty was the first of a number of treaties of ‘Friendship, Commerce and Navigation’ that, in varying degrees, required the signatories to respect the rights of alien property owned by nationals of the other State. The next step took place in 1871, when disputes over the alleged British violation of neutrality during the American Civil War led to the *Alabama Claims* arbitration, in which an *ad hoc* panel of arbitrators (which included the King of Italy, the President of the Swiss Confederation and the Emperor of Brazil) sat in Geneva³. The successful arbitration of these disputes led to the establishment of the Permanent Court of Arbitration at The Hague in 1899⁴. The PCA hosted its first investor-state dispute in 1935⁵, and remains active today⁶. Unlike the Permanent Court of International Justice (PCIJ)⁷, and its successor institution the International Court of Justice (ICJ)⁸, the PCA has jurisdiction to decide matters submitted to it that involve non-sovereign entities. The Secretary General of the PCA is appointing authority under the UNCITRAL Arbitration rules.

In the second half of the twentieth century the role of private interests in public international arbitral proceedings increased dramatically. Indeed, the contemporary necessity to distinguish between ‘International Arbitration’ and ‘International *Commercial* Arbitration’ - the former connoting arbitral proceedings involving (or between) states and the latter between private parties – illustrates the extent to which sovereign involvement has affected the modern

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¹ The full title of the Jay Treaty, named after American Secretary of State John Jay, was the ‘*General Treaty of Friendship, Commerce and Navigation 1794*’.
⁴ The PCA was established by the *Hague Convention for the Pacific Settlement of International Disputes* (1899).
⁵ *Radio Corporation of America v China* (1941) 8 ILR 26
⁶ The case load of the PCA is rising again due to its role as designating authority under the UNCITRAL Rules and its increasing use as a venue for *ad hoc* investor-state arbitrations under Bilateral Investment Treaties.
⁷ The PCIJ was set up as part of the peace process following World War One. It has non-compulsory jurisdiction over states. It was subsumed by the ICJ in 1945.
⁸ Commonly referred to as the ‘World Court’, the ICJ was established as the principal judicial organ of the United Nations in 1945. Like the PCA, the ICJ is based at the Peace Palace in The Hague. The ICJ has no jurisdiction to hear disputes involving private individuals.
practice of arbitration. Somewhere between these two procedural forms lies Investor-State Arbitration (ISA). ‘ISA’ is a blanket term for the binding resolution of disputes between foreign investors and host states. Much like International (or inter-state) Arbitration, ISA may be *ad hoc* or institutional. Institutional ISA usually results from the operation of a dispute resolution mechanism within an investment agreement between states.

Most modern multilateral and Bilateral Investment Treaties (BIT’s) contain ISA provisions which nominate an institutional venue or specify a procedure for the resolution of disputes. An example of a multilateral investment agreement is the Energy Charter Treaty (1994). Today there are over three thousand BIT’s in force. In the 1960’s, the Organisation for Economic Development (OECD) sought to establish a ‘New International Economic Order’. This objective required the stabilisation of economic relations between developed, capital-exporting countries and their capital importing counterparts in the developing post-colonial world. One of the outcomes of this program was a dramatic increase in the number of BIT’s, and a sharp rise in the per-instrument involvement of developing countries, especially Asian states. For example, the People’s Republic of China signed 117 BIT’s between 1982 and 2006. Latin American states have also been active: Peru signed 400 BIT’s between 1993 and 2004. Today there are between 2,500 and 3,000 BIT’s worldwide, and most of them are young. Indeed, the proliferation of BIT’s in the 1990’s is the reason for the growth of ISA and its contemporary significance within the field of international commercial law and practice.

It is beyond this scope of this chapter to examine the substantive aspects of BIT’s in any detail. Here, the writer is only concerned with how BIT’s structure processes for the settlement of disputes. Whilst it is risky to generalise in an area as divergent as international

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9 Significantly for the writer, the need to distinguish between international commercial arbitration and international arbitration is recognised at paragraph 5 of the IBA Guidelines on Conflicts of Interest on International Arbitration.
10 Done at The Hague on 17 December 1991, the Energy Charter Treaty (ECT) was the Final Act of the European Energy Charter Conference. The content of the ECT is mostly substantive, relating to the protection of foreign investments in the domestic energy sectors of member states. Chapter 3, Part V of the ECT concerns dispute settlement. ICSID Arbitration is one of three dispute resolution methods available under Article 26(4), the others being ad hoc UNCITRAL Rules arbitration and arbitration at the Stockholm Chamber of Commerce.
trade law and relations, just as we can identify ‘typical’ or ‘model’ arbitration clauses because there are fundamental elements to a private *compromissum*, so do the load-bearing walls of an ISA provision permit some generalisation on structure and form. As with purely private-party arbitration, consent is an essential precondition to ISA. The central pillar of any ISA provision is therefore the mechanism by which the state signatories submit to arbitration. It is this mechanism that allows foreign investors (being nationals of one of the signatories to the BIT) to commence arbitration against the state that hosts their investment if that state breaches their rights. The extent to which ISA provisions cover truly procedural ground varies greatly. What a purely private ICA practitioner would identify as an *ad hoc* arbitration – really the *ex nihilo* formation of a tribunal and the conduct of proceedings in accordance with bespoke rules, unassisted by any institution – is very rare in ISA. Most ISA provisions refer to an arbitral institution (be it ICSID, PCA, ICC, CIETAC or some other body) making the setting in which an ISA is conducted predominantly institutional. The most important international agreement for the procedural law and practice of ISA is the *Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965)\(^{15}\), because the Washington Convention established the premier ISA institution: the International Centre for the Settlement of Investment Disputes (ICSID). A typical BIT will give the parties a choice of two or three dispute resolution systems: UNICITRAL Rules arbitration is often the *ad hoc* option; arbitration at the SCC and ICC are common institutional alternatives. If the treaty gives the parties UNCITRAL Rules and ICC arbitration as its first two options, the third option will likely be ICSID arbitration.

ICSID has special arrangements with the member states of the North American Free Trade Agreement (NAFTA). Canada, The United States and Mexico signed NAFTA on 17 December 1992. Under NAFTA Chapter 11, an investor who alleges that a state party has breached its obligations under NAFTA may commence ICSID arbitration against that state under either the ICSID Additional Facility Rules, or the UNCITRAL Rules. The Additional Facility Rules expressly allow for NAFTA Chapter 11 arbitrations involving non-ICSID members\(^{16}\). The Additional Facility has made ICSID even busier: as of 2007, over 50 claims had been brought to ICSID under NAFTA Chapter 11. Bias challenges have featured in a

\(^{15}\) The Washington Convention was submitted for signature and ratification on 18 March 1965. The Convention entered into force on 14 October 1966.

\(^{16}\) The United States is the only NAFTA bloc member that is also a party to the Washington Convention. Mexico has not signed ICSID; Canada signed the Washington Convention in December 2006, but is yet to ratify it.
number of these actions, including the *Canfor Corporation v USA* and *Grand River v USA* matters examined below.

This chapter will consider the special case of ICSID. The writer is approaching ICSID proceedings as a ‘special case’ because when an ICSID tribunal is convened it does not take a municipal seat: in contrast to the New York Convention framework, the Washington Convention model is stateless. It is important to note that is not true of all ISA proceedings, which may or may not be seated at ICSID. ‘Seat Theory’ still applies to *ad hoc* ISA proceedings. For example, investor-state disputes submitted to the PCA are, as we saw in our discussion of the *Telekom Malaysia* challenge in Chapter 3, subject to the mandatory procedural laws of The Hague. ICSID is the only truly delocalised arbitral institution in the world\(^\text{17}\). For the purposes of this study, the specific result of the exclusion of the procedural law of the seat is that, in contrast to the New York Convention model of ICA, the fundamental rules of procedural fairness that apply to ICSID proceedings are not derived from municipal law and public policy, but rather from the Washington Convention and the jurisprudence of ICSID. This difference requires that the writer commence this chapter with a brief overview of the Washington Convention system, and a short institutional summary of ICSID. ICSID appointment, challenge and appeal procedures will then be discussed. The writer will then examine a number of ICSID challenge decisions, including *Amco Asia v Indonesia*\(^\text{18}\), *Vivendi Universal v Argentina*\(^\text{19}\), *Suez v Argentina*\(^\text{20}\), *Generation Ukraine v Ukraine*\(^\text{21}\) and *Zhinvali Development v Georgia*\(^\text{22}\). The extraordinary challenge to counsel in *Hrvatska Elektroprivreda dd v Slovenia* will be discussed last. The problem of precedent and the new head of ‘Role/Issue Conflict’ will then be discussed, followed by an assessment of the policy pressures that flow from the institutional proximity of ICSID to the World Bank. The writer will conclude that, although the bespoke test prescribed by the Washington Convention sets a very high bar for bias challenges, ICSID jurisprudence displays an

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\(^{18}\) *Amco Asia Corp v Republic of Indonesia*, ICSID Case ARB/81/1 (Decision on Proposal to Disqualify an Arbitrator, 24 June 1982, unpublished).

\(^{19}\) *Compania de Aguas de Aconquija S.A. & Vivendi Universal v Argentine Republic*, ICSID Case ARB/97/3 (Decision on the Challenge to the President on the Committee, 3 October 2001) 17 ICSID Review – (2002) FILJ 168

\(^{20}\) *Suez Sociedad General de Aguas de Barcelona S.A. & InterAgus Servicios Integrales del Agua S.A. v Argentine Republic*, ICSID Case ARB/03/17 (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007)

\(^{21}\) *Generation Ukraine Inc v Ukraine*, ICSID Case ARB/00/9

\(^{22}\) *Zhinvali Development Ltd v Republic of Georgia*, ICSID Case ARB/00/1 (Decision on Respondent’s Proposal to Disqualify Arbitrator, 19 January 2001, unpublished)
increasing disregard for its black letters and preference for the tenets of the Sussex Justices test.

2. The Washington Convention 1965

The Washington Convention was drafted and settled by the executive officers of the International Bank for Reconstruction and Development (IBRD) – the World Bank. The World Bank was born out of the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire in July 1944. The Washington Convention addressed the perceived inadequacy of Diplomatic Protection and confirmed the international legal status of the trend towards the recognition of the rights of private investors in foreign states. As Sir Elihu Luaterpacht observed

For the first time a system was instituted under which non-state entities – corporations or individuals – could sue States directly; under which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; under which the operation of the local remedies rules was excluded; under which the tribunal’s award would be directly enforceable within the territories of the State’s parties.

Because the drafters of the Washington Convention were principally concerned with the establishment of rules for the settlement of disputes, the content of the pact is entirely procedural. Indeed, much of the substantive law that governs the rights of the parties to an ISA was extant in custom well before 1965. The protection of alien property was, for example, a well settled rule of international law when the Jay Treaty was negotiated. The

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23 The purpose of the Bretton Woods meeting was to negotiate the program of post-World War Two reconstruction. It most notable products were the IBRD and the General Agreement on Tariffs and Trade (GATT), both of which have contributed greatly to the development of the liberalised global economy in which ISA and ICA take place.

24 The remedy of Diplomatic Protection is sought when an aggrieved foreign investor requests their home state to bring their claim against their host state on their behalf though diplomatic channels. The process is horizontal and more political than legal, with the outcome that the practical availability of Diplomatic Protection is subject to the willingness of the home state to take action against the offending host state. This effectively deprives all but the largest commercial actors of access to this remedy. See for example Brierly, J.L., The Law of Nations (Oxford 1963) at p.277. Under Article 27, in the event a Washington Convention member state fails to enforce an ICSID award, the availability of Diplomatic Protection is revived.


26 John Adams, second President of the United States, said in 1796 that ‘there is no principle of the law of nations more firmly settled than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereignty by all efforts in his power’. See Moore, J.B., A Digest of International Law (1906) 4:5, cited in Dolzer & Schreuer, above note 13 at 11
procedural focus of the Washington Convention is the legacy of its designer, Aron Broches. During his tenure as General Counsel at the World Bank, Broches wisely concluded that the best way to maximise the security of international capital flows was not to attempt to reach an agreement on substantive standards for the rights of investors and their host states, but rather to put ‘procedure before substance’ and establish an effective model for the impartial settlement of disputes. The guarantee of adjudicatory impartiality is, therefore, at the core of the Washington Convention and the mandate of ICSID.

3. ICSID

Article 1(1) of the Washington Convention establishes ICSID (‘the Centre’). The stated purpose of the Centre is to ‘provide facilities for the conciliation and arbitration of investment disputes between Contracting States and the nationals of other Contracting States’. The expression ‘Contracting State’ means a member of the World Bank, but Article 67 is drafted to allow ICSID Administrative Council approved non-member states to sign the Convention.

Article 2 of the Convention seats ICSID at the principal office of the World Bank, which is Washington DC. The seat of an ICSID proceeding will be Washington unless the parties agree otherwise. Under Article 63(a) the parties may agree to conduct proceedings at the PCA or at the seat of another institution ‘with which the Centre has arrangements’. Although the Convention does use the word ‘seat’, the Centre is not by this designation subjected to municipal law in the same way a private arbitral tribunal (or ad hoc ISA tribunal) would be. In the sense of curial supervision, ICSID is procedurally stateless. This is due to the interaction of Articles 52 and 53 of the Washington Convention. Article 52 lists the grounds upon which annulment may be sought. These grounds are:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or

27 Above note 13 at 20
28 Ibid
29 Washington Convention, Article 1(2)
30 Washington Convention, Article 67
31 In addition to Administrative Council approval, the applicant non-member state must be a party to the Statute of the ICJ.
32 Washington Convention, Article 62
33 Washington Convention, Article 52(1)
(e) that the award has failed to state the reasons on which it is based.

Article 52(3) confers exclusive power to hear applications for annulment upon an *ad hoc* committee of three. Article 53(1) provides that the awards of ICSID tribunals are binding upon the parties and ‘not subject to any appeal or to any other remedy except those provided for in this Convention’. Because the only right of appeal is to the *ad hoc* committee under Article 52, recourse to the courts of the seat is excluded: ICSID is its own *locus arbitri*. But in contrast to a ‘delocalised’ ICA proceeding – where the exclusion of state court supervision is subject to the mandatory provisions of the law of the seat and the public policy of the states which are asked to enforce the award - ICSID procedure is fully immunised against municipal procedural law. This is the case even where ICSID proceedings are seated by agreement in a place other than Washington: venue has no affect on ICSID proceedings. This is not true of NAFTA Chapter 11 proceedings, which are governed by the Additional Facility Rules (or the UNCITRAL Rules, whichever is agreed) and the New York Convention, rather than the Washington Convention. In ICSID proceedings proper, interim measures and award review (including *vacatur*) can only be sought from ICSID itself: the parties have nowhere else to go. Commenting on the affect of these rules, Park has described the ICSID model as ‘a special system of quality control’ with its own ‘internal challenge procedure’. Whilst self-containment has its virtues, it is not without vice: due to the definition of ‘award’ under Article 53, the affirmative decision of an *ad hoc* annulment committee only binds the parties to the case. This means that the awards of subsequent tribunals convened to reconsider a case can themselves be the subject of further annulment proceedings, resulting in an ‘expensive version of the childhood game of snakes and ladders’ like that which took nine years (and four tribunals) in *Klockner v Cameroon*.

4. The ICSID *Lex Arbitri*

Article 44 provides that arbitral proceedings are to be conducted in accordance with the Convention and (unless the parties agree otherwise) the ICSID Arbitration Rules. The Rules

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34 Washington Convention, Article 52(3). The members of the *ad hoc* annulment committee are appointed by the Chairman of the Administrative Council. The President of the World Bank is *ex officio* the Chairman of the ICSID Administrative Council. The implications of this institutional connection are considered below.


37 Above note 17 at p.68

38 *Klockner v The United Republic of Cameroon and SOCAME*, ICSID Case ARB/81/2

39 The version of the rules that applies is that which was in force at the time consent to arbitration was granted by the parties.
were last revised in 2006. Where the Convention and the Rules are silent on a matter of procedure, and the parties have not agreed on how to proceed, the Convention provides that the tribunal shall decide the question. Unless the parties select it, municipal procedural law has no role to play in ICSID arbitration. The *lex arbitri* of ICSID is therefore derived from non-national sources. In order of priority, these sources are:

1. The Washington Convention
2. The ICSID Arbitration Rules
3. ICSID Jurisprudence

These sources are examined below. It is beyond the scope of this Chapter to embark upon a full survey of the ICSID *lex arbitri*. The focus of this thesis is on bias challenges: how they are made and decided. As in ICA, in ICSID proceedings bias challenges can be made before, during or after the award is made. There is, however, one crucial difference to ICA – in ICSID arbitration the parties do not have the right to plead bias at the enforcement stage. The Washington Convention has its own enforcement mechanism and does not rely upon the New York Convention for the enforcement of ICSID awards. The Washington Convention contains no equivalent to Article V (‘refusal to enforce’) of the New York Convention. The Article 54 ICSID enforcement mechanism is unidirectional:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

It follows that domestic enforcement courts have no power to review ICSID awards; when a member state court is asked to enforce an ICSID award, all it is entitled to do is verify that the award is authentic. For the purposes of this study, the primary outcome of this limitation is that there is no public policy ground upon which to plead a denial of natural justice by *ex post facto* discovery of arbitrator bias. In an ICSID proceeding, the only post-award opportunity to plead bias is by motion for annulment under Article 52(1)(d). The *sui generis* enforcement regime of the Washington Convention has the secondary outcome that ICSID

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40 The ICSID Arbitration Rules 2006 came into force on 10 April 2006
41 Washington Convention, Article 44
42 Above note 13 at p.288
44 Above note 13 at p. 288
tribunals are not *de jure* influenced by the enforcement practices of New York Convention member states or the doctrine of their courts.

(1) The Washington Convention

A party to an ICSID proceeding may directly challenge an arbitrator at the appointment stage or during the arbitral proceedings. An indirect challenge may be made by application for annulment of the award under Article 52. The provisions of the Convention which regulate direct challenges are:

**Article 14** – Chapter I of the Convention sets out the process by which Contracting States may nominate arbitrators to the ICSID Panel. Under Article 13, each Contracting State may nominate four persons to the ICSID list. Article 14 states the qualities which a person must possess in order to be nominated as a Panel member or be appointed as an arbitrator in an ICSID proceeding. The requisite qualities are (1) high moral character, (2) technical expertise, and (3) the capacity to exercise independent judgment. Regardless of whether they are party-appointed or placed by the Chairman, where an arbitrator does not possess all three of these essential traits, that arbitrator can be directly challenged in accordance with Article 57. It is notable that the qualities of the arbitrator do not include impartiality.

**Article 38** – Chapter IV of the Convention governs the appointment of arbitrators by the Chairman of the Administrative Council. Article 38 regulates default appointments by the Chairman. Article 38 creates a ‘Common Nationality Prohibition’, providing that, in order to be eligible the appointees ‘shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute’. The purpose of the Common Nationality Prohibition is to avoid even the semblance of a lack of objectivity.

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45 Above note 25 at p.515
46 *Washington Convention, Article 40(2)*
47 Notwithstanding the silence of Article 14, ICSID tribunals seem to interpret ‘independent judgement’ as including a requirement of impartiality. See for example para 42 of *Suez v Argentina*
48 The Chairman’s power to appoint is conditional upon (1) the lapse of ninety days since registration of the initial request for arbitration, and (2) request by a party to the arbitration. Once these conditions are met, the Chairman must consult the parties then make the appointment(s).
49 Above note 25 at p.495; the Prohibition applies to sole arbitrators (who it must be said are rare in ICSID proceedings), party-appointed arbitrators and ‘neutral’ chairs. An important limit upon the scope of the Common Nationality Prohibition is that it functions only in situations of default appointment by the Chairman pursuant to Article 38, and does not apply where the Chairman is designated as appointing authority under the
Article 57 – this article governs the process of challenging arbitrators. It allows for the challenge of any tribunal member on account of any fact indicating manifest lack of the qualities required of an arbitrator under Article 14(1) (ie. high moral character, expertise and independent judgment). This sets an ‘extremely high bar for challenging an arbitrator’. Significantly, vantage is not clarified: the black letters of Article 57 make no reference to any objective or ‘reasonable third person’ test. As will be observed, the first arm of Sussex Justices is, rather, a jurisprudential addition to Article 57.

