PRACTICAL GUIDELINES FOR INTERVIEWING, SELECTING AND CHALLENGING PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION©

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I. INTRODUCTION

It is a truism of arbitration that the process is only as good as the quality of the arbitrators conducting it.[1] In the common international arbitration scenario of a tripartite panel, with each party appointing one arbitrator and the party-appointed arbitrators then selecting the presiding arbitrator, each side's selection of "its" arbitrator is perhaps the single most determinative step in the arbitration. The ability to appoint one of the decision makers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party.

It is also a truism that a party will strive to select an arbitrator who has some inclination or predisposition to favor that party's side of the case such as by sharing the appointing party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party's case.[2] Provided the arbitrator does not "allow this shared outlook to override his conscience and professional judgment,"[3] this need carry no suggestion of disqualifying partiality. This is a natural and unexceptional aspect of the party-appointment system in international arbitration.

There is a distinction to be drawn, however, between a general sympathy or predisposition and a positive bias or prejudice.[4] Bias in favor of, or prejudice against, a party or its case encompasses a willingness to decide a case in favor of the appointing party regardless of the merits or without critical examination of the merits.[5] Bias or prejudice constitutes partiality, which is the most fundamental basis for disqualification of an international arbitrator.

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[***] The views presented herein are strictly the authors' personal views. The authors wish to thank Professor William W. Park and _____ for their thoughtful comments on the draft.

[1] "The reputation and acceptability of the arbitral process depends on the quality of the arbitrators." A. Redfern & M. Hunter, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 217 (2d ed. 1991).

[2] Hunter, Ethics of the International Arbitrator, 53 Arbitration 219, 223 (1987) ("[W]hen I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias"); Carter, Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice, 3 Am. Rev. Int'l Arb. 153, 164 (1992); Hunter & Paulsson, A Code of Ethics for Arbitrators in International Commercial Arbitration?, 19 Int'l Bus. Law 153, 155 (1985).

[3] Redfern & Hunter, supra note 1, at 221.

[4] Hunter & Paulsson, supra note 2, at 154.

[5] Id. at 155.

Some parties to international arbitrations have at times nominated arbitrators with a positive bias.[6] This may occur when parties from differing legal and cultural backgrounds approach the selection of arbitrators with differing assumptions as to the standards for qualifications and conduct of party-appointed arbitrators. Some parties accustomed to certain trade association arbitral rules,[7] labor arbitrations in some countries or some state laws in the United States, which allow for "non-neutral" party-appointed arbitrators, may believe that arbitrators can and should be outright advocates for their appointing party inside the tribunal. Other parties may believe that party-appointed arbitrators should be strictly neutral and impartial, like the presiding arbitrator or a judge. Most take the middle ground described in the paragraph above, believing that "their" arbitrators can be generally predisposed to them personally or to their positions, as long as they can ultimately decide the case – without partiality – in favor of the party with the better case.

If an international arbitration commences on the basis of such differing assumptions, it is possible that one or both parties will lose confidence in the fairness of the process. Indeed, it is even possible that such a basic misunderstanding will fatally compromise the proceedings.[8] Whatever the divide between the parties, one must assume they share the expectation that arbitration will provide justice or, at least, avoid clear injustice. Although justice may be an amorphous concept, one certain pillar of justice is confidence in the ultimate fairness of the process, which rests substantially on a perception that the arbitrators are impartial.[9] Such confidence requires clearly-defined standards for both the qualifications and conduct of party-appointed arbitrators and full disclosure by candidates of information relevant to those standards. It is only against such shared standards that the parties, and their advising counsel, can confidently and reasonably measure and select their arbitrators.

Institutional arbitration rules do not, however, clearly define the standards for the selection of party-appointed arbitrators.[10] There also exists a dispute over the proper terminology for the test for disqualification of biased arbitrators. Even the International Bar Association's "Ethics for International Arbitrators" ("IBA Ethics"), which provides the best single set of rules for arbitrators, defines the standards in broad, general terms, which may themselves give rise to more problems. This can be a particular problem for parties or counsel who are either new to international arbitration or who have only a periodic involvement. Even experienced parties and counsel must be somewhat daunted each time they face the task of selecting arbitrators in the

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6 Id. at 153.

7 Hunter & Paulsson, supra note 2, at 156(e,g,, Rules of the London Maritime Arbitrators Association).

8 A misunderstanding between the government parties to the Buraimi Oasis arbitration as to the role of the party-nominated arbitrators led to the abandonment of the proceeding and resolution of the dispute by military intervention. Redfern & Hunter, supra note 1, at 200, citing Wetter, III The International Arbitral Process 357v (Oceana 1979).

