

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

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Presented for the Degree of Doctor of Philosophy in Law at Murdoch
University, 15 September 2008

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TABLE OF ABBREVIATIONS

Institutions and Organisations

AAA - American Arbitration Association

ABA - American Bar Association

ACICA – Australian Centre for International Commercial Arbitration.

AIA - Italian Arbitration Association

APRAG – Asia Pacific Regional Arbitration Group

ASA - Swiss Arbitration Association

CAMCA - Commercial Arbitration and Mediation Centre for the Americas

CAS - Court of Arbitration for Sport

CCPIT - China Council for the Promotion of International Trade

CEPANI – *Centre belge pour l'étude et la pratique de l'arbitrage national et international*

CIArb – Chartered Institute of Arbitrators

CIETAC - China International Economic and Trade Arbitration Commission

CMEA - Council for Mutual Economic Assistance (Eastern Europe)

CMI - Comité Maritime International

CRCICA - Cairo Regional Centre for International Commercial Arbitration

CRT - Claims Resolution Tribunal for Dormant Accounts in Switzerland

DIFC – Dubai International Finance Centre

DIS – German Institute of Arbitration

EBCC - East Berlin Chamber of Commerce

EC - European Community

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

KLRC - 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

AAA/ABA Code – AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1977, revised 2004)
AAA International Rules - AAA International Arbitration Rules (1997)
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

CISG – United Nations Convention on International Sale of Goods (1980)

Comm – Commercial

Concordat – Swiss Inter-Cantonal Arbitration Convention

Con LR – Construction Law Reports

Co – Company

Corp – Corporation

CPR – Civil Procedure Rules

DAA - Dutch Arbitration Act (1986)

DAB - Dispute Adjudication Board

DAC – Departmental Advisory Committee

DCCP – Dutch Code of Civil Procedure

Dis Res J – Dispute Resolution Journal

ECHR – European Convention on Human Rights

ECJ – Court of Justice of the European Communities

EDNY – Eastern District of New York

EDF - European Development Fund

EEC - European Economic Community

EFTA – European Free Trade Area

ER – English Reports

EU - European Union

EWCA – England and Wales Court of Appeal

FAA – US Federal Arbitration Act (1925)

F 2d – US Federal Reporter Second Series

F 3d – US Federal Reporter Third Series

F Supp – Federal Supplement

FALCA - Fast and Low Cost Arbitration

GCCP – German Code of Civil Procedure

Geneva Convention – Geneva Convention on the Execution of Foreign Arbitral Awards (1927)

Geneva Protocol – Geneva Protocol on Arbitration Clauses (1923)

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

IBA Guidelines – IBA Guidelines on Conflicts of Interest in International Commercial Arbitration (2004)

IBA Rules of Ethics - IBA Rules of Ethics for International Arbitrators (1987)

IBA Rules of Evidence– IBA Rules on Taking of Evidence in International Commercial Arbitration (1999)

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

ICSID Rules - ICSID Arbitration Rules (2006)

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

IUSCTR – Iran-United States Claims Tribunal

IUSCT Rep - Iran-United States Claims Tribunal Reports

J - Justice

JBL – Journal of Business Law

J Int Arb – Journal of International Arbitration

J Mar L & Com – Journal of Maritime Law and Commerce

J World Inv – Journal of World Investment

KB – King's Bench

Laker Airways familiarity - apparent bias by reason of the fact that arbitrator and counsel for a party are from the same chambers

LCJ – Lord Chief Justice

LJ – Lord Justice

Lloyd's Rep – Lloyd's Law Reports

LMCLQ – Lloyd's Maritime and Commercial Law Quarterly

Ltd - Limited

Mealey's IAR – Mealey's International Arbitration Reports

MERCOSUR - Common Market of the Southern Cone of South America

Mitsubishi doctrine – pro-arbitrability/pro-arbitration doctrine

Model Law – UNCITRAL Model Law on International Commercial Arbitration (1985)

Model Law 2006 - UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006

MR – Master of the Rolls

NAFTA - North American Free Trade Agreement

NCCP- French New Code of Civil Procedure

ND Cal – US District Court for the Northern District of California

New York Convention - New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

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

Panama Convention – Inter-American Convention on International Commercial Arbitration (1975)

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 Book – FIDIC Conditions of Contract for Construction (1987)

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*

RUAA - Revised Uniform Arbitration Act (2000)

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

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

S - Section

SC – Senior Counsel

S Ct – Supreme Court of the United States

SDNY – Southern District of New York

SLR – Singapore Law Reports

SPIL – Swiss Private International Law (1987)

Strasbourg jurisprudence – the jurisprudence of the European Court of Human Rights

Sussex Justices – 'reasonable apprehension' test for apparent bias

TCPRC - Texas Civil Practice and Remedies Code

Telekom Malaysia bias – apparent bias by reason of the arbitrator's prior determination of an unrelated matter factually or legally similar to the case before them

UAE – United Arab Emirates

UCP 500 - ICC Uniform Customs and Practices for Documentary Credits (1994)

UDHR – Universal Declaration of Human Rights (1948)

UN – United Nations

UNCITRAL – United Nations Commission on International Trade Law

UNCITRAL Rules – UNCITRAL Arbitration Rules (1976)

UNCTAD – United Nations Conference on Trade and Development

UMLEC - UNCITRAL Model Law on Electronic Commerce (1996)

UPICC – UNIDROIT Principles of International Commercial Contracts (1994)

WAMR – World Arbitration and Mediation Report

WAR – Western Australia Reports

Washington Convention - Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)

WTAM – World Trade and Arbitration Report

World Bank – International Bank for Reconstruction and Development

Yale LJ – Yale Law Journal

YCA – Yearbook of Commercial Arbitration

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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