Article 58 – decisions on challenges are taken by the unchallenged members of the tribunal itself. Where the challenge is made to a member of an annulment Commission, the same rule applies. Where the challenge is made to a sole arbitrator, or the tribunal or Commission is split on the challenge, the Chairman of ICSID shall decide finally. Generation Ukraine suggests that, in the rare event that the Chairman himself is conflicted out, the matter will be referred to the Secretary General of the PCA for final determination.

Because the Washington Convention does not create a detailed enforcement objection mechanism, it is quiet on indirect (ie. post-award) bias challenges. There is really only one article on point: Article 52(1)(d) - ‘serious departure from a fundamental rule of procedure’. This annulment sub-article has two compound elements: (1) the breach must be in respect of a rule of procedure that is fundamental, and (2) the breach of that rule must have been serious. A non-serious breach of a fundamental rule of procedure will not be enough; serious
breach of a non-fundamental rule will be similarly excusable. The ‘fundamental rules’ referred to in Article 52 are different to the general procedural rules that bind an ICSID tribunal: ‘fundamental rules’ are restricted to principles of natural justice which, it has been observed, are universally seen as including a rule against bias. The violation of the rule against bias would therefore need to be ‘serious’. The travaux préparatoires to the Convention make it clear that, in order to be ‘serious’, the breach must be ‘more than minimal’ and must have had the effect of depriving the applicant party of the benefit of the rule in question. The ad hoc annulment committee in Klockner I commented in obiter that a lack of impartiality would constitute a serious departure from a fundamental rule of procedure. To date, there are no published decisions on annulment applications founded on the ex post facto appearance of bias.

(2) ICSID Arbitration Rules

In ICSID arbitration the parties are afforded considerable autonomy in the selection of procedural rules – the Washington Convention allows the parties to use rules other than the ICSID Rules (the most common alternative being the UNICTRAL Rules). It is important to note, therefore, that ICSID Rules do not necessarily apply to proceedings conducted at ICSID. The UNICTRAL Rules, for example, are often selected in ISA provisions within BIT’s, with the result that the Article 10(1) ‘justifiable doubts’ standard for challenge applies in resulting ICSID proceedings. Similarly, the ICSID Arbitration Rules do not apply to NAFTA Chapter 11 claims arbitrated at ICSID under the Additional Facility. When the UNCITRAL Rules/Model Law standard is applicable, an ICSID tribunal may consider the doctrine and case law of Model Law states. ISA proceedings subject to the UNCITRAL Rules are sometimes consolidated with ICSID proceedings subject to the ICSID Rules. When

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54 MINE v Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 85, cited in Schreuer, above note 25, p.970
55 Above note 25 at p.969
56 Above note 43 at p.95
57 Above note 25 at p.971
58 Klockner v Cameroon at 130
59 Article 44 of the Washington Convention provides that, unless otherwise agreed by the parties, any ICSID proceedings between the parties will be conducted in accordance with the ICSID Rules.
60 Because Article 10(1) of the UNCITRAL Rules employs substantially the same wording as Model Law Article 12(2), the writer will not discuss the UNCITRAL Rules standard for challenge in this chapter.
61 Even where the ICSID Rules apply and no municipal jurisprudence is incorporated, ICSID tribunals sometimes still resort to the case law of leading seats for guidance on challenges. See for example Vivendi v Argentina at para 24, where the committee refers to the decision of the Paris Court of First Instance in Philipp Brothers v Drexel Burnham Lambert Ltd.
a challenge is made in mixed consolidated proceedings, it will be subject to separate tests applicable under each set of rules.\footnote{See for example the second challenge to Professor Kaufmann-Kohler in Suez v Argentina}

ICSID Rule 6 requires that arbitrators ‘judge fairly’. Much like the Article 7(2) of the ICC Rules, ICSID Rule 6(2) requires that arbitrators sign a declaration of independence and provide a written statement of ‘past and present professional, business and other relationships (if any) with the parties’.\footnote{ICSID Arbitration Rule 6} The ICSID Rules were last amended in 2006.\footnote{The preceding amendments to the ICSID Rules took place in 1984 and 2003.} The changes included an addition to Rule 6(2) requiring that the arbitrator disclose ‘any other circumstances that might cause [his/her] reliability for independent judgment to be questioned by a party’ and, importantly, ‘assume a continuing obligation to promptly notify the Secretary General of the Centre of any such circumstance’\footnote{The amendments to the ICSID Arbitration Rules came into force on 1 April 2006. Amendments were also made to the ICSID Financial Regulations.}. The first affect of the 2006 amendments to Rule 6 is that the obligation to disclose extends beyond relationships (and, for example, into the realm of Pinochet-type sympathies and outcome preferences). The second affect is that, where before it was limited to past or present relationships, the Rule 6(2) obligation to disclose is now ongoing. And in Vivendi v Argentina (Re Challenge to President Fortier) the tribunal held that the Rule 6(2) disclosure obligation applies to members of \textit{ad hoc} annulment committees as it does members of merits panels.\footnote{Vivendi Universal v Argentina (Re Challenge to President Fortier) at para 18} Another important jurisprudential extension of Rule 6(2) is that arbitrators have an ongoing (but limited) duty to investigate possible conflicts of interest.\footnote{Suez v Argentina para 47}

ICSID Rule 9 governs challenge procedure. Under Rule 9(1), the party ‘proposing disqualification’ must bring their challenge ‘promptly’. The ICSID Rules do not define what is ‘prompt’. Professor Schreuer has offered the opinion that ‘promptly’ means ‘as soon as the party concerned learns of the grounds for a possible disqualification’\footnote{Suez v Argentina (Re Arbitrator Kaufmann-Kohler) the tribunal held 53 days was not prompt}; in Suez v Argentina (Re Arbitrator Kaufmann-Kohler) the tribunal held 53 days was not prompt.\footnote{Above note 25 at p.1198}. Given their broad influence, it seems safe to say that something like the fifteen day limit imposed under the UNCITRAL Rules can be expected to apply. If the proposal to disqualify is not promptly made, the right to propose disqualification will be deemed to have been waived under Rule 27.\footnote{Suez v Argentina at para 26}
(3) ICSID Jurisprudence

As a preliminary matter, neither the Washington Convention nor the ICSID Rules adopt a doctrine of precedent. But due to the twin policy objectives of adjudicatory consistency and international rule-making, ICSID tribunals do tend to follow the decisions of other ICSID tribunals. We can safely say, therefore, that there is such a thing as ‘ICSID Jurisprudence’. Much like the jurisprudence of a court in a Civil Law state, ICSID jurisprudence consists of the decisions of ICSID tribunals and the doctrine of leading scholars of foreign investment law and dispute resolution. On questions of substantive law, ICSID tribunals increasingly refer to the decisions of ICSID and other ISA panels (a juridical practice which, the writer will demonstrate, is causing a rise in the number of Role/Issue Conflict challenges). On procedural matters, ICSID tribunals refer to the rules of arbitration established by other international bodies, and the general principles of international arbitration. Challenge decisions often cite judgments of previous ICSID panels and the decisions of the courts of leading arbitral seats as persuasive authorities for the conclusions reached. As has been observed in Chapter 6, ICSID tribunals often refer to and apply the IBA Guidelines on Conflicts of Interest in International Arbitration when they decide challenge proposals.

In preceding chapters, the writer has identified certain widely accepted principles which compliment or inform the rule against arbitrator bias, amongst which two are especially important: nemo judex and de minimis. Given the statelessness of the ICSID lex arbitri, the operation of these principles cannot be assumed. Accordingly, it is necessary to establish the place and function of these maxims in ICSID jurisprudence.

(i) nemo judex in sua causa

As is to be expected, ICSID tribunals do recognise the rule that ‘no man may be a judge in his own cause’: nemo judex informs the Article 14 requirement of independent judgement, and the ICSID Rule 6(2) disclosure obligation presupposes the operation of nemo judex. The force of this rule is also evident from the regularity with which critics of ICSID cite the Centre’s institutional proximity to the World Bank: the ‘cause’ of the

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Centre is identified as the cause of its parent, and the ICSID process is said to be illegitimate as a result.\(^{71}\)

(ii) \textit{de minimis non curat lex}

ICSID Tribunals have consistently confirmed that the challenge and disqualification articles of the Washington Convention are subject to \textit{de minimis}. In pre-award challenges governed by Article 57, the circumstances which are said to deprive the arbitrator of his capacity to exercise independent judgment must be ‘manifest’ and, it follows, significantly more than trifling. Similarly, in an annulment application brought under Article 52(1)(d) the procedural breach must be ‘serious’. The record confirms that Article 57 challenges are subject to \textit{de minimis}: the tribunal in \textit{Amco Asia} applied \textit{de minimis} to dismiss a challenge to an arbitrator whose firm had a profit sharing arrangement with the lawyers for the claimant, and the annulment committee in \textit{Vivendi Universal v Argentina} confirmed the availability of the exception in \textit{obiter}\(^{72}\). In the context of Article 52, the use of the expression ‘more than minimal’ (to explain the meaning of the word ‘serious’) is a strong indication that \textit{de minimis} functions in post-award settings as well.

5. ICSID Challenge Decisions

The ICSID test is unique: the inter-operation of Articles 14(1) and 57 produces a rule that an ICSID arbitrator may only be challenged for bias where they manifestly lack the capacity to exercise independent judgment. No other arbitral institution or law uses this test. The key word is \textit{manifest}. As a general rule, something will be ‘manifest’ when the court does not need the assistance of counsel to see it. The term is not uncommon in arbitration laws: some domestic arbitration statutes, for example, allow for judicial review of awards on the basis of ‘manifest error of law’\(^{73}\). Internationally, the notion of ‘manifest breach of procedural fairness’ is well developed in Anglo-American foreign judgment enforcement contexts, where enforcement may be refused if the procedural public policy of the enforcing state is patently offended by the manner in which the foreign court reached its conclusion\(^{74}\).


\(^{72}\) \textit{Vivendi v Argentina} at para 27

\(^{73}\) See for example s.43 of the Uniform Commercial Arbitration Acts of the Australian states.

As has been observed, it was not until relatively recently that the ICSID case-load ‘took off’. Despite the comparative paucity of reference, ICSID tribunals have had a number of opportunities to consider the challenge and disqualification provisions of the Washington Convention. In fact, questions of independence arose in the very first ICSID case of *Holiday Inns/Occidental Petroleum v Morocco*75. In *Holiday Inns* the Claimant’s arbitrator stood down after disclosing that he had become an outside director of Occidental Petroleum76. Since then ICSID panels have varied in their approaches to the Article 57 term ‘manifest’. The *travaux preparatoires* to the Washington Convention do not define or elucidate the expression. ‘Manifest’ has been interpreted to mean ‘obvious or evident’77 and to ‘exclude reliance on speculative assumptions or arguments’78, but not to bar challenges brought solely on the basis of appearances (ie. manifest does not mean *actual*)79. And it certainly does not prevent the challenger from pleading matters unknown to, or undisclosed by, the arbitrator – the appearance does not need to be manifest at the time the arbitrator sits, so long as the material facts of the challenge are proven later80. Schreuer says the expression ‘manifest’ operates as an evidentiary condition which ‘imposes a relatively heavy burden of proof on the party making the proposal [to disqualify]’81. The reader may recall that similar opinions were expressed by certain state courts in respect of the *Gough* ‘real danger’ test82. This begs the question: which test for bias does the Article 14/57 most closely resemble: *Sussex Justices, Porter v Magill* or *Gough*?

The writer is of the view that the test created by the Washington Convention is, in its black letters, closest to *Gough*. This opinion is based on the fact that (1) neither Article 14 nor Article 57 uses the word ‘reasonable’ or establishes a third person ‘objective observer’ vantage point, (2) the term ‘manifest’ is a usage of administrative law which implies court vantage and limited judicial review, and (3) the use of the word ‘manifest’ to preface the word ‘lack’ in Article 57 elevates the ICSID standard above that of a simple lack of capacity for independent judgment and, therefore, into the realm of evidentiary probability. The writer’s opinion is, however, not unconditionally supported by the record – although early

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75 ICSID Case ARB/72/1, reported in ICSID Eleventh Annual Report 1976/1977 at p.34, cited in Tupman, above note 70 at p.44.
76 Above note 70 at p.44
77 *Suez v Argentina* at para 34
78 *Vivendi v Argentina* at para 25
79 Ibid
80 Ibid
81 Above note 22 at p.1200, cited in *Vivendi v Argentina* at para 24
82 See for example *Webb v The Queen* [1994] 181 CLR per Dean J at 71

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decisions (such as *Amco v Indonesia*) interpreted Article 57 as setting a strict test, in recent years ICSID tribunals have taken steps to lower the bar for bias challenges. The current trend is away from ‘real danger’ and towards the *Sussex Justices* test. In order to observe it, the pattern of challenges must be examined in chronological order.

**Amco Asia Corp & Ors v Indonesia; Re Arbitrator Rubins (1982)**

This challenge arose out of ICSID proceedings on a claim brought by a group of three foreign investors against the Republic of Indonesia for the wrongful seizure of the Jakarta hotel Kartika Plaza on 1 April 1980. Indonesia challenged the Claimant’s appointee, Mr Seymour J. Rubin. The material facts of the challenge were that seven years earlier Mr Rubin had given tax advice to the individual who controlled the three corporate claimants. His firm also had an office and profit sharing arrangement with the lawyers for the Claimant, but neither Amco nor its controlling shareholder were clients of either firm.\(^{83}\) Although formally the arrangement ended before the arbitration started, for the first six months of proceedings the two firms still shared offices.\(^{84}\) Counsel for Indonesia argued that these facts deprived Mr Rubin of independence. The Claimant’s responded that Mr Rubin’s independence was not impaired, and that he was subject to a lower standard of independence (and thus a *Sunkist*-type higher threshold for challenge) because he was a party appointed arbitrator. In accordance with Article 58 of the Washington Convention, Indonesia’s challenge was decided by other members of the tribunal (Professors Goldman and Foighel).

The challenge was dismissed: there was found to be no manifest risk of partiality because the services rendered by Mr Rubin to the Claimant’s principal shareholder were not in the nature of regular legal advice, their commercial significance was minimal (the fee for the advice being Canadian $450), and the links between the two law firms did not ‘create any psychological risk of partiality’.\(^{85}\) In stressing the significance of the Article 57 expression ‘manifest’, the tribunal held that under the Washington Convention the challenger must prove not only the facts which indicate a lack of independence, but also that the lack is ‘highly probable’, not just ‘possible’ or ‘quasi-certain’\(^{86}\). The tribunal reached conflicting conclusions on the Claimant’s argument that a separate standard of independence was

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83 The decision on the challenge to Arbitrator Rubins was not published. This summary of the materials facts draws on the discussion of the *Amco Asia* challenge in Tupman, above note 70
84 Ibid at p.44
85 *Amco Asia v Indonesia*, ICSID Case ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (24 June 1982)(unreported)
86 *Amco Asia v Indonesia*, cited in Tupman, above note 70 at p.44
appropriate for party appointed arbitrators, on the one hand stating that ‘no distinction can and should be made’, and on the other holding that a party arbitrator cannot be disqualified for relationship because the party appointing system presumes some acquaintance between the party and its appointed arbitrator.\(^{87}\)

The decision has been the subject of strong criticism by commentators. Writing in 1989, Tupman expressed the opinion that the tribunal in Amco Asia imposed a standard that would tolerate virtually all prior business or professional relationship. Such a standard has no precedent in the municipal law of any country, and it is quite astonishing that it should have been applied in ICSID, with its unique and delicate balance of the rights of host states and foreign private investors.\(^{88}\)

More recently the ad hoc annulment committee in Vivendi v Argentina commented in obiter:

> The fact remains that [in Amco Asia] a lawyer-client relationship existed between the claimant and the arbitrator personally during the pendency of the arbitration; this must surely be a sufficient basis for a reasonable concern as to independence, unless the extent and content of the advice can really be regarded as minor and wholly discrete [emphasis added].\(^{89}\)

Although this more recent criticism is conditional, it confirms the specific disapproval of the decision in Amco Asia and the general trend towards a softer Sussex Justices reading of Article 57. The lasting value of Amco Asia lies in its confirmation of the de minimis exception to the rule of disqualification for prior services rather than its interpretation of the ‘manifest lack of independent judgment’ standard (or its consideration of the Sunkist distinction between party arbitrators and neutral chairs). The action taken by Indonesia in Amco Asia also sheds some light on the rather abstract, personal policy challenge brought by the Republic in the CalEnergy arbitration,\(^{90}\) a matter which has been said to provide ‘a virtual encyclopaedia of allegations of delay’.\(^{91}\)

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\(^{87}\) Above note 70 at p.45
\(^{88}\) Ibid at p.51
\(^{89}\) Vivendi v Argentina para 22
\(^{90}\) Himjurna California Energy Ltd (Bermuda) v The Republic of Indonesia, Extract of partial award in (2000) XXV YB Comm Arb 109; the Cal Energy dispute was resolved by ad hoc UNCITRAL Rules arbitration in The Hague, with Indonesian law as governing law.
\(^{91}\) Buhler, M.W., Webster, T.H., Handbook of ICC Arbitration (Sweet & Maxwell 2005), p.304
**Zhinvali Development v Georgia (2001)**

Irish company Zhinvali commenced ICSID proceedings against Georgia for recovery of pre-investment expenditures incurred in expectation of a contract for the rehabilitation of a power plant near Tbilisi. A proposal to disqualify was made by Georgia on the basis of occasional, purely social contacts between the arbitrator and an executive officer of the Zhinvali. Georgia’s challenge was decided by arbitrators Davis Robinson and Seymour Rubin (the arbitrator challenged in *Amco Asia*). They dismissed the proposal, stressing the absence of any professional or commercial relationship between the arbitrator and the executive. In their unreported decision of 19 January 2001, the deciding members held that Georgia’s contention that ‘a merely occasional personal contact could manifestly affect the judgment of an arbitrator, in the absence of any further facts, was purely speculative’. The *Zhinvali* challenge decision was cited with approval by the ICSID tribunal in the challenge to President Fortier in *Vivendi v Argentina*.

**Vivendi Universal & Anor v Argentina; Re President Fortier (2001)**

On 21 November 2000, an ICSID tribunal unanimously dismissed a claim brought by Argentine company Compania de Aguas del Aconquija SA and its parent (multinational water services company Vivendi Universal) against the Argentine Republic in relation to the regulation of utility prices following the financial crisis of 1999. In March 2001 the unsuccessful Claimants applied for annulment of the award under Article 52 of the Washington Convention. In accordance with Article 52(3) the President of the ICSID Administrative Council appointed three list-arbitrators to the *ad hoc* annulment committee. The appointees included Canadian Yves Fortier QC, and the members agreed that Mr Fortier would be the President of the committee. When his fellows made their Rule 6 declarations of independence, Mr Fortier qualified his position. After reserving its rights at first, Argentina challenged President Fortier. The material facts of the challenge were that one of the partners at Mr Fortier’s firm Ogilvy Renault had given advice on Quebec tax law to Vivendi’s

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92 *Zhinvali Development Ltd v Republic of Georgia*, ICSID Case ARB/00/1 (Decision on Respondent’s Proposal to Disqualify Arbitrator, 19 January 2001, unreported), cited in *Vivendi v Argentina* at para 23
93 Ibid
94 Ibid
95 Ibid
96 Decision on the Challenge to the President of the Committee in *Compania de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic* (ICSID Case ARB/97/3) 3 October 200
97 *Vivendi v Argentina* at para 1
corporate predecessor, Compagnie Generale des Eaux. Mr Fortier was not personally involved and the tax matter was unrelated to the claim against Argentina.