9 Hascher, ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators, 6 ICC Int'l Ct. Arb. Bull. 4, 11 (Nov. 1995).

10 The literature includes several excellent pieces on the topic of party-appointed arbitrators in international arbitration. These include: Redfern & Hunter, supra note 1, at 198-226; W.L. Craig, W.W. Park & J. Paulsson, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 12.04 at 209 (2d ed. 1990); Carter, supra note 2; Hunter & Paulsson, supra note 2; Hascher, supra note 9; Lowenfeld, The Party-Appointed Arbitrator in International Controversies: Some Reflections, 30 Texas Int'l L.J. 59 (1995); Smith, Impartiality of the Party- Appointed Arbitrator, 6 Arb. Int'l 320 (1990); and Mosk, The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal, 1 Transnat'l Law. 253 (1988).

absence of clear, guiding principles applicable to all parties. Arbitrator candidates, as well, would benefit from clear standards guiding the disclosure process.

The absence of clear standards for selection of party-appointed arbitrators may undermine confidence in the international arbitral process and hence limit the growth of arbitration as a means of resolving international disputes. This is particularly unfortunate because, in the opinion of the authors, there is substantial common ground among experienced practitioners as to the basic standards for party-appointed arbitrators.

The purpose of this paper is to present in a succinct practitioner's format those general standards that appear to represent a consensus among international arbitration specialists. With the caveat that the disqualification of an arbitrator is dependent upon the specific facts of a concrete situation, and unique circumstances may apply to the selection of arbitrators in any given case, the general standards have been organized into three main categories, which are set forth in Section III below

II. STANDARDS OF IMPARTIALITY, INDEPENDENCE AND NEUTRALITY FOR PARTY-APPOINTED ARBITRATORS: BACKGROUND

A. Impartiality and Independence: Ultimately, A Test of Impartiality

All of the major private international arbitration rules contain some variation of the most fundamental standards for the qualification and conduct of arbitrators: impartiality and independence. These standards, or one standard in two-pronged form, are embodied in the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"),[11] the London Court of International Arbitration ("LCIA"),[12] and the American Arbitration Association's (AAA) International Rules.[13] The International Chamber of Commerce ("ICC") Arbitration Rules expressly require only independence.[14] The International Centre for the Settlement of Investment Disputes ("ICSID") Arbitration Rules do not specifically require impartiality or independence, but they do require that arbitrators sign a declaration that they will "judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation" other than as provided in the ICSID Convention.[15]

The traditional concepts of impartiality and independence, which are inter-related, warrant examination. An "impartial" arbitrator, by definition, is one who is not biased in favor of, or prejudiced against, a particular party or its case, while an "independent" arbitrator is one who has no close relationship – financial, professional or personal – with a party or its counsel.[16]

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11 UNCITRAL Arbitration Rules, Art. 10(1).

12 LCIA Arbitration Rules, Art. 5.2, 10.3 (effective Jan. 1, 1998). The LCIA Rules also prohibit all arbitrators from advising a party on the merits or outcome of the dispute, either before or after appointment, or from acting as an advocate for any party in the arbitration. Id. Art. 5.2.

13 AAA International Rules, Art. 8.1 (effective April 1, 1997).

14 ICC Arbitration Rules, Art. 7(1) (effective Jan. 1, 1998). All arbitrators in an ICC proceeding must sign a Statement of Independence. Id. art. 7(2); Bond, The Selection of ICC Arbitrators and the Requirement of Independence, 4 Arb. Int'l 300, 303 (1988). The ICC Arbitration Rules also provide, however, that an arbitrator may be challenged for lack of independence "or otherwise." ICC Arbitration Rules, Art. 11(1).

15 ICSID Rules of Procedure for Arbitration Proceedings, Rule 6(2).

16 Redfern & Hunter, supra note 1, at 220-21.

The IBA Ethics defines "partiality" in terms of favoring one of the parties or as being "prejudiced in relation to the subject-matter of the dispute".[17] It does not specifically address a prejudice against a party or define the meaning of the phrase "prejudiced in relation to the subject-matter of the dispute."

"Dependence" is defined by the IBA Ethics as arising from "relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties".[18] According to this source, the following may be considered as giving rise to justifiable doubts as to an arbitrator's impartiality or independence: (1) a material interest in the outcome of the dispute; (2) a position already taken in relation to the dispute; (3) current direct or indirect (i.e., via a member of family, firm or partner) business relationships with a party or a potentially important witness; (4) past business relationships of such a magnitude or nature as to be likely to affect an arbitrator's judgment; and (5) continuous and substantial social or professional relationships with a party or a potentially important witness.[19] This list is certainly helpful, but it is also general and incomplete. For example, it does not directly address family relationships.