An important threshold issue was whether ICSID Rule 9 (Disqualification of Arbitrators) applies to members of ad hoc annulment committees. This was raised and addressed by the committee sua sponte. ICSID Rule 9 does not refer to annulment committees or their members, only ‘Tribunals’ and ‘arbitrators’. The committee held that the intention of the Administrative Council to apply ICSID Rule 9 to ad hoc committees could be inferred from the history of the Rules: the key event was the 1984 amendment of ICSID Rule 53 (which concerns the rules of procedure for annulment committees) to extend the application of Chapter 1 of the ICSID Rules (in which ICSID Rule 9 falls) to post-award panels. Prior to 1984, only Chapters II to V of the ICSID Rules applied to post-award committees. Today, such a question would not arise because the 2003 amendments to the ICSID Rules removed the specific article and chapter references in Article 53, replacing them with the catch-all phrase ‘the provisions of these Rules’.

The challenge was dismissed. Although they criticised the Amco Asia decision, the committee members agreed with the earlier tribunal that the effect of Article 57 was to preclude reliance on ‘mere speculation or inference’. Guided by this reading, the deciding members – Professor James Crawford SC and Professor Jose Carlos Fernandez Rozas – held that there was no reason to regard Mr Fortier’s independence as impaired by the facts disclosed. More generally, the committee held that an arbitrator’s professional relationship with a party is not an automatic basis for disqualification, and that ‘all the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently’. The test the deciding members applied was

Whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party [emphasis added]

98 Vivendi v Argentina at para 9
99 Vivendi v Argentina at para 22
100 Vivendi v Argentina at para 25
101 Vivendi v Argentina at para 27
102 Vivendi v Argentina at para 25
This awkward formulation of the Article 14/57 test is a creole of the second arms of Gough and Sussex Justices: it merges ‘real risk’ with ‘reasonable apprehension’. The footnote to it refers to the then-recent English decisions in Saudi Cable and Re Medicaments. The reader will recall that the court of Saudi Cable followed the ‘real danger’ test; the decision of the Court of Appeal in Re Medicaments to apply a ‘real possibility’ reformulation of the Gough test paved the way for Porter v Magill. As such, the committee in Vivendi was guided by a body of municipal jurisprudence that was in transition. This explains why the phrases ‘real risk’ and ‘reasonably be apprehended’- which the writer has identified as competing second arms of the test for apparent bias- are wedded in the Vivendi judgment. Because the two expressions cannot co-exist, the Vivendi annulment committee’s interpretation of the Article 14/57 test is of limited value as a statement of law.

That is not to say, however, that the decision is without value as a precedent. Importantly, the deciding members held that where reasonable doubts as to the capacity for independent judgment are justified, the challenge will still be subject to the de minimis rule. Although the facts of the challenge did not require substantive consideration of the principle, the members did comment in obiter that the fee rendered by Mr Fortier’s firm in the ‘relevant period’ (which the members defined as being the period after the proceedings against Argentina commenced) was in their view a de minimis sum.

**SGS v Pakistan; Re Arbitrator Thomas (2002)**

SGS challenged Pakistan’s party arbitrator, Mr J Christopher Thomas, on the basis of his connections with counsel for Pakistan (Freshfields partner Jan Paulsson). The particulars of the Claimant’s challenge were that three years earlier Arbitrator Thomas had been counsel for the successful respondent in an ICSID arbitration (Azinian v Mexico) in which Mr Paulsson was an arbitrator, and that the partial manner in which the tribunal in Azinian decided in favour of Mr Paulsson’s client created a reasonable appearance that Arbitrator Thomas would ‘return the favour’ in the instant matter. SGS said that the subsequent appointment of Mr Paulsson as president of a tribunal in an action in which Mr Thomas was advising a party supported the appearance of bias.

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103 Vivendi v Argentina at FN 18
104 It may also be that the tribunal was guided by American jurisprudence: the US Court of Appeals for the Fourth Circuit applied a ‘real risk’ test in 1999. See ANR Coal Co v Cogentrix of North Carolina, Inc., 173 F 3d 493 (4th Cir 1999)
105 Vivendi v Argentina at para 27-8
106 Robert Azinian & Ors v United Mexican States, ICSID Case ARB(AF)/97/2
The deciding arbitrators dismissed the challenge. Reading Article 57 of the Convention, the members concluded that

the party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made.\(^{107}\)

The tribunal held that the Claimant’s challenge was ‘bereft of any basis in the fact of this proceeding’, and characterised the proposal as ‘simply a supposition, a speculation merely’.\(^{108}\) Significantly, the word ‘manifest’ was taken as meaning ‘clearly and objectively’; the deciding members identified its function as a test for whether the inference that independence is lacking should be drawn.\(^{109}\) In its acceptance of inference as a basis for disqualification, the *obiter* in *SGS* conflicts with other ICSID challenge decisions. Inference was expressly rejected as a basis for challenge in *Amco Asia* and *Vivendi v Argentina*.\(^{110}\) In light of the broader pattern, the real contribution of the *SGS* decision was to open the door for the use of an objective ‘reasonable person’ test.

**Canfor Corporation v The United States of America (2003)**

This challenge arose out of arbitral proceedings brought under NAFTA Chapter 11. In July 2002, Canfor Corporation and Tembec Inc (both Canadian producers of softwood lumber) filed NAFTA claims concerning countervailing duty and anti-dumping measures adopted by the United States in relation to Canadian softwood lumber products.\(^{111}\) One year before his appointment, in a speech to a Canadian Government council, the Claimant’s arbitrator described US government measures on softwood lumber ‘harassment’. The legitimacy and affect of US Government softwood lumber policy was live in the dispute. Upon learning of these comments, the US proposed disqualification.

The challenge was referred to the Secretary General of ICSID under the Additional Facility. In March 2003 the Secretary General wrote to the challenged arbitrator informing him that if

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\(^{107}\) *SGS Societe Generale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case ARB/01/03 (Decision on Claimant’s Proposal to Disqualify and Arbitrator, 19 December 2002) (2005) 8 ICSID Rep 398 at 402

\(^{108}\) *SGS v Pakistan* at 404

\(^{109}\) *SGS v Pakistan* at 402

\(^{110}\) *Vivendi v Argentina* at para 25

\(^{111}\) *Canfor Corporation v The United States of America; Terminal Forest Products Ltd v The United States of America*, Decision on Preliminary Question [2006] 18 W Trade & Arb Mat 4 at p.136
he did not stand down a decision upholding the US challenge would be issued. The arbitrator resigned. Although no formal decision was made, the Secretary General still expressed a clear view in favour of the challenge: *Uni-Inter* Bias was made out. This decision provides an early glimpse of ICSID jurisprudence on ‘Issue Conflict’ in NAFTA proceedings.

**Generation Ukraine v Ukraine; Re Arbitrator Voss (2003)**

The challenge in *Generation Ukraine* raised the problem of *Grundel* Bias at ICSID. The challenged arbitrator - Dr Juergen Voss - was appointed by the Ukraine in ICSID proceedings commenced by Generation Ukraine. The Claimant challenged Dr Voss on the basis that he had, during his time as Deputy General Counsel of the Multilateral Investment Guarantee Agency (MIGA, a member of the World Bank Group) been involved in studies and investment policy reviews of Ukraine for the OECD. The Claimant’s concern was that Dr Voss had developed personal connections with Ukrainian political officials, and that these personal connections would deprive him of the capacity for independent judgment. The deciding arbitrators (Jan Paulsson and Eugene Salpius) were divided on the Claimant’s disqualification proposal, and in accordance with Article 58 the challenge went to the Chairman of the ICSID Administrative Council for final determination. It was at this point that the matter took on the colour of *Grundel*: because Dr Voss was being challenged on the basis of his relationship with a World Bank Agency (MIGA), and the person being asked to judge his independence was the President of the World Bank, there was a potential breach of *nemo judex in sua causa*.

In an *ad hoc* procedure that has been described as ‘original and unparalleled’, the President of ICSID referred the challenge to the Secretary General of the PCA in The Hague. The Secretary General of the PCA considered the matter and made a recommendation that the proposal to disqualify Dr Voss be dismissed. This recommendation was accepted by the Chairman of ICSID, and the challenge was rejected. The arbitration resumed and the investor’s claim was ultimately rejected. Commentators have praised the approach taken by

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113 *Generation Ukraine v Ukraine*, ICSID Case ARB/00/9 (Award 16 September 2003)
115 Ibid
117 *Generation Ukraine v Ukraine* at para 4.18
ICSID in *Generation Ukraine*. According to Nigel Blackaby, the procedure adopted demonstrates that ‘the [ICSID] Chairman and the [World] Bank as a whole have perfectly understood that it was in the public interest to have an independent and impartial tribunal’ determine the challenge to Dr Voss. In the context of this Chapter, the *sua sponte* decision of the President to refer to the PCA must be seen as an expression of tacit approval for Lord Hewart’s dictum that ‘justice must be seen to be done’ and, therefore, a step towards the jurisprudential implementation of a *Sussex Justices* test in ICSID proceedings.

**Grand River Enterprises & Ors v The United States of America; Re Arbitrator Anaya (2007)**

Grand River Enterprises commenced arbitration against the United States in response to agreements reached by the US Government with certain tobacco companies. Like *Canfor*, the *Grand River* claim was brought under NAFTA Chapter 11. Grand River - a cigarette manufacturer owned by a Canadian First Nations group – appointed Professor James Anaya. The US challenged Professor Anaya on the basis that he was advocate for certain Native American groups in proceedings against the US before the Inter-American Commission on Human Rights and the UN Commission on the Elimination of Racial Discrimination (CERD). The US claimed that justifiable doubts arose as to Professor Anaya’s ability to impartially judge the NAFTA claim, because his participation in the Human Rights matters suggested he had predetermined the issue of US compliance with international obligations.

The challenge went to the Secretary General of ICSID. The relevant standard was UNCITRAL Rule 11(1). On 23 October 2007 the Secretary General wrote to Professor Anaya’s informing him that his role as advocate before CERD was incompatible with his function as arbitrator in the NAFTA matter, and asked if he would continue to act as advocate in the CERD proceedings. Professor Anaya responded that he would not, but that he would continue to assist law students in relation to Human Rights advocacy work they were doing for the Western Shoshone people. Applying the ‘justifiable doubts’ standard posited by the UNCITRAL Rule 11(1) the Secretary General found that Professor Anaya’s advisory work was not inconsistent with his role as arbitrator, and was not on its own enough to cause justifiable doubts to arise. The US challenge was accordingly dismissed.

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119 *Grand River Enterprises & Ors v The United States of America*
This challenge also arose out of the Latin American ‘Water Wars\textsuperscript{121}. There were three parallel ICSID proceedings: two were governed by the ICSID Rules and one by the UNCITRAL Rules. The parties to the UNCITRAL Rules proceedings (English company Anglian Water Group and the Republic of Argentina) agreed that ICSID would administer their action\textsuperscript{122}. The parties could not agree on the number of arbitrators or their method of appointment, and a three member tribunal was constituted in accordance with Article 37(2) of the Washington Convention. Argentina appointed Venezuelan Professor Pedro Nikken; the Claimants (who included French water-services multinational Suez) appointed Swiss Professor Gabrielle Kaufmann-Kohler. ICSID appointed American Professor Jeswald Salacuse as President of the tribunal. Rule 6 declarations of independence were made and the tribunal was constituted on 7 June 2004. On 12 October 2007, after only one of the three merits hearings had been conducted, Argentina filed an Article 57 challenge to Professor Kaufmann-Kohler. It is worth noting that Professor Kaufmann-Kohler was a member of the Working Party that produced the IBA Guidelines on Conflicts of Interest in International Arbitration.

The basis of the challenge was that Professor Kaufmann-Kohler had been a member of the ICSID tribunal in the first \textit{Vivendi} claim against Argentina (from which the annulment proceedings and challenge to Yves Fortier QC arose). Argentina argued that the award of US$105 million in favour of Vivendi and its partner revealed

\begin{quote}
a \textit{prima facie} lack of impartiality...made evident through the most prominent inconsistencies of the award that result in the total lack of reliability towards Ms Gabrielle Kaufmann-Kohler\textsuperscript{123}
\end{quote}

The alleged inconsistencies in the award were factual and evidentiary. The proposal turned on time limits: the tribunal was not notified of the challenge until 52 days after Argentina became aware of Professor Kaufmann-Kohler’s involvement in the \textit{Vivendi} award. In respect of the UNCITRAL Rules proceeding, in which the fifteen day time limit imposed by Article

\textsuperscript{121} The expression ‘Water War’ was first used to describe the ICSID claim brought by Bechtel against Bolivia for termination of certain water concessions (the ‘Bolivian Water War’ of 2001-2006). The Water Wars continue elsewhere in Latin America, namely Argentina. Because the World Bank encouraged these states to privatise their fresh water systems, the role of ICSID as forum for the Water Wars has been criticised by an array of Non-Government Organisations.

\textsuperscript{122} \textit{Suez v Argentina} at para 6

\textsuperscript{123} Respondent’s Proposal to Disqualify, para 8, cited in \textit{Suez v Argentina} at para 12
11(1) applied, the tribunal found that Argentina’s challenge was out of time\textsuperscript{124}. The tribunal reached the same result under the ICSID Rules, holding that the challenge to Professor Kaufmann-Kohler was not ‘prompt’ for the purposes of ICSID Rules 9(1)\textsuperscript{125}. Although it was strictly unnecessary, the deciding members did comment in \textit{obiter} that the challenge was without merit: it relied on the inference that Professor Kaufmann-Kohler was biased against Argentina simply because she was a member of a tribunal that made a unanimous award against the Republic six years earlier. The tribunal concluded that the effect of Article 57 was to deprive parties of the right to challenge on inference and the ‘mere belief’ that independence is lacking\textsuperscript{126}.

The tribunal compared the Spanish and English versions of Article 14, noting that the difference in language raised a question of whether the Article 14/57 test implies an objective or subjective standard for apparent bias challenges\textsuperscript{127}. The deciding members held that the terms of Article 57 (in particular, the word ‘manifest’) implied a requirement that the challenger lead ‘evidence that a reasonable person would accept as establishing the absence of the qualities required by Article 14’\textsuperscript{128}. This is an approximation of the first arm of \textit{Sussex Justices}, but an oversimplification of the objective test. As has been observed, there are two semantic options for an objective test: ‘reasonable \textit{person}’ and ‘reasonable \textit{court}’. The \textit{Gough} test uses the latter, but it is no less objective. The writer’s view is that the \textit{Gough} approach is required by the Washington Convention, and should have been taken in the challenge to Professor Kaufmann-Kohler. In the writer’s submission, the Article 57 expression ‘manifest’ is an administrative legal device which is usually interpreted as requiring that a defect be apparent \textit{to the court} without the assistance of counsel. Court vantage - rather than the view of the hypothetical third person- is more properly implied in the term ‘manifest’.

\textbf{Suez & Ors v Argentina; Re Arbitrator Kaufmann-Kohler (No.2) (2008)}

Shortly after the dismissal of its first proposal, Argentina challenged Professor Kaufmann-Kohler again. The second challenge was filed after Argentina discovered that in 2006 Professor Kaufmann-Kohler had been elected to the supervisory board of Swiss bank UBS. The relationship between UBS and the claimants was that UBS held a 2.1% stake in Suez,

\textsuperscript{124} Suez v Argentina at para 21
\textsuperscript{125} Suez v Argentina at para 22
\textsuperscript{126} Suez v Argentina at para 40
\textsuperscript{127} Suez v Argentina at para 39
\textsuperscript{128} Suez v Argentina at para 40
and a 2.38% stake in Vivendi\textsuperscript{129}. Argentina’s second challenge extended to two other ICSID proceedings against the Republic in which Professor Kaufmann-Kohler was also an arbitrator: *Electricidad Argentina SA & EDF International SA v Argentina*\textsuperscript{130} and *EDF International, SAUR International SA & Leon Participaciones Argentinas SA v Argentina*\textsuperscript{131}. Argentina’s challenge also pleaded the Rule in *Dimes*: as a non-executive director of UBS Professor Kaufmann-Kohler received a proportion of her remuneration in UBS stock, making her an indirect shareholder in the claimant companies\textsuperscript{132}. Argentina alleged that Professor Kaufmann-Kohler failed to disclose these facts in accordance with ICSID Rule 6(2) and UNCITRAL Rule 9.

In their decision of 12 May 2008, Arbitrators Nikken and Salacuse dismissed the second challenge. The deciding members applied the different tests required under the Washington Convention and UNCITRAL Rules (the latter applying to the AWG claim due to the operation of Article 8(3) of the Argentina-UK BIT), effectively separating the disqualification proceedings. The challenge subject to the UNCITRAL Rules was quickly dismissed. Argentina’s argument that Professor Kaufmann-Kohler was under a duty to disclose that she was a director of UBS and that UBS had interests in the international water sector was without merit. UBS had no interest in Anglian Water Group, and common involvement in the water sector was ‘too remote and tenuous as to hardly be called a connection or relationship at all’\textsuperscript{133}. Accordingly, Professor Kaufmann-Kohler had not breached UNCITRAL Rule 9 by failing to disclose her UBS directorship, and no ‘justifiable doubts’ arose under UNCITRAL Rule 10(1).

In respect of the challenge subject to the Washington Convention, the deciding members cited *Amco Asia* as persuasive authority for the proposition that Article 57 imposes a ‘heavy burden’ on the challenger to prove that the lack of capacity for independent judgment is ‘highly probable’, not just ‘possible’\textsuperscript{134}. The decisions in *SGS v Pakistan* and *Vivendi v Argentina (Re President Fortier)* were also cited in support of this interpretation\textsuperscript{135}. On the question of whether the link between Professor Kaufmann-Kohler, UBS and the Claimants caused a manifest lack of independence, the deciding members held that ‘such connections

\textsuperscript{129} *Suez v Argentina* at para 12
\textsuperscript{130} ICSID Case ARB/03/22
\textsuperscript{131} ICSID Case ARB/03/23
\textsuperscript{132} *Suez v Argentina* at para 12
\textsuperscript{133} *Suez v Argentina* at para 24
\textsuperscript{134} *Suez v Argentina* at para 29
\textsuperscript{135} *Suez v Argentina* at para 29
are increasingly easy to make as globalisation of modern life rapidly advances and countless institutions engage in activities that are global in scope\textsuperscript{136}. The connection between an arbitrator and a party ‘must be evaluated qualitatively’ in order to determine whether the lack of independence is manifest\textsuperscript{137}. Noting that no ICSID tribunal had to date been confronted with the question of bias by portfolio, the deciding members saw fit to inclusively list four criteria for the qualitative evaluation of the connection:

(1) Proximity: how closely connected is the arbitrator to the relevant party?

(2) Intensity: how intense and frequent are the interactions between the challenged arbitrator and the relevant party?

(3) Dependence: to what extent is the challenged arbitrator dependent upon the relevant party for benefits flowing from the connection?

(4) Materiality: to what extent are the benefits that flow to the arbitrator from the connection with the relevant party significant and material?\textsuperscript{138}

Factor (3) draws on \textit{nemo judex} and the Rule in \textit{Dimes}; factor (4) is an incorporation of \textit{de minimis}. The tribunal held that, despite Argentina’s contentions, the connection between UBS and the Claimants did not satisfy the four criteria: UBS were a ‘passive, portfolio investor’ rather than an ‘active’ and ‘strategic’ investor (as Argentina contended)\textsuperscript{139}. Given the scale and scope of its global operations, the share price of UBS did not depend upon the value or profitability of its interests in Suez or Vivendi. Because a decision against the claimants would have had no significant effect on UBS\textsuperscript{140}, the compensation received by Professor Kaufmann-Kohler for performance of her duties as a director would be similarly unaffected by the award\textsuperscript{141}.