Since the UNCITRAL, LCIA and AAA rules, and the IBA Ethics all include a dual test of impartiality and independence for arbitrators, it is surprising that the ICC stands out by expressly including only the sole test of independence. Because of the elite position of the ICC in international arbitration, this omission deserves examination. The rationale for the ICC's emphasis of the independence test lies in the objective verifiability of this test.[20] Impartiality, on the other hand, is seen as a subjective notion that is difficult to assess at the outset of a case.[21] Nevertheless, the Deputy Secretary General and General Counsel of the ICC has explained that the ICC's test of independence should be viewed as broad enough to include both concepts of impartiality and neutrality.[22] Other authorities have noted as a general principle "that all ICC arbitrators should be impartial. . ."[23] Thus, the ICC test is not meant to exclude impartiality but to subsume it within the rubric of the more objective test of independence.

This analysis is supported by the fact that the independence requirement is initially found in the ICC Rules in a discussion of the nomination stage of the arbitration.[24] Parties must appoint, and the ICC must confirm, *only* arbitrators who are independent. But the ICC Rules recognize a second step in the proceeding – the challenge stage. At this phase, an arbitrator may be challenged for lack of independence "or otherwise".[25] Those two general words, "or otherwise", may carry a mountain of meaning, including within them the concept of impartiality. Nevertheless, it is clear that the ICC gives predominance to the concept of independence.

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17 International Bar Association, Ethics for International Arbitrators § 3.1, reprinted in 26 I.L.M. 583, 584-89 (1987).

18 Id.

19 Id., § 3.2 - 3.5.

20 Hascher, supra note 9, at 5-6. See also Bond, supra note 14, at 304.

21 Hascher, supra note 9, at 5-6; Bond, supra note 14, at 304.

22 Hascher, supra note 9, at 6. See also Bond, supra note 14, at 304 ("the absence [of a reference to impartiality] must not be understood as an endorsement of the idea that an arbitrator in ICC arbitrations has the right to be biased as long as he is independent.")

23 Craig, Park & Paulsson, supra note 10, at 228.

24 ICC Rules, Art. 7(1).

25 Id. Art. 11(1).

The new English Arbitration Act has taken the opposite step in simplifying the test by expressly requiring only impartiality.[26] Chapter 1 calls for an "impartial tribunal," and Chapter 24 provides for the removal of an arbitrator if "circumstances exist that give rise to justifiable doubts as to his impartiality;…" The drafters perceived that a strict interpretation of independence, meaning the absence of connections between arbitrators and parties, could be inconsistent with the benefits of retaining the most qualified and experienced arbitrators. While a lack of independence is considered relevant to a determination of impartiality, it is a disqualifying factor *only* when it is sufficiently substantial as to actually constitute partiality. In this view, independence is subsumed as a subset of the test of impartiality. The explanation for this approach is provided in the report accompanying the draft Act:[27]

> 101. The Model Law (Article 12) [UNCITRAL Model Law on International Commercial Arbitration] specified justifiable doubts as to the independence (as well as impartiality) of an arbitrator as grounds for his removal. We have considered this carefully, but despite efforts to do so, no-one has persuaded us that, in consensual arbitrations, this is either required or desirable. It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.
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> 102. We can see no good reason for including "non-partiality" lack of independence as a ground for removal and good reasons for not doing so. We do not follow what is meant to be covered by a lack of independence which does not lead to the appearance of partiality. Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the "independence" of an arbitrator. For example, it is often the case that one member of a barristers' Chambers appears as counsel before an arbitrator, who comes from the Chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law.… We would further note in passing that even the oath taken by those appointed to the International Court of Justice, and indeed to our own High Court, refers only to impartiality.
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> 103. Further, there may well be situations in which parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent.
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> 104. *We should emphasize that we intend to lose nothing of significance by omitting reference to independence. Lack of this quality may well give rise to justifiable doubts about impartiality, which is covered, but if it does not, then we cannot at present see anything of significance that we have omitted by not using this term.* (Emphasis added.)

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[26] Arbitration Act 1996, Chapters 1(a) and 24(1)(a) (June 17, 1996).

[27] Departmental Advisory Committee on Arbitration Law (Chairman, The Rt. Hon. Lord Justice Saville), Report on the Arbitration Bill ¶¶ 101-04 (February 1996).

This approach is consistent with the reality, as evidenced in practice, that parties may waive a strict interpretation of independence, but may not waive the fundamental requirement of impartiality.[28] An arbitrator who is impartial but not wholly independent may be qualified, while an independent arbitrator who is not impartial must be disqualified. In selecting party-appointed arbitrators in international arbitration, the absolutely inalienable and predominant standard should be impartiality.

B. "Neutrality": Nationality and International Mindedness

Although, as a matter of semantics, the term "neutral" could be applied to encompass the standard of impartiality, including independence, it generally has a more narrow meaning in international arbitration. The term "neutral" is often used to refer only to *national neutrality* (i.e., when the sole or presiding arbitrator is from a different country than that of either party).[29] The term can also be used to refer to a party-appointed arbitrator who is expected to vote for the party with the better case, despite having sympathy toward the party who appointed him or her because of a shared background, tradition or culture – the "middle ground" noted above.[30]

The gulf between these two usages of the term "neutral" is best illustrated by a real-life example. At the Iran-United States Claims Tribunal in The Hague, each of the three panels consisted of a U.S. national, an Iranian national, and a chairman from a third country. Many private parties and counsel developed a shorthand of referring to the third-country arbitrators as "the neutrals." This often led to rebukes from the U.S. arbitrators who, although appointed by the U.S. Government, considered themselves to be "neutral," i.e., fully impartial and independent.

Reality dictates that the nationality of the parties will always be a factor in the appointment of international arbitrators. When the parties appoint their own arbitrators, they will often favor an arbitrator of their own nationality or at least of common cultural and jurisprudential background. More striking – and indicative of the importance of the appearance as well as the actuality of absolute impartiality and independence for presiding arbitrators – is the prevailing practice in international arbitration that the presiding arbitrator be of a different nationality than the parties.[31] This serves to highlight the importance of national neutrality as a standard distinct from substantive impartiality and independence.

The institutional rules on the nationality of arbitrators vary. Most strict is ICSID: under the ICSID Arbitration Rules, *none* of the arbitrators may "have the same nationality as nor be a national of either party".[32] A sole or presiding arbitrator appointed by the ICC International Court of Arbitration "shall be of a nationality other than those of the parties," although in unusual circumstances such an arbitrator may be a national of one of the parties provided the parties do not object.[33] Similarly, the LCIA Rules prohibit the sole or presiding arbitrator from having the

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28 Redfern & Hunter, supra note 1, at 221.

29 Lalive, On the Neutrality of the Arbitrator and of the Place of Arbitration, in Swiss Essays on International Arbitration at 23, 24 (1984).

30 Redfern & Hunter, supra note 1, at 221.

31 Lalive, supra note 27, at 24-25; Redfern & Hunter, supra note 1, at 223.

32 ICSID Arbitration Rules, Art. 3(1).

33 ICC Rules, Art. 9(5). The parties may, however, appoint nationals of their own countries as arbitrators. The ICC Court has taken a strict approach to ensuring national neutrality in the presiding arbitrator,

same nationality as either party unless all parties agree in writing.[34] The UNCITRAL Arbitration Rules do not absolutely restrict the nationality of the arbitrators, but they do provide that if an appointing authority is called upon to appoint a sole or presiding arbitrator, it should consider the "advisability of appointing an arbitrator of a nationality other than the nationality of the parties."[35] The AAA International Rules similarly provide that when the AAA acts as the appointing authority, it may on its own initiative or at the request of any party "appoint nationals of a country other than that of any of the parties".[36]

One leading authority has noted that neutrality can be taken beyond its geographic usage to include also religion, economic ideology and social environment, all of which may condition an arbitrator's way of thinking.[37] The same expert has argued that the term should include a juridical open-mindedness, and an international outlook characterized by a sympathy for other countries' legal cultures and institutions (i.e., a comparative law approach) and an absence of legal nationalism or parochialism.[38]

This test of international mindedness makes sense because the arbitral panel may be required to determine the credibility of witnesses from differing cultures, to apply the laws of different nations and to create a procedural framework for resolving the dispute that accommodates the legitimate expectations of parties from different legal systems. These tasks require an open mindedness toward different legal procedures and rules.

While this aspect of neutrality should, to the greatest extent possible, apply to the sole or presiding arbitrator, it should not be applied to party-appointed arbitrators because it may prevent a party, in some circumstances, from appointing an arbitrator who hails from a common culture or legal system.[39] While neutrality in the sense discussed here should not be required of party-appointed arbitrators, parties should consider nominating arbitrators who embody these traits because such arbitrators will likely have greater credibility with the presiding arbitrator.

C. Differing Standards for Party-Appointed Arbitrators?

1. General Practice

Some countries' laws treat party-appointed arbitrators differently than the presiding arbitrator. In the United States, for example, some states' laws allow, and sometimes even endorse, overt partiality for party-appointed arbitrators. Under New York state law, for example, a party-

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ruling in one case that a Swedish national, who was a partner in a New York-based law firm, was disqualified from serving as the presiding arbitrator because one of the parties was from the United States. Tupman, Challenge and Disqualification of Arbitrators in International Commercial Arbitration, 38 Int'l & Comp. L.Q. 26, 28 n.13 (1989).