On the remaining question of whether her failure to disclose her UBS directorship constituted a manifest lack of capacity for independent judgment, the tribunal also ruled against Argentina. Before deciding on this ground of the challenge, the tribunal was required to determine whether the 2003 ICSID Rules obliged Professor Kaufmann-Kohler to disclose a matter that arose after the constitution of the tribunal. The deciding members held that

\textsuperscript{136} \textit{Suez v Argentina} at para 33
\textsuperscript{137} \textit{Suez v Argentina} at para 33
\textsuperscript{138} \textit{Suez v Argentina} at para 35
\textsuperscript{139} \textit{Suez v Argentina} at para 33
\textsuperscript{140} \textit{Suez v Argentina} at para 36
\textsuperscript{141} \textit{Suez v Argentina} at para 40
although the 2003 form of ICSID Rule 6 did not expressly impose an ongoing (or post-
constitutional) disclosure obligation on arbitrators, the old rule did contain an implied
ongoing obligation of disclosure. As to the particulars of the matter not disclosed, the
tribunal found that Professor Kaufmann-Kohler was not involved in the day-to-day
management of UBS and was unaware that UBS owned shares in Suez or Vivendi until
reading Argentina’s second disqualification proposal. Professor Kaufmann-Kohler could
not disclose a relationship of which she was unaware. The tribunal found that Rule 6 created
no specific requirement to investigate possible conflicts of interest: the deciding members
commented in obiter that the only basis for implying such a duty would be in a situation in
which an arbitrator had ‘reasons to conjecture that a possible circumstance exists’. Given
that Professor Kaufmann-Kohler was under such a limited obligation to inquire as to possible
conflicts of interest, and considering that she did go through a conflict checking process with
UBS (in which she gave confidential descriptions of her appointments as arbitrator), her
failure to inquire into the possibility of a remote connection between UBS and the claimants
did not constitute a manifest lack on independent judgment. Argentina’s proposal was
dismissed in full and orders terminating the suspension of the arbitration were made.

Hrvatska Elektroprivreda d.d v Slovenia; Re David Mildon QC (2008)

This challenge was unique: it involved a rare form of ASM Shipping Familiarity - an
objection to counsel, rather than to the arbitrator. The Claimant (the Croatian national
electricity company) requested arbitration against the Republic of Slovenia on 4 November
2005. After preliminary hearings in July 2006, the matter was booked for a two week
sent the tribunal their list of attendees. The list named David Mildon QC of Essex Court
Chambers as counsel for the Respondent. The President of the ICSID tribunal (David A.R.
Williams QC) was a door tenant at Essex Court. At no point prior had the Respondent
advised the tribunal or the Claimant that Mr Mildon would be presenting part of its defence at
the Paris hearing. The Claimant wrote to the Respondent seeking disclosure of the personal
and professional relationship that existed between Mr Mildon and the President, clarification
of the role Mr Mildon was to play in Paris, and the chronology of his engagement as

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142 Suez v Argentina at para 43
143 Suez v Argentina at para 39
144 Suez v Argentina at para 47
145 Hrvatska Elektroprivreda d.d v Slovenia; Re David Mildon QC, ICSID Case ARB/05/24 (Tribunal’s ruling
regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008), para 3
146 Hrvatska Elektroprivreda d.d v Slovenia, para 3
The Respondent’s lawyers replied that no relationship, professional or otherwise, existed between the President and Mr Mildon, but refused to disclose when Mr Mildon had been retained or the nature of the role he would play at the hearing.

The correspondence continued: the lawyers for the Claimant contended that their client (Slovenia) was entirely foreign to the London Chambers system, and derived no comfort from the status of English barristers as separate, self-employed legal practitioners. It was put that Slovenia would not have consented to the appointment of Mr Williams as President had it known that he was a door tenant in the same chambers as counsel for the Respondent. The Claimant identified the failure to disclose the appointment of Mr Mildon as a breach of General Standards 3 and 7 of the IBA Guidelines, which require prompt disclosure by both arbitrators and parties of problematic circumstances. The lawyers for the Respondent replied that neither IBA General Standard 3 dealt with disclosure by arbitrators, and General Standard 7 disclosure by parties - neither dealt with disclosure by lawyers. After the Respondent again refused to give the chronology of Mr Mildon’s appointment, the Claimant gave notice that it would make an objection to his involvement at the outset of proceedings in Paris.

Slovenia objected to Mr Mildon on the first day of the hearing. The ICSID tribunal – whose members included the President – was required to determine two questions: (1) did it have the power to make an order disqualifying counsel, and (2) should such an order be made in the circumstances. With respect the first question, the Tribunal referred to ICSID Rule 6 (judge fairly), Rule 18 (notice of counsel), Rule 19 (the tribunal shall make orders required for the conduct of the proceeding), and Rule 39 (power to make provisional measures for the preservation of a party’s rights). Washington Convention Article 56(1) (the immutability of ICSID tribunals) played a pivotal role: under this principle a properly constituted tribunal cannot be changed once the proceedings have begun. The IBA Guidelines and their Background Information (namely Paragraph 4.5) were also cited with approval by the
tribunal. Relying on Scheuer’s commentary the tribunal concluded that ‘as a judicial formation governed by public international law’154 it did have the inherent power to make orders necessary to preserve the integrity of its proceedings, and that this inherent power included the power to disqualify counsel155. With respect to the second question, the fact that Slovenia was foreign to the London Chambers system, coupled with the Respondent’s conscious decision not to inform the Claimant of its choice of counsel, had ‘created an atmosphere of apprehension and distrust which it is important to dispel’156. The members decided that Mr Mildon’s continued participation in the proceedings could indeed lead a reasonable observer to form a justifiable doubt as to the impartiality or independence of the President of the tribunal157. On these grounds the tribunal made orders that Mr Mildon could not participate any further in the proceedings.

At first glance, this unprecedented decision seems to turn on its own facts. Three points stand out. Firstly, the party challenging counsel (Slovenia) was not a Common Law state and had no familiarity with the customs of the English Bar (such as the Cab Rank Rule or the status of barristers as independent sole practitioners). Secondly, the party opposing the challenge had refused to give particulars of counsel’s engagement in its replies to the Claimant’s letters of inquiry and demand. Finally, if the tribunal did not disqualify counsel, then there would have been an appearance of partiality that required the President to stand down. As the proceedings were well advanced, the replacement of the President was not an option. As a matter of law, to do so would have gone against the principle of immutability enshrined in Washington Article 56(1). But one closer examination, the decision may have broader implications for ICSID and ICA. It is fundamental that parties have the right to counsel of their choice - this is ICSID Rule 9. But the accepted fundamentality of the right to counsel does not, it seems, render it an absolute procedural rule: where the choice of counsel imperils the integrity of the process, the right will be trumped. It remains to be seen whether this decision is a one-off - the ‘Pinochet of ICSID jurisprudence’, if you like – or the first line of a new spell in the book of Black Arts. The writer suspects it is the latter.

chambers now disseminate, there is an understandable perception that barristers’ chambers should be treated in the same way as law firms’; see (2004) 5 BLI 433

154 Hrvatska Elektroprivreda dd v Slovenia, para 33
155 Hrvatska Elektroprivreda dd v Slovenia , para 33-34
156 Hrvatska Elektroprivreda dd v Slovenia, para 31
157 Hrvatska Elektroprivreda dd v Slovenia, para 30
6. Role/Issue Conflict and the Problem of Precedent

The jurisprudence of foreign investment law is in a phase of rapid development. As in ICA, party autonomy allows the parties to agree on the law applicable to the substance of their dispute. Failing express choice, the law governing the merits of a claim will be derived from the law of the state party, including relevant conflict of laws rules, and ‘such rules of international law as may be applicable’\(^{158}\). The expression ‘rules of international law’ has the same meaning as under Article 38(1) of the Statute of the ICJ\(^{159}\). ICJ Article 38(1) lists the sources of international law as being international conventions, international customs, general principles of law recognised by civilised nations, judicial decisions and the doctrine of eminent scholars\(^{160}\). As Schreuer notes, the Statute of the ICJ was drafted with state-state disputes in mind; the ‘neat categories’ contemplated by ICJ Article 38(1) do not necessarily ‘conform to the complex realities of international practice’\(^{161}\). ICSID tribunals are, therefore, engaged in a limited but constant process of bespoke rule-making. The development and recognition of the customary law of foreign investment is where this process is most visible.

The record shows that ICSID tribunals most often apply customary law to questions of state responsibility, denial of justice, nationality and the legality of expropriation\(^{162}\). As has been observed, ICSID tribunals regularly cite and follow earlier ICSID challenge decisions when they determine proposals for disqualification. Similarly, the published awards of ICSID tribunals are the best source of the customary substantive law of foreign investment. Although the Washington Convention does not posit a doctrine of precedent, the practice of following earlier decisions is increasingly common in ICSID arbitration. The subject matter of ICSID arbitration is the chief reason for this practice: because the same issues arise over and over between investors and host states (such as the foreign investor’s entitlement to fair and equitable treatment), each award’s persuasive value as an expression of customary law is increased by a recurring congruency of facts. Leading ISA practitioners have confirmed the trend towards precedent: according to Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, ICSID awards ‘naturally serve as precedents’\(^{163}\); Albert Jan van den Berg has observed that ‘there is a tendency to create a true arbitral case law’ in the field of investment.

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\(^{158}\) Washington Convention, Article 42
\(^{159}\) Report of the Executive Directors (History Vol II, p.262, 1029), cited in Schreuer, above note 25 at p. 610
\(^{160}\) ICJ Statute, Article 38(1)
\(^{161}\) Above note 25 at p.610
\(^{162}\) Above note 13 at p.265
In 2005 Pierre Duprey noted the similarity between ISA awards and judicial case law. There are, naturally, strong arguments against these opinions. The claim that ISA awards enjoy some kind of *de facto* precedential status is weakened by the fact that the law of foreign direct investment is in its infancy: it may be that we are bound to see some consistency in ISA awards at this stage of the game because the rules are still primary; the appearance of consistency may well vanish once secondary rules (or ‘the rules of the rules’) develop and the jurisprudence of ISA fragments. It is, of course, too early to tell.

In the writer’s opinion, ICSID awards do appear to be, and are treated more and more like, precedents. Whilst this has gone some way to achieving the policy objective of adjudicatory consistency, it has collided with the reversible personality of the arbitrator. The problem is that, unlike in a municipal setting - where case law is generated by individuals (judges) who serve only as rule-makers - in arbitration the rule-makers are also the rule-users; ‘counsel one day, arbitrator the next’. Significantly, it is from their role as rule users that most leading arbitrators make their money: although there are some notable exceptions, for most practitioners the function of arbitrator is not especially lucrative, at least not when compared to the money that can be made arguing the case. It follows that, as a precedent, an award may assume a commercial value when an arbitrator ‘changes hats’ to counsel: he may get the benefit of a rule he made. If an arbitral award has weight as a precedent, can the arbitrators who made it subsequently argue for its application when they appear before other tribunals as counsel? And would there be a risk that in deciding the earlier matter they were generating case law for their client’s benefit in the latter? These pressing questions are currently being debated in the context of ‘Issue Conflict’, one form of which the writer has termed *Telekom Malaysia* bias.

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165 Ibid at p.258
167 In *Telekom Malaysia*, the challenged arbitrator - Professor Emmanuel Gaillard - was serving as counsel in a similar but unrelated investor-state dispute in which he was pressing an ICSID expropriation claim on behalf of a foreign consortium against the Kingdom of Morocco (*Consortium RFCC v The Kingdom of Morocco*, ICSID Case ARB/00/6). The question was whether Professor Gaillard would be generating case law against his client’s position in the claim against Morocco if he decided against the aggrieved investor in the *ad hoc* claim against Ghana. Ghana said he would, and that justifiable doubts as to his impartiality arose as a result. Judge Von Maltzahn of the District Court of The Hague agreed and made orders requiring Professor Gaillard to stand down as counsel in the ICSID case or resign as Chairman of the tribunal in the *ad hoc* matter.
ISA Issue Conflicts are to be distinguished from Issue Conflicts in ICA. In ICA, Issue Conflicts tend to focus on the arbitrator’s previous expressions of opinion in lectures (*Uni-Inter Bias*) and their consecutive service in matters of similar or identical facts (which gave rise to the challenge in *Qatar v Creighton*). But in investment arbitration, Issue Conflicts can arise out of wholly separate (but concurrent or consecutive) arbitral proceedings. Although *Qatar v Creighton* situations do sometimes arise in ISA, because of the emerging doctrine of precedent the conflict is more between roles than issues – between the role of rule-maker and the role of rule-user. In this sense, ‘Role Conflict’ may be a better name for this type of challenge. The appeal in *Eureko v Poland* illustrates the new problem of Role/Issue Conflict in ISA. The first appeal in *Eureko v Poland* has been discussed in Chapter 3. Poland claimed that arbitrator Stephen Schwebel was related to the lawyers for the Claimant: they had offices in the same building. The Brussels Court of First Instance dismissed Poland’s challenge. On appeal, Poland raised Role/Issue Conflict. Schwebel was co-counsel with Sidley Austin in an unrelated concurrent ICSID arbitration (*Vivendi v Argentina*), and Shwebel and Messrs Sidley Austin cited the *Eureko* award as authority for certain propositions they were making on behalf of their clients against Argentina before the ICSID tribunal. The legal issue common to the both proceedings was the interpretation of the investment treaty obligation of fair and equitable treatment.

The question for the court was whether Schwebel’s impartiality was cast into doubt by the fact that he participated as arbitrator in the making of an award in one arbitration (*Eureko v Poland*) that would be persuasive authority for his arguments as counsel in another (*Vivendi v Argentina*). The Belgian Court of Appeals declined to rule on Poland’s additional objection: Poland failed to notify the arbitrators in accordance with the Belgian procedural rules or make the Role/Issue Conflict argument before the Court of First Instance. Although the Brussels Court of Appeals did not rule on the merits of Poland’s challenge, there is no reason to suspect that the conclusion would have been any different to that reached by the District Court of The Hague in *Telekom Malaysia*. If anything, the evidence in *Eureko v Poland* was much stronger: Schwebel actually cited his award against Poland in the submissions he made

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169 See for example *Qatar v Creighton* [1999] Rev Arb 308
170 See for example the challenge in *BG Group Plc v The Republic of Argentina*, where Albert Jan van den Berg’s service as arbitrator in a string of ICC arbitrations against Argentina was said to give rise to justifiable doubts as to his independence. Argentina’s challenge was dismissed by the ICC Court in an unpublished decision. In March 2008, Argentina applied to the US District Court for the District of Columbia for *vacatur*. At the time of writing the motion was pending.
171 ICSID Case ARB/07/3
as counsel for Vivendi, proving the point that in the two matters Schwebel was playing the roles of rule-maker and rule-user consecutively. On the other side of the Atlantic, Argentina objected to Vivendi’s reliance on the Eureka award, making a formal request to the ICSID tribunal to have the record stricken of any reference to the decision. Although the merits of Argentina’s objection were not formally decided, commentators have inferred from the citation of the Eureka decision in the final award that the ICSID tribunal rejected Argentina’s position. This does not mean, however, that Role/Issue Conflict cannot found a challenge in an ICSID proceedings: the position taken by the Secretary General in Canfor Corporation suggests that it is a valid basis for proposing disqualification in an ICSID proceeding; the decision in Grand River Enterprises suggests that even the broadest issues (such as a state’s compliance with ‘international commitments’) may be actionable. But neither Canfor nor Grand River was decided under the ‘manifest apparent bias’ test prescribed by Article 57 of the Washington Convention, and neither challenge raised the Eureka/Vivendi ‘problem of precedent’. Nevertheless, it can be surmised from the preference for Sussex Justices displayed by ICSID arbitrators that Role/Issue conflict of the Eureka/Vivendi type would amount to ‘manifest lack of capacity for independent judgment’ under Article 57.

7. Reasons for the trend towards Sussex Justices

It is clear from the record that, despite the fact that they are equipped with the high ‘black letter’ threshold for disqualification set by Article 57, ICSID panels are softening in their approach to bias challenges. Reliance on inference, as well as the use of the ‘reasonable fair minded observer’, is now permissible. These sua sponte doctrinal developments beg the question: why are ICSID tribunals moving away from the high bar of the ‘manifest apparent bias’ test towards the Sussex Justices model? In the writer’s view, the explanations can be found in the policy pressures flowing from the institutional proximity of ICSID to the World Bank and the cross-pollination of ICSID jurisprudence with the law and practice of ICA.

7.1 ICSID and the World Bank: North v South

The consistent involvement of developing countries has required ICSID to increase the appearance of procedural fairness. The majority of ICSID claims are brought against developing countries (colloquially referred to as ‘the South’ or ‘the Southern economies’) by

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172 Above note 120 at p.6
foreign direct investors from developed, northern hemisphere economies. International arbitration first acquired a ‘North v South’ quality in the late 1970s, when a number of high value disputes arose out of large petrodollar construction projects in the Arab world. The process has retained much of this colour: one need only type the word ‘ICSID’ into a search engine to see that ICSID is identified by many as an institutional extension of the World Bank and a vehicle for ‘multinational corporate hegemony’. Recently, these objections have taken hold at the state level: in April 2007 Bolivia, Venezuela and Nicaragua declared their intentions to withdraw from the Washington Convention. Ecuador has made similar noises. To date, only Bolivia has actually pulled out. In a statement made after the withdrawal, the Bolivian Special Ambassador for Trade and Integration cited the ICSID claim of Aguas de Illimani (a subsidiary of Suez). The International Finance Corporation (a member of the World Bank Group) was a shareholder in the claimant company. The Bolivian Special Ambassador alluded to nemo judex when he said ‘It is clear that the same institution should not be both arbitrator and a party to the dispute’.

Allegations of ICSID bias are usually made on the basis that the institutional links between the Centre and the World Bank make the two entities ‘one and the same’, or that the record of decisions against Southern host states betrays a deeper ‘philosophical link’ between ICSID purpose and World Bank policy. With respect to the first criticism, it is a matter of public record that ICSID is a creation of the World Bank. As such, it is uncontroversial that the origins of the Centre lie in the policy of the IBRD. The World Banks pays the running costs of ICSID; the Administrative Council of ICSID is composed largely of the representatives of World Bank member states; the World Bank and the Administrative Council convene concurrently; the President of the World Bank is ex officio the Chairman of the Administrative Council. What is controversial is that the connection between the two institutions has not been severed as the rate of ICSID claims (and public awareness of the Centre) has increased in recent years. Other arbitral institutions have grappled with the task of reconciling success with heritage. The reader may recall, for example, how the International Olympic Committee (IOC) reacted to the challenge in Grundel v International

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173 Above note 166 at p.43
175 Venezuelan officials have said that the decision to abandon the World Bank and the IMF is ‘on standby’ while the finance ministry analyses the impact of the move on sovereign debt: see Gonzalez, above note 154
176 Above note 71
Equestrian Federation\textsuperscript{177} (in which concerns as to the independence of the Court of Arbitration for Sport from the IOC were expressed in \textit{obiter} by the Swiss Federal Court). The IOC divested itself of its responsibility for the CAS and transferred control of the court to a new organically and economically independent Council.

The World Bank has not undertaken any formal Grundel restructuring: the 2006 amendments to the ICSID Rules and Financial Regulations did not address the issue of ‘filioparental relations’ between ICSID and the World Bank\textsuperscript{178}. But as Fouret observes, critics of the ‘World Bank Tribunal’ ignore the fact that, when compared to the other institutions engaged in the day-to-day conduct of ISA, ICSID is transparent in its process and product. Awards in \textit{ad hoc} ISA proceedings under the UNCITRAL Rules are hardly ever published; the Stockholm Chamber of Commerce (prominent as a seat for East-West ISA’s involving former Soviet host states and PRC enterprises) usually publishes awards without identifying the parties or the arbitrators; ICC proceedings are inherently confidential. Although party consent is still required, when an ICSID award is published it includes the names of the parties, the subject matter of the dispute (probably the most important component where the public interest is concerned) and the names of the arbitrators\textsuperscript{179}. The majority of ICSID awards are now published or otherwise disclosed\textsuperscript{180}, and some ICSID hearings are even open to the public\textsuperscript{181}. It is clear therefore that, as a target for criticism, ICSID is far easier than it is legitimate.

As for the second basis, the writer is of the opinion that the Bolivian Water Wars damaged the reputation of ICSID at a critical time when its case load and profile were rising. The human right of access to water faced off against the Smithian economic right of the investor to the fruits of their labour, with ICSID as the stage. The ‘philosophical link’ between the policy of the World Bank and the purpose of the Centre was raised by the host state. According to the Bolivian President

\begin{footnotes}
\item[177] 1 Civil Court ATF (15 March 1993)
\item[178] Above note 113 at p.123
\item[179] Ibid at p.134
\item[180] Above note 151 at p.264
\item[181] For example, the July 2002 hearings in \textit{United Parcel Service of America, Inc. v Government of Canada} were open to the public.
\end{footnotes}
No country in the world has ever won in international arbitration… Not the governments, not the nations, not the people. Only the companies win.\(^{182}\)

This is plainly not true: as of late 2006, the numbers of final awards in favour of states and investors were about even.\(^{183}\) Despite empirical contradiction, the Bolivian President’s view is shared by some of the poorer Contracting States; similar sentiment is propagated by a range of non-government interest groups opposed to international trade liberalisation. As Rusty Park noted in 2006, ‘not all observers today accept Ricardo’s theory of comparative advantage, or share the assumption that cross-border trade and investment (the circulatory system of globalisation) bring the world a net benefit’.\(^{184}\) The Bolivian Water War provided rich pickings for leaders looking to evict foreign investors and establish (or re-establish) command economic models. In the last few years a group of states has formed up behind Venezuelan President Hugo Chavez, who has vowed to withdraw from the World Bank and the International Monetary Fund and replace them with a Latin American funded regional lending institution, the ‘Bank of the South’.\(^{185}\)

ICSID proceedings take place in this increasingly complex policy setting. ICSID arbitrators have clearly felt the pressures of their heated geo-political context: on North/South arbitrations, Algerian Judge Mohammed Bedjaoui has written of ‘the problems or arbitral “neutrality” of the harsh times we live in’.\(^{186}\) Bias challenges – where the allegation of conspiracy is most readily made – suffer the most in the North/South context; they become test cases for transparency in international arbitration. As former Secretary General of the ICC Anne Marie Whitesell observed in 2007, the desirability of encouraging states to participate in international arbitration is an important policy consideration in ISA proceedings; this realpolitik would appear to be colouring ICSID challenge jurisprudence. It should not be forgotten that, in ISA, states are well positioned to make demands, and to some extent it seems that ICSID challenge panels are giving them the test they want when they challenge arbitrators. It is evident from the unique measures taken in the Generation

\(^{182}\) Above note 174

\(^{183}\) Above note 113 at p.135

\(^{184}\) Above note 36 at p.351

\(^{185}\) Above note 68


Ukraine challenge that ICSID is adapting its procedures where conflicts of interest. Whether they are doing so consciously or subconsciously, ICSID arbitrators seem to be reacting to the policy pressures around them by adding elements of Sussex Justices and lowering the Article 14/57 test for bias. It has been said that the arbitrator’s need to adhere to a strict judicial standard of independence is part of a ‘broader trend towards the moralisation of international commercial law in general’; in this process the laws and practices of international arbitration respond to the global public interest. In ISA, the speed of this process of modification is increased by the tendency of ICSID arbitrators to refer to and follow earlier ICSID challenge decisions. It also has to do with the ICA pedigree of ICSID arbitrators.

7.2 Cross-pollination with ICA jurisprudence

The increasing tendency of ICSID arbitrators to read the ‘reasonable apprehension’ test into Article 57 is partly due to the prevalence of that test in ICA. The writer has shown in earlier chapters that the majority of jurisdictions apply an approximation of the Sussex Justices test to challenges to arbitrators, and suggested in Chapter 7 that the test may have a place in the procedural lex mercatoria. Many of the people who serve as ICSID arbitrators also practice in the more diverse field of ICA with the result that, via the medium of the arbitrator, ISA and ICA are cross-pollinating. As Lew, Mistelis and Kroll observed in 2003, ‘the characteristics of investment arbitration are seen in commercial arbitrations and vice versa’. The law and practice of ICA clearly informs ICSID challenge jurisprudence. Evidence of this can be found in the judgment in Vivendi Universal v Argentina (Re Challenge to President Fortier), where the committee referred to the decision of the Paris Court of First Instance in Philipp Brothers as well as the English rulings in Saudi Cable and Re Medicaments. The more common approach, however, seems to be to invoke principles of municipal procedural law as self-evident rule, or to rely on the General Standards of the IBA Guidelines as authority for broad interpretations of municipal laws such as the ‘reasonable third person’ vantage point.

The problem with projecting ICA challenge and disqualification standards onto ICSID procedures is that ICA standards have developed over a long duration, in a multiplicity of municipal regulatory contexts. ICSID, in contrast, is a self-contained jurisdiction with no

188 Gouiffes, L., L’Arbitrage International propose-t-il une model original de justice?, in Recherche sur l’arbitrage en droit international et compare: Memoires pour le diplome d’études approfondies de droit international prive et du commerce presents et soutenus publiquement (LDGJ 1997), p.55
189 Above note 43 at p.804
municipal connection. Similarly, the Washington Convention requirement of ‘manifest lack of independence’ is a rule with no municipal equivalent. If there was a state which had such a rule, then its case law might be relevant. But there is not: the closest municipal equivalent of the Washington Article 14/57 rule is the Gough ‘real danger’ test. If anything, it should be Gough-era English jurisprudence that guides ICSID arbitrators in their approaches to disqualification proposals. Although there may be an argument that the increasing publicity of ICSID proceedings warrants recognition of Lord Hewart’s dictum (and thereby justifies the application of the first arm of Sussex Justices), there is no legal basis for the use of the second arm of Sussex Justices in ICSID challenges. The practice of employing elements of the Sussex Justices test is, it appears, either the result of ICSID arbitrators performing some kind of subconscious tronc commun of municipal law or an accident of the group’s exposure to ICA norms.

8. Conclusion

ICSID has emerged as the leading venue for investor-state dispute resolution, and a crucial institutional component of the global trade complex. The posited law of the Washington Convention is now supplemented by a considerable body of jurisprudence. Since the challenge in SGS v Pakistan, elements of the Sussex Justices ‘reasonable apprehension’ test have been progressively tacked on to the black letters of Article 57 of the Convention by ICSID tribunals. Reliance on inference, for example, is no longer off limits; the fiction of the ‘reasonable fair minded observer’ has been introduced even though the ICSID Convention and Arbitration Rules make no mention of it. As ICSID proceedings take on more of the characteristics of a public adjudicatory process (eg. reporting of judgments, allowance of amicus curae submissions, open hearings, etc) the threshold for disqualification is getting lower. The availability of new grounds for challenge – including Uni-Inter Bias, Role/Issue conflict of the Eureka/Vivendi type, and Hrvatska Counsel Conflict – is either a cause or effect of this. A sure consequence of this process of jurisprudential modification is that disqualification proposals are increasingly common in ICSID proceedings: the ‘Black Art’ of bias challenge has caught on. Whilst the cure for this ailment is not simple, the writer is sure that Sussex Justices is not the answer. Earlier interpretations of the Washington Article 14/57 ‘manifest’ standard, such as that arrived at by the tribunal in Amco Asia, more closely correspond with the intent of the Convention and should be preferred today. If the preference
for *Sussex Justices* continues, a standing pool of ‘arbitrators only’ will need to be created and the function of the Secretary General of the PCA formalised.
CHAPTER 8

Causes and Cures

_The age of innocence has come to an end..._

- Jan Paulsson (1985)

1. Introduction

Pleading the appearance of bias is one of a raft of tactics deployed by parties who seek to delay and disrupt ICA proceedings, and deprive their opponent of the arbitrator of their choice. The writer calls these tactics ‘The Black Arts’. There are a number of ways to derail arbitral proceedings but crying bias is certainly one of the best. The reason is that the proceedings are usually suspended while the challenge and any subsequent appeals are heard in supervising courts. Generally, the law does not always require suspension: Model Law Article 13(3) gives the tribunal discretion on whether to continue with the arbitration during the pendency of the challenge, for example. But given the prospect of reconstitution, most tribunals adjourn while the challenge is on foot. If the arbitration is institutional, the challenge might go up to a review committee or standing panel and even beyond into state courts; if the tribunal is _ad hoc_ the challenge may delay the proceedings for months or years while state courts deliberate on difficult questions (such as the interaction of the institutional rules chosen by the parties with the procedural law of the seat). Procedural public policy will complicate things further. The challenger’s best day out will be where the arbitrator simply stands down. But the delay caused is often just as good a result. As any commercial disputes lawyer knows, delays can be beneficial for the client: they might give them time to make (or free up) money for the award, allow for creative book keeping, or even give the client a chance to shed assets. Experience suggests that delays also tend to revive settlement negotiations, sometimes with positive results. But causing delay may also constitute an abuse of process and a breach of professional ethics. The fundamentality of the right to challenge
provides an essential shield against these risks; and the lower the threshold for disqualification, the thicker that shield is for the party holding it up.

In the preceding national and regional surveys the writer has shown that there are three competing tests for apparent bias: (1) the ‘reasonable apprehension’ test (the ‘Sussex Justices test’); (2) the ‘real possibility’ test (the ‘Porter v Magill’ test); and (3) the ‘real danger’ test (the ‘Gough test’). The preceding country studies have shown that English and American approaches to arbitrator bias have converged in recent years, favouring a higher threshold for impeachment. In Chapter 5 we saw that in the Common Law seats of the Asia Pacific (most of which are Model Law) all three tests for bias are represented: Hong Kong follows Porter v Magill, Malaysia follows Gough and Australia applies Sussex Justices. The European seats also vary in their approaches. The case law catalogued in Chapter 3 shows that Swiss and German courts are probably tougher on challengers – less likely to disqualify an arbitrator than French and Swedish courts. In Chapter 6 the writer put it that there is in the lex mercatoria a rule equivalent to Model Law Article 12 and that, due to the increasing use and significance of the IBA Guidelines, the test for bias that informs it is Porter v Magill. In Chapter 7 the writer surveyed ICSID challenge jurisprudence and concluded that, although the ‘manifest lack of independence’ requirement imposed by Article 57 of the Washington Convention was interpreted strictly and in a manner consistent with the Gough test, ICSID panels are adopting Sussex Justices piece-by-piece. In short, although Sussex Justices has ‘market share’, since the early 1990’s leading seats and arbitral institutions have experimented with higher thresholds for arbitrator bias.

Before we consider the merits of imposing a higher test for apparent bias, one pressing question must be answered: why has the legal landscape changed so much over such a short time? The answer is complicated. First and foremost, law is alive: law answers society. There must, therefore, be some micro-societal reason for the jurisprudential shifts that have occurred in recent years. Although it is a cliché, there are good reasons to blame the lawyers: there can be no denying that Magic Circle law firms have taken over arbitration in the last thirty years, or that their arrival changed the way things were done. The lawyers are the agents of change. The increased rate of challenge must, in the writer’s view, be seen as a by-product of this market process. It seems safe to say that the arbitrators are not becoming less

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¹ Petrochilos, G, Procedural Law in International Arbitration (Oxford University Press 2004), p.139
impartial – there might be some basis for saying that the recent development of a truly global market has increased the diversity of the individual’s interests, but the record shows that allegations of portfolio bias nearly always fail for *de minimis*. Similarly, the kinds of prejudices that were widespread and socially acceptable in the nineteenth and early twentieth century are rightly taboo now. If anything, the professionalisation of the arbitrator’s function has increased the *actual* distance of the arbitrator from the parties. So it is not the arbitrators who have changed; it is *arbitration*. The gentlemen’s club of arbitration is history: arbitration is now dominated by lawyers, rather than arbitrators. To understand why challenges have become common in this setting, we need to see a challenge proceeding for what it really is: a situation of expert hunters and easy targets.

**Expert Hunters – the arrival of the ICA technocrat**

ICA began as an Old World cottage industry, a field of legal practice closer to a hobby than a profession. The pool of arbitrators was made up of ‘a handful of academic *aficionados* on the fringe of international law’\(^2\). This group of ‘Grand Old Men’ was chiefly comprised of elite European (especially French and Swiss) academics, English silks and a few retired judges (such as Lord Wilberforce)\(^3\). The ICC was the clubhouse for this clique of learned patricians\(^4\). But in the wake of the Oil Crises of the 1970s, a North/South reorientation of international trade occurred which brought international arbitration to the attention of North American capital exporters and, perhaps more importantly, their lawyers. Large, full service Anglo-American law firms began to invest heavily in ICA. Dezalay and Garth carried out a study of this process in the mid-1990s, and their results are fascinating. They identify the arrival of the Anglo-American firms as the first stage in the process of ‘rationalisation’ (or *banalisation*, if you take a more romantic view) of ICA practice\(^5\). Crucially for the writer, Dezalay and Garth observed that the big Anglo-American firms began to ‘introduce the legal techniques which are the basis of their preeminence’\(^6\).

The legitimacy of procedural ‘tactics’ is a distinctly Anglo-American notion; the same can probably be said for the idea of procedural law as a discrete skill. American lawyers have a


\(^3\) Ibid

\(^4\) Ibid, p.52

\(^5\) Ibid, p.37

\(^6\) Ibid
well deserved reputation for procedural creativity: the pop image of the attorney who has a ‘motion for anything’ is certainly founded in truth. The vast majority of the Anglo-American lawyers who became interested in ICA were, first and foremost, litigators. By the mid-1980s the lieutenants of this first wave were branding themselves as international arbitration specialists: the ICA technocrat was born, and market-driven generation warfare soon broke out. On the field, the procedural specialisation of this new technocracy faced off against the more general skill-sets of the Grand Old Men. Dezalay and Garth describe the clash as follows:

the desire to promote their own technical competencies has led them [the technocrats] to a position that devalues the wisdom and generalist experience of their notable mentors, whom they characterise as dinosaurs. Since they [the technocrats] are for the most party too young to compete with the charisma of grand old men, they must emphasise their technical sophistication.\(^7\)

Where the Grand Old Men were more sophisticated in matters of substantive law (they had farmed the frontier in the Libyan Oil arbitrations and distilled the lex mercatoria), the ICA technocrats knew more about procedure. The technocrats exploited party autonomy and pushed for the adoption of rules of procedure familiar to them, transforming relatively informal arbitration into ‘offshore litigation’.\(^8\) Indeed, it is from this process that typically American procedures have crept into ICA: cross examination, party-appointed experts and orders for full discovery are well known examples. The lawyers that introduced these practices came from an adversarial jurisdiction with an esteemed tradition of rights-driven constitutionalism - due process ranks highest amongst the raft of constitution rights familiar to the Anglo-American invaders. The right to an impartial and independent judge is a basic principle of due process in Common Law systems, and one in which American litigators are especially well versed in pleading. It is worth remembering that the American faction were raised in a ‘Vacatur Only’ setting – the ancient US Federal Arbitration Act does not allow for mid-proceeding challenge: the parties have to wait until an award is rendered, at which time they may run their bias challenge in the form of a motion for setting aside. The Americans were, therefore, used to ‘playing for keeps’ at the post-award stage. With this professional heritage in mind, it should perhaps be less surprising that the rate of bias challenges in ICA

\(^7\) Ibid, p.40
\(^8\) Ibid, p.35
increased once the Anglo-American technocrats were established: as hunters they were only doing what they knew best.

**Easy Targets – the Grand Old Men**

The Grand Old Men were sitting when the technocrats arrived. The closed market of Continental ICA, with its polite dualist society of European academics and lawyers, made their seats all the more comfortable. At first, to the Anglo-American outsiders, it seemed as though everybody knew everybody except them. This European ‘salon society’ was a bit too cozy for the technocrats, trained as they were in the bare-knuckle adversarial tradition of Common Law litigation. The key words of the new arrivals were ‘transparency, rationalization and competition’. By the late 1980s the technocrats were objecting to the professional familiarity and proximity of the senior actors. Consistent with their skills, the focus of their attack was procedural: the rules of arbitrator disclosure and independence. By 1991 the technocrats had gained a good deal of influence at the ICC, so much so that modifications to the ICC Rules were mooted. The proposal was to introduce an additional requirement that arbitrators disclose any significant prior or ongoing relationships with counsel for the parties, rather than just the parties themselves. The Swiss faction objected on the basis that ‘the relationships that may exist between counsel and arbitrators are irrelevant, because they cannot possibly call into question the independence of the arbitrator, it’s only the relationships with the parties that arise’. Many of the Grand Old Men and their apprentices were against the creation of a rule for the disclosure of relationships with counsel. But the ICC opted to support greater transparency, and made efforts to expand the disclosure requirements of the ICC Rules. The ICC Court took the view that the Rule 7(2) ‘Declaration of Independence’ should include a mention of any significant relationship between arbitrators proposed and counsel for the parties in the arbitration. The institutional push for transparency continues today, the 2004 IBA Guidelines being the most recent chapter.

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9 Ibid, p.69 (at FN11); the authors cite one lawyer’s recollections of the ‘very friendly’ proceedings in the Government of Kuwait v Aminoil arbitration (1982) as an example of this polite society in action.

10 Ibid, p.48
11 Ibid, p.49
12 Ibid, p.49
13 Ibid, p.50
14 Ibid, p.49, citing Pierre Lalive
It is no coincidence, in the writer’s opinion, that the arrival of the Anglo technocrats corresponded with the recognition of new grounds for challenge. In the preceding chapters the writer has observed that, since 1991, the technocrats have progressively added to the list of objectionable circumstances: the most recent addition is Telekom Malaysia Bias of the kind pleaded in the Eureko/Vivendi arbitrations. Although procedural specialisation is certainly one of the reasons for the success of the hunters, a more significant reason may be that the Grand Old Men were easy targets. They were high profile, high visibility ‘divas’ with impeccable reputations. The fact that they knew everybody and everybody knew them was how they came to monopolise the ICA ‘game’ in the first place. But when the technocrats arrived, the virtue of familiarity started to be seen as a vice.

It is important to note that the technocrats not only had the advantage of fact, they had the advantage of law: a test for bias geared toward appearances. The hunters also had the benefit of a target group who placed a high premium on reputation. Right or wrong, bias and corruption are related conditions: one is technical misconduct, the other professional (even criminal) misconduct. The tar might be different but the brush is the same. When a challenge is made the threat to the arbitrator’s reputation is direct and serious - the fact that most institutional rules afford the arbitrator the right to respond to the allegation of bias proves this, as does the fact that arbitrators often feel shame when they are challenged. The emotive, often indignant language used in the written responses filed by arbitrators betrays the psychological impact of the challenge upon them. Sir William Norman Raeburn KC apparently never recovered after he was removed for actual bias in ‘Catalina’ v ‘Norma’. As ‘moral entrepreneurs’ arbitrators have an eggshell skull for allegations of misconduct. As Loyola University Professor Margaret Moses has observed, many arbitrators simply withdraw when they are challenged. This is more than a reaction to the challenger’s loss of confidence – often what the arbitrator is doing is avoiding the risk of doing damage to their reputation by responding to the challenge and ending up with public hearings of the allegation of bias in state courts. The younger generation of arbitrators appears to be more willing to resist the challenge – it may be that they have grown up with the Anglo technocrats, and have become acclimatized. Perhaps the best recent example is Swiss Professor Gabrielle Kaufmann-Kohler, who refused to stand down in the face of repeated bias.