34 LCIA Rules, Art. 6.1. The LCIA Rules define "nationality" to include that of controlling shareholders or interests. Id. Art. 6.2.

35 UNCITRAL Rules, Art. 6(4).

36 AAA International Rules, Art. 6(4).

37 Lalive, supra note 27, at 27. In one ICC case, a party challenged an arbitral panel because it did not include an arbitrator from a developing nation. The Court of Justice of Geneva rejected the challenge, noting that two of the arbitrators were from neutral countries (Sweden and Switzerland). Id. at 27 n.19, citing Westland Helicopters, Ltd. v. Egyptian Arab Republic, 26 November 1982, pp. 50-51.

38 Lalive, supra note 27, at 27-28.

39 The ICC attempts to apply the same standard of independence (and impartiality) to all arbitrators, but it does not apply the same test of cultural neutrality to party-appointed arbitrators that it applies to sole or presiding arbitrators.

appointed arbitrator is presumed to be a partisan for the appointing party and is not characterized as "neutral" in the sense of the presiding arbitrator;[40] an arbitration award can be vacated on the ground of arbitrator partiality only if a party's rights were prejudiced by the bias of an arbitrator who was required to be "neutral" (i.e., a sole or presiding arbitrator).[41] The same standard is set forth in the Uniform Arbitration Act, which was promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws,[42] and has been adopted in the U.S. by 34 states and the District of Columbia.[43]

The AAA-American Bar Association ("ABA") Code of Ethics for Arbitrators in Commercial Disputes ("AAA-ABA Code") also establishes patently different standards for sole or presiding arbitrators and for party-appointed arbitrators. After six canons of general applicability, the seventh canon of the AAA-ABA Code provides that party-appointed arbitrators should be considered "non-neutral" unless the parties' agreement, the applicable arbitration rules, or the governing law requires all arbitrators to be neutral.[44] Thus, the Code's default provision *presumes* that party-appointed arbitrators are in fact partial unless otherwise agreed or provided.[45] The AAA Commercial Arbitration Rules also do not require that party-appointed arbitrators be neutral.[46]

In contrast, the Federal Arbitration Act in the U.S. makes no clear distinction between party-appointed arbitrators and sole or presiding arbitrators. The Act provides only one standard for refusing enforcement of an arbitration award based on arbitrator conduct: an award may be vacated for "evident partiality or corruption in the arbitrators, or either of them".[47] The reference to "the arbitrators, or either of them" is an indication that none of the arbitrators is permitted to be partial. Unlike New York case law, most federal courts have applied this single standard for the qualification and conduct of *all* arbitrators.[48]

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40 Carter, supra note 2, at 156, citing Statewide Ins. Co. v. Klein, 482 N.Y.S.2d 307 (App. Div. 2d Dept. 1984).

41 Id., citing New York Civil Practice Law & Rules § 7511(b)(1)(ii)(McKinney 1992).

42 7, Part I, Uniform Laws Ann. § 12(a)(2) (West 1997).

43 Id. at 1 (West 1997).

44 AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII, Introductory Note. The AAA-ABA Code is not part of the AAA Arbitration Rules, and is not automatically applicable to any given arbitration. It provides precatory guidelines which may, in a given case, be adopted by the parties. Interestingly, both the American Bar Association and the American Arbitration Association would prefer an across-the-board standard of neutrality. See commentary by Holtzmann in X Yearbook Commercial Arbitration 131, 137 (1985). Further, in 1990, the ABA's House of Delegates approved a resolution calling for amendment of the Code to reflect that party-appointed arbitrators in international arbitrations should serve as neutrals unless otherwise agreed. Redfern & Hunter, supra note 1, at 219, citing 1 World Arbitration and Mediation Report 4 (1990).

45 Canon VII of the AAA-ABA Code distinguishes party-appointed arbitrators by actually allowing them to communicate with the appointing parties concerning any aspect of the case, provided that notice is given of the intent to do so, and also by making the disclosure requirements for party-appointed arbitrators less stringent. Id., Canon VII(B)(1) & (C)(2).

46 AAA Commercial Arbitration Rules, Art. 12 (effective July 1, 1996).

47 9 U.S.C. § 10(b).

48 Carter, supra note 2, at 160-61. See Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147 (1968); Florasynth, Inc. v. Pickholz, 750 F.2d 171, 173 (2d Cir. 1984); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1275 (2d Cir. 1971); Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 893 (D. Conn. 1991); Standard Tankers (Bahamas) Co. v. Motor Tank Vessel AKTI, 438 F. Supp. 153, 159 (E.D.N.C. 1977). A few federal courts have confused the issue

Similarly, the IBA Ethics does not distinguish between the qualifications or standards of conduct for party-appointed arbitrators and sole or presiding arbitrators.[49] None of the arbitrators is allowed to communicate with the parties unilaterally about the case except to the extent necessary to determine his or her competence, availability and whether there exist justifiable doubts as to impartiality and independence.[50] The standard for disclosure is the same for all arbitrators: all must disclose anything that might create justifiable doubts as to the prospective arbitrator's impartiality or independence.[51]

The UNCITRAL Model Law for International Commercial Arbitration, which has been adopted in many countries (e.g., Australia, Canada and Hong Kong) and some U.S. states, provides that an arbitrator may be challenged "only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."[52] This indicates that independence and impartiality are required of all arbitrators.[53]

2. Should Differing Standards Be Adopted?

There is a natural distinction between the parties' expectations for the party-appointed arbitrators and the presiding arbitrator. It is both realistic and unobjectionable for a party to an international arbitration, which by definition involves parties from different countries and legal systems – and a virtually unappealable outcome – to want the reassurance of having (consistent with the concept of impartiality) at least one "known-quantity" arbitrator.

The party-appointed arbitrators are in a different position than the presiding arbitrator in that they may have contact initially with the appointing party in an *ex parte* interview, they may also have *ex parte* contact during the selection of the presiding arbitrator, and they may initially have a general sympathy or predisposition in favor of the appointing party or some aspect of its case through a shared or similar economic, political, social, cultural, national, or legal background or through doctrinal positions taken in writings, lectures, or previous arbitrations.[54] As recognized

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by applying a lesser standard to party-appointed arbitrators. See, e.g., Stef Shipping Corp. v. Norris Grain Co., 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

49 IBA Ethics for International Arbitrators §§ 5.1 and 5.3. Like the AAA-ABA Code, the IBA Ethics is not binding on the parties unless adopted by agreement.

50 Id. at § 4.1.

51 Id.

52 UNCITRAL Model Law, Art. 12(2).

53 It is interesting to note that the grounds for refusing enforcement of an award that are embodied in the UNCITRAL Model Law and in the New York Convention, which are identical, do not specifically reference arbitrator impartiality and independence Id., Art. 36; Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on June 10, 1958 ("New York Convention"), Art. V. The grounds for refusing enforcement include the following: (1) the arbitral tribunal was not composed or the arbitral procedure used was not in accordance with the parties' agreement or the law of the site of the arbitration; (2) proper notice of the appointment of the arbitrators or of the arbitration proceedings was not given; (3) the party was unable to present its case; or (4) the award goes beyond the bounds of the arbitration agreement. The first ground has been used for attacking an award on the basis of an alleged lack of independence. Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334, 335 n.1, 337 (5th Cir. 1976) (presiding arbitrator had previously drafted the civil code for the government party that prevailed).

54 Hunter & Paulsson, supra note 2, at 155. See also Craig, Park & Paulsson, supra note 10, at 212.

in one leading treatise, a party has a right "to nominate an arbitrator compatible with its national and economic circumstances."[55]

It is also generally recognized that the party-appointed arbitrators may "serve" the appointing party in the limited sense –consistent with deciding the case impartially – of ensuring that the presiding arbitrator selected will not be inimical to the party's case, ensuring that the party's case is understood and carefully considered by the panel, "translating" the party's legal and cultural system (and occasionally the language) for the benefit and understanding of the other arbitrators, and ensuring that the procedure adopted by the panel will not unfairly disadvantage the appointing party.[56] One experienced arbitrator summarized the beneficial aspects of the party-appointment process in this way:

> "As I see it, party-appointed arbitrators in international controversies perform two principal and overlapping functions.
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> First, I think the presence of a party-appointed arbitrator gives some confidence to counsel who appointed him or her, and through counsel to the party-disputant. At least one of the persons who will decide the case will listen carefully – even sympathetically – to the presentation, and if the arbitrator is well chosen, will study the documents as well, whether or not they would have done so in any case. Thus the presence of a well chosen party-appointed arbitrator goes a long way toward promising (if not assuring) a fair hearing and a considered decision.
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> Second, in an international case a party-appointed arbitrator serves as a translator. I do not mean just of language, though occasionally that is required as well, as even persons highly skilled in the language of arbitration may be confused by so-called *faux amis* (false friends) – words that look the same but have different meanings in different languages. I mean rather the translation of legal culture, and not infrequently of the law itself, when matters that are self-evident to lawyers from one country are puzzling to lawyers from another."[57]