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15 Ibid, pp.35-6
16 [1938] 61 LIL Rep 360
17 Ibid, p.33
challenges brought by Argentina in the ICSID proceedings against French company Suez\textsuperscript{19}. But it seems that only the thickest skinned of the Grand Old Men will resist, the rest often prefer to walk away. There is resulting snowball effect: the challenge’s prospects of success are raised by the sensitivity of its target, and the observable success of challenges makes lawyers more willing to try challenge tactics in other proceedings. The cycle contributes to what the writer calls the ‘Problem of Demand’.

**Competition as a cause**

Trade in legal services is far from free. States usually exercise relatively high degrees of control over their legal professions. States do this for a variety of reasons, some of which are practical and some of which are policy-based. Generally speaking, the European states tend to control their professions more than the countries of the Common Law world. Although arbitration is a freer market that the market for litigation services (ie. you do not always have to be a lawyer in the state in which the arbitration is seated in order to appear before the arbitral tribunal), the constant threat of related proceedings in state courts (where the often strict local admission requirements do apply) gives the local legal profession a distinct in-country advantage. Nationals of states that are most commonly chosen as seats – Switzerland, France, Sweden and England – therefore have a competitive advantage over foreign practitioners of ICA. Because of their higher rate of exposure to arbitral proceedings as counsel, lawyers from these leading seats develop skills (and professional profiles) faster than their competitors from the New World. This is why Swiss, French, Swedish and English nationals are overrepresented in the ICA ‘mafia’ today. When the Common Law technocrats arrived, the market dominance of the Grand Old Men was at its peak.

With this market reality in mind, it seems that challenges may have had a hidden function: to displace the old guard. Challenges allow the ‘upstart’ technocrats to assert their procedural expertise (and thereby demonstrating their competitive advantage) whilst at the same time disrupting the cycle that has favoured the Continental professions. If the places of the Grand Old Men are not so safe, neither are those of their apprentices. Commenting on the 1991 debate over the implementation of a requirement for arbitrator-counsel relationship disclosure in the ICC Rules, Dezalay and Garth remarked ‘it is partly a matter of introducing

\textsuperscript{19} Suez Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v Argentine Republic, ICSID Case ARB/03/17
competition into a market that was strongly cartelised\textsuperscript{20}. The writer agrees with this observation. There must be a correlation between the increased rate of bias challenges and the arrival of free-market ideology via the agent of the Anglo-American technocrat.

**The Problem of Demand**

Any trade in services is subject to the laws of supply and demand. Legal services generally, and the Black Arts specifically, are no exception. The writer’s view is that the increased use of bias challenges has created a client-driven demand for the tactic in high-value disputes. Micro-economic forces are, therefore, partly responsible for the increased rate of bias challenge. Some international commercial actors – including companies and states – demonstrate a clear willingness to resort to the Black Arts. The general privacy of commercial arbitral proceedings limits the extent to which these ‘repeat offenders’ can be identified, but in the investor-state field (where there is a public record) Argentina and Poland have repeatedly challenged arbitrators without good cause; looking at *Amco Asia* and *CalEnergy* we might add Indonesia to the list as well. As has been observed, the delay caused by a challenge means that the challenge can achieve its objectives even if it fails. As clients (including parties on the other side of the challenge) are exposed more and more to challenge tactics, they observe their effectiveness. This cycle creates the ‘Problem of Demand’: users of arbitration become more willing to resort to the Black Arts as their rate of exposure to them increases, and the more they instruct their lawyers to challenge arbitrators, the more skilled those lawyers become in running challenges. The challenge machinery (the law) becomes more efficient as its operators (the lawyers) become specialists; the product (the challenge itself) naturally improves. In this thesis, the writer has sought to prove that this process is underway: the most compelling evidence of the Problem of Demand is that there are new ways of getting rid of arbitrators emerging every year. It is apparent that the IBA Guidelines will need to be updated soon – V.V. ‘Jonny’ Veeder foresaw this in 2005 when he described the Orange List of the IBA Guidelines as ‘a malignly imaginative check-list for tactical challenges by recalcitrant parties’\textsuperscript{21}. The Orange List will, for example, need to be extended

\textsuperscript{20} Above note 2 at 49
to include Eureko/Vivendi Role/Issue Conflict. The writer suspects that the Working Group will be required to make other additions in the near future.

Whilst the writer is masquerading as an economist, it is worth crystal ball gazing for a moment longer: macro-economic forces may also contribute to the Problem of Demand. History proves that when times are tough, obligations become onerous, and the number of contract disputes increases. In modern cross-border settings, this means more arbitration clauses are activated. The demand for arbitration lawyers skilled in the Black Arts increases as a result, because more parties are impecunious and demanding ‘total war’ from their lawyers. The current Global Financial Crisis may, therefore, exacerbate the Problem of Demand and further increase the rate of bias challenge in ICA.

Arguments for the cure

The arrival of the Anglo-American technocrats, and the resulting introduction of adversarial procedures and liberal economic logic, caused a dramatic increase in the rate of bias challenges in ICA. The Problem of Demand has developed as a result. Since the early 80s, the technocrats have progressively expanded the jurisprudence of bias, such that new grounds for challenge are now available. The writer has agreed with Dezalay and Garth that the desire to compete has informed this process. In earlier chapters, the writer foreshadowed an argument that the judicial use of the Sussex Justices test to interpret the expression ‘justifiable doubts’ under Article 12 of the UNCITRAL Model Law makes it too easy to challenge an arbitrator. This, in turn, offends the objectives of ICA: efficiency, flexibility and finality. The element of expertise is also at risk: as Marc Henry mused in 2001, if the obligation of independence is too strict the arbitration world would be deprived of some of its most famous arbitrators.\(^\text{22}\)

Kriegk has denounced the objective, absolutist approach to independence as a dogma, cult or tyranny of appearance.\(^\text{23}\) Out of agreement, the writer has suggested that the Gough ‘real danger’ test is more suitable for use in matters relating to ICA, and that if adopted in leading

\(^{22}\) Henry, M., *Le devoir d’independence de l’arbitre* (LGDJ 2001), para 470

seats it would reduce the rate at which bias challenges are made. To reiterate, the Arms of the Gough test are:

(1) assessment of the impugned conduct ‘in the eyes of the court’ (First Arm)

(2) a ‘real danger’ threshold (Second Arm)

Having come (back) to life in 1993, this test is now nearly extinct. England now uses the Porter v Magill test, and with the exception of Malaysia, every state that followed Gough has now abandoned it in favour of the ‘real possibility’ test. It has been observed that the Doctrine of Party Autonomy is central to the law and practice of ICA. In Chapter 3 the writer invoked party autonomy and suggested the following clause as a means of achieving the ad hoc restoration of the Gough test in arbitration:

Challenges (‘Gough Clause’)

The Parties agree that any allegations that an arbitrator appears to lack impartiality or independence will, at whatever stage and in whatever jurisdiction they are made, be finally determined by the relevant authority asking itself whether there was (or is), in the relevant authority’s eyes, a real danger that the arbitrator was (or is) biased.

In an ideal world, UNCITRAL would make a Gough option available under the Model Law. This is probably unrealistic: even if all of the states that had at one time or another applied a Gough test pushed for such an amendment, they would never have the numbers to carry the proposal. Indeed, their own records would go against them: the vast majority of Model Law states have experimented with the ‘real danger’ test have reverted to a Porter v Magill compromise. Failing this, Model Law states might enact the ‘real danger’ test as a ‘Model Law Plus’ provision to Article 12. Although no state has done this, legislative additions to the Model Law’s ‘justifiable doubts’ test have been made. The new Federal Arbitration Law of the United Arab Emirates is an example: Articles 12(1)(c) and (d) of the UAE law are near perfect adoptions of the Explanation to General Standard 2 of the International Bar Association Guidelines. There is no reason why a Model Law state could not enact the Gough test as an additional or explanatory provision to Article 12. The Gough test could also be taken up by leading arbitral institutions in amendments to their rules. Those institutions that
use standing panels to hear challenges to arbitrators (such as the ICC) could adopt the ‘real danger’ test in the challenge jurisprudence.

In any event, statutory recognition of the *Gough* test is unnecessary: party autonomy dictates that substantially the same outcome can be achieved on an *ad hoc* basis by the parties themselves. If the parties wish to mitigate the risk of bias challenges disrupting their arbitration they can ask for the *Gough* test when they first meet; the arbitrator could even propose the standard after giving disclosure (but before entering onto the reference). In the writer’s opinion, there is no clear bar to the validity of a *Gough* Clause in an arbitration agreement or procedural order, especially in a Model Law seat. Under Model Law Article 13(1), party autonomy expressly extends to the challenge process, subject to the ‘within thirty days’ right of the parties to seek final review of the challenge decision by the court or other authority specified in Article 6. The parties can, for example, contract into and out of time limits for the challenge; agree who will decide the challenge (especially important in *ad hoc* proceedings in Model Law states); and how the submissions will be made (oral, written, or both). It would seem open to the parties to agree to *Gough* as part of the challenge arrangements, although this would only happen if the agreement was made before any challenge had arisen (otherwise, why would a challenger make their life harder?). There may be an argument that the autonomy conferred by Article 13(1) extends only to *truly* procedural arrangements – and that the test for bias is a matter of substantive law – but this there is no authority on this question. The writer is of the opinion that the parties do have the power to choose a test for bias, because the question of impartiality and independence is inherently procedural. Even if the question of bias is a merits matter, it would be open to the parties to choose the *Gough* test as an exercise of the general power to choose substantive law conferred on them by Model Law Article 28(1).

The writer will now make a case for the validity of such a clause at the stage of judicial review by arguing that both arms of the *Gough* test are suited to arbitration and can be validly applied by arbitrators, arbitral institutions and state courts supervising arbitral proceedings.
2. The First Arm of Gough

Specific objections may be made with respect to the First Arm of Sussex Justices, and these objections aid the argument for Gough. In the writer’s view, the strongest submissions for the First Arm of the Gough test are:

2.1 Specialist review

Arbitration law is a species of the civil procedure genus. In the Civil Law world, the principles of arbitration come from Roman law. In the Common Law world, the statutory origins of arbitration lie in the Special Case Procedure that was available under the English Arbitration Act 1697\(^\text{24}\). Arbitration remains a ‘special case’ of private law today. That it bears almost no relation to public law is a function of the Doctrine of Non-Arbitrability, under which disputes involving the determination of matters of public law are not capable of settlement by arbitration. Most challenges to arbitrators are heard either by the tribunals themselves (as panels of specialists at first instance), supervisory panels at arbitral institutions such as the ICC and SCC, or specialised courts like the English Commercial Court. Although appeal might take a challenge to a state court, the more likely scenario is one of specialists reviewing specialists in a ‘closed doors’ institutional setting. Disclosure, conflict of interest and bias are matters of professional conduct and, therefore, expert evidence. This thesis has shown that bias challenges turn on their own facts, the principal components of which are usually the relationship of the parties to the arbitrator and the arbitrator to the dispute.

In Common Law systems, and arguably Strasbourg jurisprudence, the ‘reasonable’ or ‘fair minded’ observer is intentionally constructed to lack expertise; he knows the material facts of the allegation of bias (‘the relationship that subsists between some members of the tribunal and one of the parties\(^\text{25}\)) but nothing more. Whilst it is not the writer’s intention to appear elitist, this hypothetical ‘everyman’ has no idea that arbitration is contractual, party-made under an expanding Doctrine of Party Autonomy, or structured around expert determination. The Sussex Justices ‘everyman’ is built to lack ‘inside knowledge’. Lord Justice Cross insisted on this in Lannon, and subsequent courts have agreed, defining this notional third

\(^{24}\) The Arbitration Act 1697, promulgated during the reign of William III, formalised the largely customary law of arbitral process by laying down a procedure whereby parties to a civil action could elect to refer their dispute to arbitration, and have the ensuing award enforced as a judgment of the Court.

\(^{25}\) [1969] 1 QB 577 per Cross LJ at 949
person (in terms reminiscent of Aquinas) as ‘a person who possesses the faculty of reason and engages in conduct in accordance with community standards’.

The judgment of this fair minded observer might be good for assessing the fairness of general court procedure – of which he can be taken as having some baseline understanding by virtue of general social participation (and, today, from exposure to the forensic drama genre of American television) – but it is no good for specialised dispute resolution procedures conducted in accordance with the standards of a closed professional community. Inside knowledge is specialist knowledge, and in this regard the judgment of the fair minded lay observer is deliberately and hopelessly impaired. How can a person evaluate the conduct of a specialist when they are themselves a generalist? We would not ask a general medical practitioner to judge the professional conduct of a heart surgeon in a medical malpractice case, but we ask the ‘man on the Clapham omnibus’ to judge the professional conduct and circumstances of some of the most highly specialised lawyers on earth every time we apply Sussex Justices to an arbitrator. In an ICA context, the application of the First Arm of Sussex Justices is misconceived and counterproductive. Instead, the First Arm of Gough should be used for arbitration because it allows for specialised (or at least truly judicial) review of specialised procedure. Whilst it may ‘personify the reasonable person’, the ‘reasonable court’ envisaged by Lord Goff must still be seen as having sufficient understanding of arbitration to rule on the propriety of the conduct of those that practice it.

2.2 Confidentiality

This brings the writer to the issue of confidentiality. The Sussex Justices test is predicated upon an acceptance of Lord Hewart’s dictum that ‘justice must be seen to be done’; the words of the ghost that has drifted in and out of Common Law courts for the last fifteen years. When His Lordship uttered these hallowed words he was expressing a general community desire to maintain checks on public exercises of the judicial power. As Lord Woolf MR observed in Saudi Cable, Lord Hewart was talking about justice in the courts. In considering the meaning of ‘serious irregularity’ (and ‘substantial injustice’) under s.60 of the English Arbitration Act (1996) in Groundshire, Bowsher J said

26 Nydam v R [1977] VR 430
27 This expression is attributed to Lord Bowen, but first appears in the judgment of Collins MR in McQuire v Western Morning News [1903] 2 KB 100 (CA) at 109
28 Saudi Cable per Lord WoolfMR at para 40
The highest requirement that justice should manifestly be seen to be done may require that a judicial decision be overturned because of the manner in which it was reached, without it being demonstrated that the result produced injustice. *But that is not the system applied to arbitrations by the 1996 Act*  

The system applied by the 1996 English Arbitration Act differs because ICA is private in both the theoretical and practical senses of the word: it is universally accepted that international arbitral hearings are private, and usually confidential. Arbitration is not an exercise of decision-making power that requires public confidence *per se.* ICA is, for the most part, invisible to those who are not direct participants in it. As has been observed in Chapter 7, ICSID and *ad hoc* investor-state proceedings might be an exception, because the interests of sovereign communities are being judged and the hearings are increasingly public. But in a confidential commercial arbitration, only the parties, their lawyers and the arbitrators can see the proceedings. Arbitration only takes on a public dimension (in both the above senses) when the assistance of a state court is required, and even in such circumstances the involvement of the state apparatus is non-substantive (ie. merits review is usually prohibited). Enforcement is the obvious example; assistance in taking evidence is another common reason for application to state courts. This thesis has shown that challenges can also go to state courts (particularly when they arise out of *ad hoc* arbitrations). It is important not to lose sight of the fact that these related public proceedings are procedural vignettes only; the broader image of ICA is private. Just because ICA touches the state judicial system at times does not make it a public adjudicatory process, or burden it with public adjudicatory imperatives. ICA has very little, and often nothing, to do with the public. This is especially so when the procedure runs smoothly, and the award is made and paid.

It is clear, therefore, that the circumstances of ICA are distinguishable from those before the House of Lords in *Sussex Justices*. In a Common Law setting, the *Sussex Justices ratio* is non-binding as a result. In other settings its persuasive value should be seen as limited. In the absence of Lord Hewart’s ‘public confidence’ policy premise there is no reason not to apply

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29 *Groundshire v VHQ* [2001] 1 BLR 395 per Bowsher J at 40, emphasis added  
30 *Lew, J.D.M., Mistelis, L.A., Kroll, S.M., Comparative International Commercial Arbitration, (Kluwer 2003)*, p.96; it is worth noting that municipal laws vary on whether there is a presumption of privacy, and often distinguish between privacy and confidentiality. See for example *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 where the High Court of Australia held 3-2 that arbitral proceedings were not inherently confidential.
Gough and make it harder to challenge arbitrators. This submission is strongest where the arbitral proceedings are private and confidential – how can there be a publicly held perception of impartiality when there is no substantive public adjudicatory process to observe? The legal-fictional character of the notional ‘fair minded lay observer’ is deliberately locked out of the private arbitral proceedings, and they should be similarly excluded from the court. This is one of the main reasons the Gough test should be used for arbitrators: the First Arm of Gough uses a ‘reasonable court’ vantage point rather than a ‘reasonable’ or ‘fair minded’ hypothetical observer. A court applying Sussex Justices in the context of a private arbitral proceeding is granting hypothetical admission to a hypothetical person. Needless to say, applying a ‘fiction to a fiction’ is unsatisfactory legal reasoning: it is two steps removed from the alignment of law and fact that is fundamental to the curial decision making process. Without the public perception imperative of Lord Hewart’s dictum there is no jurisprudential foundation upon which to object to Gough.

2.3 Waiver

Sussex Justices was a criminal matter. The Sussex Justices test is a public adjudicatory standard; the low ‘reasonable apprehension’ threshold reflects a variety of public law and policy considerations which are alien to ICA, including the (1) presumption of innocence in criminal proceedings, (2) the presence of the jury and (3) the need to maintain public confidence in the administration of criminal justice. These are certainly within procedural public policy, but does that mean the Sussex Justices test is too? If it is a public adjudicatory standard, could the Sussex Justices test be waived?

The prevailing opinion amongst ICA practitioners and scholars is that the Equal Treatment provision of the Model Law is mandatory and cannot be waived or excluded by the parties. Redfern and Hunter identify the Doctrine of Party Autonomy as the ‘first principle’ of arbitral procedure, and equal treatment as the second. Equal treatment functions as a restriction on party autonomy in Model Law states. Impartiality and independence are preconditions for equal treatment, as actual party preference will cause an actionable ‘inequality of arms’ in the dispute. The availability is waiver is a precondition for access to party autonomy. Making the

31 Redfern, A., Hunter., M., Blackaby, N., Partasides, P., Law and Practice of International Commercial Arbitration (Thompson 2004), p.317; that Model Law Article18 is mandatory and is supported by the fact that it uses the word ‘shall’ twice.
32 Ibid
initial agreement to arbitrate – the first autonomous act of the parties – is an act of waiver (ie. waiver of recourse to state court of jurisdiction). The process of arbitral rule-making (be it achieved in ‘one hit’ by the adoption of a lex arbitri or in stages by the ad hoc creation of procedural rules for the dispute) relies upon waiver. As a result, the concept of procedural waiver is well developed in arbitration law. It was expressly acknowledged by the US Supreme Court in Mitsubishi\textsuperscript{33}. Even where expansive readings of party autonomy prevail, not every right will be treated as waivable. There is significant divergence in academic and judicial opinions on this issue. Leading scholars of ICA express the opinion that only those parts of the Model Law that concern non-arbitrability or are expressive of public policy cannot be waived by the parties\textsuperscript{34}.