Nonetheless, it bears repeated emphasis that party-appointed and presiding arbitrators alike are expected to maintain an impartial demeanor and to decide the case in favor of the party with the better factual and legal position.[58] Overt or evident partisan behavior by a party-appointed arbitrator, whether or not effective, undermines confidence in the system. The common wisdom is that when a party-appointed arbitrator crosses the line and acts as an advocate for the appointing party, the other arbitrators, particularly the presiding arbitrator, will discount or disregard the views of such an "advocate arbitrator, and thus, such conduct will rarely be successful."[59] In rare circumstances, partisan behavior may even be challenged by the opposing party.[60]

This concept of a "predisposed but ultimately impartial" party-appointed arbitrator does not require formally different standards for party-appointed and presiding arbitrators in international

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55 Craig, Park & Paulsson, supra note 10, at 228.

56 See generally Redfern & Hunter, supra note 1, at 204-05. It might be questioned whether the last point should be listed since it is the duty of all arbitrators to ensure that the procedure used does not unfairly prejudice either party.

57 Lowenfeld, supra note 7, at 65.

58 Redfern & Hunter, supra note 1, at 201, 221.

59 Id. at 222; Lowenfeld, supra note 7, at 60.

60 Redfern & Hunter, supra note 1, at 222.

arbitration rules.[61] It is, as other authorities have said, "a delicate issue,"[62] but any attempt to define and codify this complex concept, which would take the form of "international arbitrators must be impartial but …," would undoubtedly undermine the all-important ultimate requirement of impartiality. The absence of attempts to codify the "delicate" position of party-appointed arbitrators in international arbitration rules presumably reflects a general sense of satisfaction with the prevailing practice.

D. Appearance of Bias

A question that commonly arises is whether the appearance of bias, as opposed to actual bias, should be sufficient to disqualify a potential arbitrator. The law in this area is admittedly confused. On the one hand, the U.S. Supreme Court and English courts have held that the mere appearance of bias is sufficient to disqualify an arbitrator.[63] On the other hand, some U.S. federal courts,[64] and an arbitral panel acting under the auspices of ICSID,[65] have held that the mere appearance of bias is not sufficient to disqualify an arbitrator.

A third alternative also exists. The AAA-ABA Code requires disclosure of certain relationships that are likely to create an appearance of partiality or bias.[66] The IBA Ethics says that a failure to disclose information may create an appearance of bias, which may be a ground for disqualification even if the non-disclosed information would not be disqualifying in itself.[67] At least one U.S. court has stated that the appearance of bias may be the basis for vacatur of an award when the arbitrator failed to disclose the challenged relationship, but actual bias is required for vacatur when the relationship has been disclosed.[68] According to the Ninth Circuit, the appearance of bias is sufficient to establish partiality in non-disclosure cases because it is the integrity of the process by which arbitrators are chosen (and not the arbitrator's decision itself), that is at issue, while in actual bias cases it is the integrity of the arbitrator's decision that is directly in question.[69]

The case for the appearance-of-bias test lies both in its objectivity (as opposed to looking into one's mind and determining actual bias) and the appearance it gives of a stricter test that will

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61 Hunter & Paulsson, supra note 2, at 155.

62 Lowenfeld, supra note 10, at 59; Hunter & Paulsson, supra note 2, at 155.

63 Tupman, supra note 31, at 50, citing Commonwealth Coatings Corp., 393 U.S. at 150; Metropolitan Properties Co. Ltd. v. Lannon [1969] Q.B. 577, 599 (*per* Lord Denning). See also Tamari v. Bache Halsey Stuart, Inc., 912 F.2d 1196, 1198 n.3 (7th Cir. 1980).

64 Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1489 (9th Cir. 1991); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 83 (2d Cir. 1984); Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1498 (S.D.N.Y. 1977). This may reflect the general practice in the U.S. of not allowing courts to disqualify arbitrators in advance of an arbitration hearing; thus, disqualification issues generally arise in U.S. courts at the procedural stage of a motion to vacate the award, after the considerable expense of time and money have been incurred for preparing and presenting the case. See Aviall, Inc. v. Ryder System, Inc., 110 F.3d 892, 895, 897 (2d Cir. 1997).