Like merits access to the court, the absolute requirement of impartiality and independence applicable to state court judges should be treated as waived by parties who agree to arbitrate. The quid pro quo is clear enough: in return for waiving the benefit of this public adjudicatory principle the parties get to choose their judge, and they get a portable award. These are considerable benefits for the cross-border actor. Whilst the rule against bias is certainly expressive of procedural public policy\textsuperscript{35}, it only needs to be varied (rather than waived) in order for Gough to apply. In a Model Law state especially it would appear open to the parties to expressly agree that Gough will apply in the event an allegation of bias is made against their arbitrator. According to Petrochilos:

There should be no doubt that the parties to an arbitration may, at any reasonable point before an award is issued, make procedural arrangements to vary both mandatory provisions of the law of the arbitration and the rules of arbitration under which their proceedings are conducted\textsuperscript{36}.

The same author has expressed the opinion that it is open to the parties to agree as to higher or lower standards of independence as part of the qualifications of the arbitrator\textsuperscript{37}, and that lists of disqualifying circumstances (such as that under NCCP Article 342) are to be read as

\textsuperscript{33} 473 US 614, 105 Sct 3346 at 3355  
\textsuperscript{34} See for example Petrochilos, above note 1, p.120  
\textsuperscript{36} Above note 2, p.170  
\textsuperscript{37} Ibid, p.136
subject to party agreement to the contrary. A court faced with such an agreement would not be asked to condone unequal treatment (which is a mandatory provision of the Model Law) because the parties are both subject to the same standard of procedural fairness. Even in the EU – the strictest jurisdiction in matters of procedural public policy – such arrangements seem possible from the decision of the European Court of Human Rights in *Osmo Suovaniemi*.

3. **The Second Arm of Gough**

The ‘real danger’ threshold is better suited for use in ICA. This is a more general submission than the specific arguments advanced above in respect of the First Arm of *Gough*. It is premised upon the following heads of argument:

3.1 **Arbitrators are not Judges**

Throughout this thesis the writer has observed that most municipal laws apply the same standard of impartiality and independence to judges as they do to arbitrators; the preceding chapters Argentina, Austria, Australia, Belgium, Brazil, Chile, Colombia, Czechoslovakia, Ecuador, Finland, France, Hungary, Hong Kong, Indonesia, Italy, Japan, Mexico, The Netherlands, Norway, Peru, Poland, Saudi Arabia, Singapore, Sweden, Uruguay and the United Kingdom all fall into this category of states. Few states depart from this rule. The United States may be a possibility: in *Commonwealth Coatings* some members of the Supreme Court entertained the notion of a higher standard for arbitrators, but in the leading judgment of Associate Justice White the same standard of judges was held applicable. Although the Court of Appeals discussed a lower standard of impartiality and independence for arbitrators in *Pitta v Hotel Association of New York City* (and more recently in the *AIMCOR* appeal) there is little authority for its application outside the Second Circuit (effectively New York). Guided by hidden dualism, certain Canadian courts have appeared willing to apply a lower standard to arbitrators in international matters, but, as in the United States, no binding judgment supports a different standard yet. The principal exception to the ‘judge-arbitrator rule’ is Switzerland. In Swiss law there is authority for the proposition that arbitrators are subject to a lower standard of independence than cantonal and federal court

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38 Ibid, p.144
39 Decision of EHR Court of 25 February 1999 (No.31737/96)
judges: it seems that a ‘bare minimum of independence’ will suffice where arbitrators are concerned. Swiss courts take this view for the practical reason that, in contrast to judges, arbitrators regularly have contact with parties and their lawyers. Generally speaking, these kinds of professional contacts will not be enough to establish an objectionable lack of independence in a Swiss court. In the past, Swiss Courts took the Judicial Organisation Act rules for the disqualification of judges into account, but did not apply them telle quelle to arbitrators. The writer has forecast that this approach will be maintained under the equivalent articles of the new Swiss Federal Supreme Court Act.

We all know what a judge is, and we all have an idea of what a judge does. Whilst the laws of judging vary state to state, the basics are universal. The Bangalore Principles of Judicial Conduct (2002) neatly mark out the imperatives: under the Bangalore Principles, a judge must possess (1) independence, (2) impartiality, (3) integrity, (4) propriety, (5) equality, and (6) competence and diligence. Considering the Bangalore fundamentals, it is easy to see why the judge-arbitrator analogy has settled so comfortably in the law and practice of ICA. Whilst the procedural analogy between arbitrator and judge may have positive ethical results in that it encourages arbitrators to aspire to judicial neutrality, it has proven itself to be unworkable in practice. Although international arbitral proceedings are being ‘judicialised with aggressiveness’, arbitrators are not judges; the role and power of the arbitrator is ‘para-judicial’ rather than formally (ie. constitutionally) judicial. It interesting that judges tend to accept this more than arbitrators. Pierre Bellet, former President of the French Court of Cassation, wrote in 1993 that the office of arbitrator should not be equated to that of a judge because the independence of a party-appointed arbitrator will seldom be equivalent to that of a judge, and it is hypocritical to think otherwise.

The image of the judge as a kind of ‘gowned robot’, living in almost shamanistic isolation from the general population, does not project well onto the arbitrator. In fact, the opposite is accurate – Dezalay and Garth have shown that leading arbitrators are socio-professionally

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43 The description of the arbitrator as a para-judicial figure is taken from Dezalay & Garth, above note 2, p.56
hyperactive; anything but the monks we expect judges to be. Algerian Judge Mohammed Bedjaoui put it in strong terms:

Like all men, an arbitrator has a conscience which gives him a certain outlook on the world. He cannot detach himself from all the emotional ties which, consciously or unconsciously, may influence his thoughts. Whenever men are judged, including judgment by arbitration...a wager is laid on impartiality. An arbitrator is not a disembodied, floating being, without origins, or ethnic, cultural, religious, social and other attachments. I think it would be destructive to exaggerate these considerations, and naïve or suspicious to ignore their existence completely.

One of the most interesting features of the international arbitration community is the variation in the settings in which interaction amongst its members occurs. Besides arbitral proceedings themselves, there are all the other forms of dispute resolution proceedings – most conducted ‘without prejudice’ and ripe for the formation of hostility and distrust - as well as related actions in courts, and educational appointments such as conferences. In 2007, Ahmed El-Kosheri and Karim Youssef expressed the view that

the world with which arbitrators have to deal is inevitably imperfect. It is therefore important at all stages – from initial selection to the rendering of the award – to set philosophical and idealistic conceptions of independence against the realities of arbitration and the practical problems that are commonly encountered.

The tactical use of challenge to delay arbitral proceedings is made viable by the problematic personality of the arbitrator, and the commercial-legal matrix in which they function. William Park has said recently ‘the consent on which private dispute resolution rests is qualitatively different from the implied submission to government courts that arguably results from living in society’. As the Paris court noted in Bompard, arbitrators are not entrusted with a public function. They are not public officials in Hobbesian metaphorical ‘social contract’ with a

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45 Above note 2, p.49-51
sovereign state like judges; arbitrators are mostly lawyers and ‘commercial men’, private citizens with private interests and lives who are placed on the bench by an *actual* triangular contract. Unlike judges, who as a fundamental rule *cannot* be chosen by the parties and are allocated cases by peer committee, arbitrators are appointed directly by the parties they are called upon to judge, usually because they have expertise in the relevant field. At The Hague, Professor Fadlallah observed that ‘a system whereby each of the parties chooses an arbitrator is hardly likely to result in a court which is totally indifferent to the parties and their concerns’\(^{50}\). According to Petrochilos ‘one does not expect the arbitrator to be innocent of the world around him. Indeed, one appoints an arbitrator because (rather than in spite) of his experience and the views that he has formed in the course of his experience’\(^{51}\). The kind of ‘intellectual virginity’\(^{52}\) we expect from judges cannot be expected of arbitrators: frankly, to do so is absurd. Below the surface, the law seems to accept this; Dominique Hascher put it well:

> The fiction of judicial independence as understood in judicial circles is maintained when it comes to choosing arbitrators, albeit superficially, giving way to greater realism when a solution has to be found\(^{53}\)

In practice, higher tests are often used where arbitrators are challenged – in many states, the judge-arbitrator analogy is paid lip service only, largely as an exercise in Ostrich policy. Higher tests are used for arbitrators because courts know who international arbitrators are: senior barristers, partners of large international law firms, elite (mostly European) academics; all people likely to have long standing professional and commercial connections with the actors of the arbitral procedure. Petrochilos describes the ICA setting:

> International arbitration takes place within an (expanding) milieu, in which practitioners share academic interests and meet in a number of fora. Arbitrators are most often practitioners who have earned their stripes by representing parties. An arbitrator may, thus, in the past have appeared for a company that has subsequently been absorbed by another company, which now proposes to appoint him in a dispute

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\(^{51}\) Above note 1, p.132


\(^{53}\) Ibid at p.86
with a third party. More commonly, an arbitrator is likely to have appeared against counsel for one of the parties, which party now appoints him.  

If we contrast this high degree of Role Reversibility and commercial immersion with the traditional role of a state court judge as a cloistered ‘oracle of a vague divinity’, then the judicial practice of holding arbitrators to the same standard as judges becomes harder to justify. The Sussex Justices elements reference a notion of absolute judicial independence that is wholly inappropriate for application to arbitrators: Bellet has gone so far as to call the appearance-based test for arbitrator bias ‘excessive and dangerous Puritanism’. In the writer’s view, the procedural fiction of the arbitrator as a judge has reached the end of its useful life. There is no good reason why a separate standard for apparent bias could not be adopted for arbitrators. In Saudi Cable, Justice Rix commented ‘it would be strange’ if the test was different for arbitrators. Well, the writer says it would be no stranger than fiction.

### 3.2 The Presumption of Competence

Since Classical times the Presumption of Competence has been a fundamental principle of customary commercial law. In Chapter 6, the writer observed the renewed significance of customary commercial law in international markets. The new lex mercatoria is an important source of law today. The Presumption of Competence is essential to the efficient operation of any market and its legal system; when a party is not entitled to presume their contractual counterpart understands their bargain, the transaction will be delayed, and the parties will incur legal, administrative and opportunity costs. The nineteenth century Franco-Italian economist Vilfredo Pareto said that the sine qua non of an efficient market is that transactions are costless. In 1937, Ronald Coase conceived the theory of ‘Transaction Cost Economics’ in which the constructive possession of complete knowledge was identified as an essential means of minimising transaction costs. Neo-Classical theories of law have dominated ICA since the Anglo-American ‘invasion’ began in the early eighties. The current emphasis is on free, efficient markets, and the law that enables them. The customary Presumption of

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54 Above note 1, p.134, citation omitted  
56 Bellet, P., comment on decision of Paris Court of Appeal, 28 June 1991  
57 Saudi Cable per Rix J paras 40-42  
58 Above note 2, p.48
Competence is central to the proper functioning of a free market – without it there is *market failure*. According to Berger

There is a presumption for the professional competence of the parties to an international commercial contract. The parties may therefore not argue that they were not aware of the significance of the contractual obligations to which they have agreed\(^5^9\).

State courts are entitled to assume that parties that have signed an arbitration agreement have done so with full knowledge of the fact that they will get an arbitrator and *not a judge*. With this contractual backdrop it *should be* harder to challenge an arbitrator on the basis of apparent bias because when the parties agree to arbitration they are *de jure* aware that if a dispute arises they are not going to get a state appointed ‘neutral’ but rather an experienced ‘commercial man’ (with a commercial past) as their umpire.

**3.3 Consistency with the Civil Standard of Proof**

In Common Law counties a different standard of proof applies in civil proceedings to that which burdens the Prosecution in a criminal matter; civil claims require proof ‘on the balance of probabilities’ while the criminal standard is set much higher at ‘proof beyond reasonable doubt’. The civil standard of proof requires the occurrence of something to be more likely than not before it will be taken as proven; it is often said that the civil standard of proof sets a threshold of ‘51% probability’. Although Civil Law states vary in their laws of evidence, it can be said with confidence that no distinction between civil and criminal standards of proof is recognized in the Civil Law world.

In the 1990’s there was a widely held belief amongst Continental ICA practitioners that ‘Common Law lawyers, particularly the Americans…were responsible for embellishing arbitral procedure’\(^6^0\). This view survives in some circles. Although as a matter of law arbitrators are usually not bound to follow strict rules of evidence, market forces (including the global expansion of the Anglo-American ‘Magic Circle’ firms) have forced some Common Law rules of evidence into ICA. Despite the Civil Law footprint in leading

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\(^{60}\) Above note 42, p.194
institutional rules (including the evidence provisions of the UNCITRAL, ICC and LCIA Rules\(^{61}\)), and the generally inquisitorial role of arbitrators (eg. direct questioning of experts and lay witnesses as opposed to the passive adjudicatory method used by Common Law judges), Anglo-American rules of evidence are slightly ahead of Civil Law principles in ICA today. The following Anglo-American rules of evidence have been appropriated by modern laws and practitioners of ICA:

1. **Adversarial procedures**: the active role of Counsel in the extraction and presentation of evidence, as opposed to the active role of the decision maker (which is a feature of Civil Law inquisitorial procedure), is a Common Law effect. Adversarial procedures in ICA include the vigorous cross examination of witnesses. Although there is allowance for adversarial procedure in some Civil Law systems (namely under the law of France, where the *principe de la contradiction* functions as a right to confront and contradict in an adversarial fashion\(^{62}\)), the adversarial procedures prevalent in ICA owe more to Anglo-American law than Continental rules of evidence.

2. **Party appointed experts**: Common Law rules of evidence allow the parties to appoint their own expert witnesses. Civil Law systems give this power to the Court, not the parties. Due to the centrality of efficiency and expertise, the use of party appointed experts is common in ICA. New trends in the use of experts – including ‘Hot Tubbing’ (or expert conclave) – suggest that the place of this aspect of the Anglo-American law of evidence will strengthen in future.

3. **Discovery**: Except to the extent that a party must indicate the evidence upon which they intend to rely, there is no duty of discovery in a Civil Law system\(^{63}\). A common complaint amongst Civil Law practitioners of ICA is that American parties (or rather their lawyers) demand full discovery: exhaustive production of documents, filing of depositions and expert reports, and inspection of subject matter\(^{64}\). The ‘scatter-gun tactic’\(^{65}\) of US-style discovery is especially common in

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\(^{61}\) Above note 31, p.356

\(^{62}\) Above note 42, p.195


\(^{64}\) Above note 31, p.355
large construction project disputes\textsuperscript{66}, where detailed expert reports and voluminous technical documents are often exchanged in pre-hearing skirmishes.

If Common Law principles of evidence are now prevalent in ICA, then related primary rules of evidence (such as the Anglo-American distinction between civil and criminal standards of proof) also have a place in ICA. Even at its most liberal, the Doctrine of Non-Arbitrability guarantees that arbitral proceedings are civil; crime is non-arbitrable. With these realities in mind there are good grounds for arguing that the standard of proof applicable in ICA is the Common Law ‘balance of probabilities’. Redfern and Hunter confirm this:

The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the “balance of probability” \textsuperscript{67}

In Chapter 2, the writer compared the Second Arms of Sussex Justices, Gough and Porter v Magill, and gave the opinion that a ‘real possibility’ is quite different from a ‘reasonable apprehension’: whilst a suspicion (or apprehension) may be reasonably founded in so far as it has been formed in the mind of a person as a result of their exercise of the faculty of reason, the material facts upon which the suspicion is based may not necessarily interact to produce the result that the apprehended outcome is a real possibility. Under all three tests for apparent bias, the challenger must prove the material facts that support the appearance. The success of a challenge will, therefore, depend upon evidence.

The reader may recall, for example, the Gough-era decision of the Hong Kong Court of Appeal in Logy Enterprises\textsuperscript{68}. In Logy Enterprises the challenge was unsuccessful because the Appellant failed to discharge the burden of proving that the composition of the tribunal was against PRC law or that there was a real danger of bias on the part of the arbitrator\textsuperscript{69}. The material facts of the challenge (the arbitrator was an official of the same Chinese export bureau as that which issued a commodity inspection certificate that was put into evidence) did not pass the civil standard of proof.

\textsuperscript{65} Above note 45, p.448
\textsuperscript{66} Above note 31, p.357
\textsuperscript{67} Ibid, p.353
\textsuperscript{68} [1997] 2 HKC 481
\textsuperscript{69} Logy Enterprises per Liu JA at 489
The Second Arms of *Gough* and *Porter v Magill* require that the ‘danger’ or ‘possibility’ of bias be real. The Second Arm of *Sussex Justices*, in contrast, requires only that the apprehension be ‘reasonable’. Because they require challengers to show a real and definite possibility, the Second Arms of *Porter v Magill* and *Gough* are consistent with the 51% threshold of probability that is the civil standard of proof. The Second Arm of *Sussex Justices* must be seen as falling well below 51% probability in so far as it allows the material facts of remote but reasonable possibilities to pass the test for proof. In this sense, the Second Arm of *Sussex Justices* conflicts with the Anglo-American civil standard of proof in use in ICA today.

3.4 A Sunkist compromise?

The key can be found in a proper balance: *est modus in rebus*. In certain United States appeal circuits (principally the Second and Eleventh), courts distinguish between the level of impartiality required of party-appointed arbitrators and ‘neutral’ Chairmen – the writer calls this the ‘Sunkist Distinction’. An alternative to the flat imposition of a ‘real danger’ or ‘real possibility’ test may be to observe a Sunkist Distinction, and use the Second Arm of *Sussex Justices* for Chairmen and the Second Arm of *Gough* (or *Porter v Magill*) for party-appointed arbitrators. It was observed in Chapter 4 that this is the approach taken in domestic arbitration in the United States, and the writer has shown that there is also authority for it in Switzerland. In the writer’s opinion, the Sunkist distinction simply acknowledges what is already accepted in practice: there is a difference between positive bias and general sympathy for the party that appointed you. Of course, the rule in *Sunkist* has its critics. Of the distinction between party appointing arbitrators and chairpersons drawn by the ICSID tribunal in *Amco Asia*, Tupman has said

unquestionably all members of the tribunal in international arbitration should be held to the same standard of independence, whether appointed by a party or not. The concept of a non-neutral arbitrator as it exists in some Common Law systems simply

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72 *Amco Asia v Indonesia*, ICSID Case ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (24 June 1982)(unreported)
has no place where the parties are of different nationalities and might lose faith in the process if a foreign, apparently lesser, standard were applied.  

Whilst the writer respectfully agrees that a single body of rules for bias is desirable in international commercial arbitration, the writer also submits that the recognition of a Sunkist-type split standard is not inconsistent with such uniformity. Principles of waiver and collateral estoppel support the Sunkist distinction: a party who has participated in proceedings before a tribunal of two party-appointed arbitrators and a ‘neutral’ chair should not be able to complain about the purported eventuation of a risk to which they consented when the tribunal was formed: *violenti non fit injuria*. Both parties should be estopped from denying that they accepted the foreseeable sympathies of the other’s appointee when the tribunal was formed.

The writer is of the view that a collateral estoppel (or implied waiver argument) arises out of the very act of accepting a ‘two and one’ tribunal in the arbitration agreement – why have an ‘umpire’ if deadlock between the party-appointed arbitrators was not a live prospect to the parties when they negotiated their dispute resolution clause? If some level of latent preference or familiarity amongst the party-appointed arbitrators was not tacitly mutually acceptable then the parties should have chosen a sole arbitrator or agreed to an entirely institution-appointed tribunal. The international customary Presumption of Competence dictates that the parties were aware of this option and chose not to take it. At the very least, where party-arbitrators are provided for, previous appointments should not be valid grounds for challenging the other party’s arbitrator. Holding the parties to their bargain requires imposition of a more rigorous standard of impartiality on the Chairman than the party-appointed arbitrators. It should, therefore, be more difficult to challenge another party’s arbitrator on the basis of apparent bias than it should be to run the same case against the chairman. This outcome would be achieved by reserving the Second Arm of *Sussex Justices* for Chairmen and leaving the others to *Gough*.

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4. General Arguments for a Higher Threshold

At this stage it is possible to make submissions in favour of a higher threshold for disqualification which take in both arms of the Gough test. These arguments take in a range of concerns, including policy considerations, commercial necessity, and outcomes derived from formalist reasoning and comparative law.

4.1 In Favor Contractus and the ‘Mitsubishi Doctrine’

It has been said that ‘There is no way to put the parties in an identical procedural situation and no need to do it, either.’ The writer has argued that a standard that addresses this reality is necessary for the proper functioning of the system of international arbitration. Arbitration is a creature of contract and ‘should be understood primarily though the lenses of contract rather than adjudication’. The agreement to arbitrate is a contract. Eminent scholars agree that ‘arbitration agreements are in general submitted to the same type of rules of interpretation as all other contracts’. It is trite law that contractual terms are to be read in a manner that favours their effectiveness. This rule of interpretation is codified at Article 4.5 of the UNIDROIT Principles of International Commercial Contracts 1994; Articles 5.103 and 5.106 of the Principles of European Contract Law 1998. Favor contractus is lex mercatoria, as are the related rules of effet utile and in favorem validatatis.

There is a well developed specific body of authority for the proposition that an agreement to arbitrate must be read in favor contractus. One view is that Article II(3) of the New York Convention, which requires the courts of member states to enforce an arbitration agreement unless it is ‘null and void, inoperative or incapable of being performed’, demands this approach. This is supported by the fact that Article 31(1) of the Vienna Convention on the Law of Treaties (1969), to which many New York Convention signatories are also party, requires that the words of Article II(3) of the New York Convention be given their ordinary

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76 Above note 64, p.150
77 Above note 34, p.283, where the author states the rule as ‘where there is doubt about the meaning of a contract term, an interpretation should be preferred that makes the contract lawful or effective (“ut res magis valeat quam pereat”; “effet utile”)’
78 Above note 51, p.283
meaning, and be read in good faith and in a manner consistent with the objectives of the state parties in signing the Convention\(^{80}\); the same can be said of the words ‘public policy’ at New York Article V(2)(b). Since \textit{Mitsubishi} US Courts have consistently held that arbitration agreements must be interpreted in favour of arbitration\(^{81}\), and most states with pro-arbitration policies have subsequently agreed with this policy\(^{82}\). Beneath the treaty superstructure, at the level of the contract, the \textit{Mitsubishi} Doctrine equates to \textit{in favor contractus}. The decision of the Full Court of the Federal Court of Australia in \textit{Comandate Marine} is a recent example of a state court following the Mitsubishi Doctrine to an \textit{in favorum contractus} construction of the arbitration clause\(^{83}\).

The courts of New York Convention member states can today be expected to interpret an arbitration clause positively \textit{in favor contractus}. Where arbitral awards are concerned contract law must be taken into account at all times, including the enforcement stage. The agreement to arbitrate is a bargain the parties must be held to \textit{pacta sunt servanda}. The rendering of an award is merely a stage in the arbitration contract; the enforcement of the award is the final stage. As a quasi-contractual document the award should be read \textit{in favour contractus} with the effect that \textit{de minimis} breaches of the contract (such as non-serious departures from procedural fairness) should not frustrate its performance. This contractual approach is complimented by the \textit{Gough} test for bias. A corollary of it is that an arbitration agreement – the undertaking that enables the award - should be read as excluding those procedural rules that frustrate its operation. The writer would place \textit{Sussex Justices} in this category of rules: this thesis has shown that the Second Arm of \textit{Sussex Justices} sets the bar too low, with the effect that parties to arbitrations in \textit{Sussex Justices} seats are better placed to frustrate proceedings by tactical challenge than they would be in a \textit{Porter v Magill} or \textit{Gough} jurisdiction (where the prospect of success would be much lower).

### 4.2 Manifest breach of procedural public policy

The New York Convention Article V(2)(b) ‘public policy’ bar is set high deliberately. State courts show an increasing awareness of this. The reader will recall that observations to this

\(^{80}\) VCLOT Article 31(1) provides that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

\(^{81}\) Above note 64, p.150

\(^{82}\) Ibid

\(^{83}\) (2007) 1 ANZ Mar L J 21
effect were made by the Court of Appeal of British Columbia in *Quintette Coal*. In Chapter 3 we saw that Swiss, German and even French courts have acted similarly, all showing a willingness to use a higher threshold for bias challenges post-award. In Chapter 4 it was observed that US courts will only refuse to enforce awards that offend the ‘*most basic notions of morality and justice*’ of the forum state\(^{84}\). In *Fertilizer Corp of India* this understanding of procedural public policy caused the ‘actual bias’ defence to enforcement to fail. Many other states recognise that, in the public policy clash between finality and fairness at the enforcement stage, finality should win unless the breach of procedural fairness is found to have been egregious.

Professor Georgios Petrochilos says procedural public policy will only be offended – and the award exposed - when the breach is ‘patent’ or ‘manifest’\(^ {85}\), and the writer agrees. A breach will be manifest when the court does not need the assistance of counsel to see it. This translates to a preference for a higher test for bias, possibly even a requirement that *actual* bias be shown for enforcement to be defeated. In the United States, Germany and Switzerland there is certainly a *de facto* higher threshold for bias challenges in foreign award contexts. There is no good reason to apply this standard to the product and not to the process. A similar approach should be taken with pre-award challenges, and it is submitted that application of the *Gough* test would achieve this.

### 4.3 ‘Narrow’ international public policy

State courts are usually careful not to impose their forum standards on foreign courts\(^ {86}\), and generally apply a looser public policy standard (which takes the narrower form of ‘international public policy’ or ‘*ordre public attenue*’) to foreign judgments than that which they apply in purely domestic legal relations between their own citizens\(^ {87}\). They do so to take account of the facts that

(a) the legal situation created by the foreign judgment is not closely, or at any rate not exclusively, connected with the forum; and

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\(^{84}\) *Parsons & Whittemore* 508 F.2d 969 (2d Cir. 1974)  
\(^{85}\) Above note 1, p.99  
\(^{86}\) *Igra v Igra* [1951] P 404 per Pearce J at 412  
\(^{87}\) Above note 1, p.98
(b) the foreign judgment has been pronounced by an authority of a foreign state, thereby purporting to create legal rights and obligations under its own legal system\(^{88}\).

If arbitral awards are just an especially portable kind of foreign judgment, then it would seem reasonable to take the same approach and construe procedural public policy narrowly at the enforcement stage. When the procedural breach is a lack of impartiality or independence, applying \textit{Gough} would be consistent with the traditional, looser procedural standard applied to foreign court judgments. This submission is especially strong where the award has been rendered in a double-\textit{executatur} state, and has been confirmed by a municipal court before being exported by the award creditor.

\textbf{4.4 Finality}

A recurring theme of this thesis is that public policy has substantive and procedural dimensions\(^{89}\). There is an undisputed \textit{procedural} public policy in favour of procedural fairness and equal treatment of parties in legal proceedings. But there is also a \textit{substantive} public policy in favour of arbitration as a means of settling international commercial disputes\(^{90}\). Finality serves the purpose of efficiency in terms of an expeditious and economical settlement of disputes; Dolzer and Schreuer observe that ‘in international arbitration, the principle of finality is typically given more weight than the principle of correctness’\(^{91}\). When they decide appeals against challenges, the courts of leading Common Law seats often preface their determinations with approximations of this policy rule: in the \textit{Positive Software} case of 2007, for example, the US Court of Appeals for the Fifth Circuit noted the risk that post-award bias challenges pose to the finality of arbitration\(^{92}\). Efficiency and finality are pillars of any pro-arbitration public policy, US or not: challenges to arbitrators undermine both. The writer has shown that the practice of challenging arbitrators

\begin{itemize}
\item \textit{Ibid}
\item \textit{Above note 42, p.164}
\item In Australia this was confirmed by Allsop J of the Full Court of the Federal Court in \textit{Comandate Marine Corp v Pan Australia Shipping Inc} [2006] FCAFC 192, where His Honour noted at 194 ‘the national interest in fostering and support of arbitration’. His Honour also referred to the text of the United National General Assembly Resolution A/40/72 of December 11, 1985 (transmitting the UNCTRAL Model Law) as evidence of the importance of commercial arbitration to the international community.
\item \textit{Positive Software Solutions, Inc v New Century Mortgage Corporation} 476 F.3d 278 (5\textsuperscript{th} Cir. 2007) \textit{Cert.denied S.Ct.}, 2007 WL 1090443 (U.S.), at para 285-6: ‘awarding \textit{vacatur} in situations such as this would seriously jeopardise the finality of arbitration. Just as happened here, losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial relationships....expansive satellite litigation...will proliferate’
\end{itemize}
is on the increase, especially in Europe. Leading practitioners Redfern, Hunter and Blackaby observed

Challenges to arbitrators were at one time a rare event. If a vacancy occurred it was usually because of the death or resignation of an arbitrator. However, modern commercial arbitrations often involve vast sums of money, and the parties have become more inclined to engage specialist lawyers, who are expert in maneuvers designed to obtain tactical advantage, or at least to minimise a potential disadvantage.\footnote{We know from costly experience that frivolous bias challenges – ‘the machinations of mischievous men’\footnote{R v Industrial Court [1966] Qd R 245 per Wanstall at 281. In this case the disqualification of the President of the Industrial Court of Queensland was sought on the basis that his wife held 1235 five schilling stock units in a large mining company involved in the dispute before him. The application was rejected by all members of the Queensland Supreme Court.} - cause delay and create enforcement risks; these are the objectives of those who practice the Black Arts. We can summarise the basic needs of those who use ICA in one sentence: when an award is made it must be final. The finality of the arbitral process requires that measures be adopted which limit the right of challenge to situations where there is a real danger of injustice. In the writer’s view, this is what the Gough test does: it makes the Black Art of bias challenge less effective.

4.5 Adopting _Gough_ has no effect on the Rule in _Dimes_

In Chapters 2 and 3 the writer traced the evolution of the rule against bias, noting that _nemo judex_ is now absolute in most states. Naturally, the writer takes no issue with this: it is and must always be the case that no man may be a judge in his own cause. In the Common Law world this fundamental rule of procedure is known as the Rule in _Dimes_; it is a rule of automatic disqualification which properly applies to judges and arbitrators alike. The Rule in _Dimes_ is subject only to _de minimis_: a judge (or arbitrator) will not be disqualified for a mere trifling interest in the cause before them. An interest does not need to be pecuniary to trigger the operation of the Rule in _Dimes_. Where there is actual bias the Rule in _Dimes_ will function to automatically disqualify a decision maker or, where they have already made a decision, render their judgment or award null and void. Despite _Pinochet (No.2)_ the rule of...
disqualification for the appearance of bias – be it as expressed in Sussex Justices, Porter v Magill or Gough - is entirely separate from the Rule in Dimes; it can be modified without affecting the fundamental procedural rule of automatic disqualification for non de minimis interest in the cause. This means that the arbitral process will always enjoy the protection of nemo judex. Whatever risk Gough poses to the procedural public policy of a state (or the integrity of the arbitral process) must therefore be seen as offset by the continued operation of the Rule in Dimes.

5. Adopting the Gough test would reduce the rate of challenge

One question remains: if the Gough test were adopted, either by the parties or the leading seats of ICA as the writer has suggested, would there actually be a downstream reduction in the number of bias challenges made in international arbitral proceedings? It has been observed that, even though a challenge may not ultimately result in disqualification of its target arbitrator, it might still serve its purpose in the delay it causes to the proceedings. On one reading, this might mean that no amount of bar-raising would reduce the rate at which bias challenges are made because their capacity to cause delay would be unaffected. But for this to be so, delay alone would need to be the objective of the challenge, rather than delay and disqualification. In the writer’s view there are two main reasons why delay alone would not be sufficient as a tactical incentive for bias challenge.

Firstly, whilst the arrival of the Anglo-American technocrats caused an increase in both demand and respect for challenge tactics, it should not be forgotten that the New World ‘barbarians’ were Romanised shortly after the walls of ICA were breached in the 1980’s. The customs of the predominantly European ICA community - which the new arrivals willingly subjected themselves to - worked against the legitimisation of the Black Arts. As Lord Steyn observed ‘The idea that arbitration is an honourable profession has long ago disappeared under commercial pressures. But the observance of good faith is still an enduring value’. There is still a widely held (albeit declining) view that frivolous challenges are bad faith, bad for arbitration: it is ‘just not cricket’ to challenge arbitrators without good grounds. This view, which reflects a custom, has been born out of recent experience. The rate of challenge

95 The writer is grateful to Professor Henry Gabriel, Loyola University (New Orleans), for his insightful remarks on this issue.
96 Above note 21 at p.100
has made it much more difficult to appoint an arbitrator than it was twenty years ago. Today, ICA practitioners often say things like ‘well, Professor Smith was the best man for the job, and we wanted to appoint him, but he would have been too easily conflicted out’. This is said most often in relation to the European arbitrators; the ‘divas’ of ICA. Whilst some practice areas are worse than others (investor-state disputes, for example, as especially exposed), this experience is shared by many arbitration practitioners. Because arbitration is a ‘game’ – or what Hayek would have called a *cosmos*, rather than *taxis* - the self-interested actions of the participants are limited. As a matter of professional ethics, the lawyer’s interests are *de jure* the same as the interests of their client. But arbitration lawyers will not make challenges they know are doomed to fail under a higher test because they know that they will suffer the moral and social consequences of their actions at later stages of the ICA ‘game’. The delay pay-off is simply not enough incentive to breach the customary rule against frivolous bias challenge, especially when delay can be achieved by other means (such as demands for further discovery) which are not subject to the same customary and moral proscriptions as challenges.

Secondly, rules of black letter law reduce the legitimacy of delay alone as an incentive. Logic dictates that if a higher threshold for disqualification is used parties will be less likely to win when they challenge an arbitrator. Today, because the arbitral process is in the hands of the lawyers – who we can assume to be aware of changes in law such as the adoption of a stricter test for challenge and the consequences of such shifts – a higher rate of *failure* will make these operators of the system less likely to advise clients to challenge arbitrators. If an action will clearly fail, or will be unjustifiably oppressive or vexatious, or will give rise to unfairness, it will be open to the court to stay it on the basis that it constitutes an abuse of process\(^97\). A party (and their lawyer) who takes a challenge to a municipal court where the *Gough* test is in force may, therefore, be abusing the processes of that court. In a Common Law seat the same party might be exposed to suit in tort (on the basis that they have taken the challenge to court for an ulterior or improper purpose)\(^98\). Arbitration agreements contain an implied, general obligation to act in good faith\(^99\): frivolous challenges may constitute breaches of this implied term, with the result that the challenger is liable to the other party. In addition, the lawyers running the challenge may even find themselves in contempt of the

\(^97\) *Walton v Gardiner* (1993) 177 CLR 378  
\(^98\) *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35  
municipal court. None of these outcomes are certain, but they do not need to be: an even remote risk of abuse of process, cross-claim in tort, a claim under good faith or a finding of contempt should be enough to turn parties and their lawyers away from making baseless challenges. If delay is so important, the lawyers will simply find another way.

In so far as it has the result of making delay alone the only probable result of a bias challenge, adopting the Gough test should cause a reduction in the number of bias challenges because the risks of challenge outweigh the reward of delay. There will, in the writer’s opinion, be a downstream reduction in the number of tenuous (and certainly frivolous) bias challenges if a stricter test is adopted. This conclusion is supported by Lord Steyn, who said ‘it may well be that the emphasis in Porter on justice being seen to be done may lead to an unwarranted increase in challenges to arbitrators’100. It is worth noting, however, that even if the Gough test were adopted, this forecast downward trend would be difficult to observe because of the general confidentiality of international arbitral proceedings.

6. Conclusion

In this thesis the writer has shown that ICA is essential to the preservation of the rule of law in international markets. The New York Convention is the only international civil judgments enforcement pact that can claim anything like the coverage needed to inspire business confidence. Trans-national commerce must use arbitration to get the benefit of the New York Convention enforcement framework. The law and practice of ICA have developed as a result. Trading states have responded by harmonising their municipal arbitration laws, around forty five by outright adoption of the UNCITRAL Model Law and many others by selective enactment of its provisions (eg. England). One Model Law provision that has enjoyed wide ranging legislative approval is Article 12, under which an arbitrator ‘may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence’. The writer has argued that this wording is so well represented in municipal laws and institutional rules as to make it lex mercatoria. But despite its virtual universality, this expression is read in different ways, and with different results. This is because municipal laws of apparent bias guide state courts in their interpretation of the expression ‘justifiable doubts’. In seats with lower thresholds for the appearance of bias – including France, The

Netherlands, Sweden, and Singapore - the Black Art of tactical challenge is clearly on the rise. The writer has given many examples of unsuccessful, often frivolous challenges run in courts in these states, and argued that the trans-national objectives of arbitration are offended by municipal laws that allow (or even invite) attempts to disqualify or remove arbitrators for trivial interests, associations and events.

This thesis has identified three competing tests for apparent bias: Sussex Justices, Porter v Magill and Gough. These are the ‘sub-tests’ of Model Law Article 12. England experimented with Gough in the 1990’s, but reverted to a Porter v Magill ‘compromise’ (incorporating the First Arm of Sussex Justices and the Second Arm of Gough) in 2002. Apart from Malaysia, all of the Common Law seats that followed Gough now apply the test in Porter v Magill. Since the judgment in Commonwealth Coatings, American superior courts have imposed a high threshold for bias disqualification, but the current assault on the Federal Arbitration Act suggests that the days of this rule may be numbered. ICSID jurisprudence is, it appears, sliding in the same direction. The courts of the leading European seats – as well as the body of Strasbourg jurisprudence that floats above most of them – apply tests which, although varied in their curial expression, draw on both arms of Sussex Justices. For reasons outlined in this thesis, the writer is of the opinion that the Gough test, with its court-vantage and high Second Arm, is better suited to arbitration and arbitrators. But very few states agree. Rather than argue for amendment of the Model Law or a program of domestic statutory incorporation of the Gough ‘real danger’ test, the writer has invoked principles of trans-national commercial law, including the Doctrine of Party Autonomy and waiver, to argue that it is open to the parties to ‘take matters into their own hands’ and limit access to the Black Art of bias challenge by including a ‘Gough Clause’ in their arbitration agreement.

There are a number of reasons why the Black Arts generally, and bias challenges specifically, have become more common as a feature of international arbitration. The actors and the context of ICA have changed dramatically since the New York Convention was settled in 1958. The petrodollar arbitrations of the 1970’s attracted new participants, including institutions and multinational law firms. The arrival of the Anglo-American technocrats in the 1980’s ushered in a new era of procedural specialisation in which international arbitration took on many of the distinctly adversarial, competitive qualities of Common Law litigation. These ‘New World upstarts’ projected their free market ideologies onto the Continental cartel of ICA practitioners, and sought to interrupt the cycle of experience and appointment that
favoured the European legal establishment. Bias challenges ranked high amongst the new competitive procedures, and they were used to good effect. By the late 1980’s the body of challenge jurisprudence was growing quickly. The observable success of challenge tactics caused the wider arbitration community to take notice, and their tactical and ethical legitimacy was quickly settled. Market approval led to the Problem of Demand as clients began to shop for lawyers skilled in the emerging Black Art of bias challenge, and, as the decisions discussed in this thesis demonstrate, bias challenges are now a common occurrence in ICA today. But the case law catalogued in this thesis is by no means exhaustive: many challenges have been run and decided in circumstances of the strictest confidentiality, and it is simply the case that we will never know for sure how regularly arbitrators are challenged. All that can be said for certain is that the immutable laws of supply and demand guarantee the future of the Black Art of challenge in international arbitration. The point has been made in this thesis that it is largely a matter for the parties whether they fall victim to the spell or not.
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