65 Amco Asia Corp. v. Indonesia, ICSID Case ARB/81/8, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982).

66 AAA-ABA Code, Canon II(A)(2).

67 IBA Ethics, § 4.1.

68 Woods v. Saturn Distribution Corp., 78 F.3d 424, 427-28 (9th Cir. 1996).

69 Id. at 427.

ensure confidence.[70] Nevertheless, from the practical vantage point of selecting the best arbitrators, the better position is not to make this a separate test for disqualification. Every arbitrator must be impartial to be qualified, and if determined to be partial, he or she is disqualified. Since bias constitutes one part of the definition of partiality, and one cannot read the mind of a prospective arbitrator, the appearance of bias or prejudice can certainly be considered in determining impartiality. But enshrining the "appearance of bias" as a second, and separate, test for disqualification confuses the issue, involves a second layer of subjectivity through application of a purely circumstantial evidence test, and may result in the exclusion of highly-qualified arbitrators with only minor connections to the dispute or the parties, thereby unnecessarily undermining the arbitration process.[71]

III. RECOMMENDED STANDARDS FOR ARBITRATORS

Given the importance of arbitrator selection in an international arbitration, it is not surprising that there have been some attempts to categorize arbitrator selection criteria relating to impartiality and independence.[72] None has attempted, however, to create a thorough framework of practical guidelines for determining whether a party appointee is disqualified. Although some cases will present special circumstances that require a different analysis from the general norm, there is a clear need for practical guidelines for use by practitioners and arbitrators. To this end, set forth below is a set of "bright-line" standards for evaluating the impartiality of party-appointed arbitrators. In these standards, the term "party" includes party affiliates and employees, as well as potentially important witnesses for the party's case.

Before proceeding, one overarching point bears emphasis: full disclosure by arbitrator candidates underpins the success of any standards for impartiality. Parties must ask questions aggressively, and candidates must be fully forthcoming with all relevant facts.[73]

A. Disqualifying Factors

There are six factors that are so indicative of partiality that they can reasonably be treated as generally disqualifying for a party-appointed arbitrator:

1) a significant financial interest in the relevant project or dispute, or in a party or its counsel;
2) a close family relationship with a party or its counsel;
3) non-financial involvement in the relevant project, dispute or the subject matter of the dispute;
4) a public position taken on the specific matter in dispute;
5) involvement in the settlement discussions of the parties; and

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70 An unstated reason for this test is that it enables a court to soften the blow of disqualification by not having to find a prominent arbitrator to be actually biased.

71 See International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551-52 (2d Cir. 1981) ("To vacate an arbitration award where nothing more than an appearance of bias is alleged would be 'automatically to disqualify the best informed and most capable potential arbitrators.'")

72 For example, one author has attempted to categorize the disqualifying factors related to arbitrators into four categories: (1) substantive views, (2) organizational sympathies, (3) personal sympathies, and (4) procedural questions. Carter, supra note 2, at 154. Another author has discussed the ICC's confirmation or rejection of nominees under two general categories — a nominee's relationships with the parties and with the parties' attorneys — with various subcategories of each. Hascher, supra, note 9, at 6-10.

73 See Redfern & Hunter, supra note 1, at 225.

6) an adversary relationship with a party.

It is noteworthy that the first three would generally be considered as independence criteria, but they reflect degrees of dependence that objectively indicate partiality.

1. Significant Financial Interest in Project or Party

A significant, existing financial interest in one of the parties, in the relevant project or the dispute, or in a party's counsel should be an automatically disqualifying factor.[74] This is the most certain basis for disqualification.[75] It is reasonable to assume that any person with an immediate and significant financial interest will be tempted to decide consistently with that interest. The result may be either an unsupported decision favoring that interest or, in the proverbial effort to "bend over backwards," an unsupported decision against that interest. Whatever his or her ruling, the arbitrator will be subject to suspicion.

For example, a prospective arbitrator's employment with the appointing party or one of its affiliates creates partiality because of the obvious issues of financial dependency, job security and subordination.[76] The same would be true for an arbitrator who is a partner of, or is employed by or with, a party's counsel. If the potential arbitrator is a partner or employee of a law firm that has an ongoing representation of the appointing party – even if the firm is not acting as the party's counsel in the dispute in question or even if the arbitrator has not personally counseled the party – that relationship should be disqualifying.[77] One must assume that the firm will continue to have a relationship with the party, and so any arbitrator from the firm is likely to have a financial interest in the outcome of the case through the firm's present or future income from the appointing party, which may be at risk from a decision adverse to that party. In addition, an arbitrator who has a long relationship with a party either through employment or representation may be influenced by a knowledge of facts that are not presented as part of the evidence in the case.[78]

Just as obviously, a prospective arbitrator's significant ownership position in one of the parties by a significant share holding, or in the relevant project by being a partner or joint venturer, should be a disqualifying factor for the same reasons stated above.[79] The arbitrator would likely decide – or struggle to avoid deciding – according to that financial interest. In comparison, an arbitrator holding an insignificant interest, such as a mere $1000 worth of stock of a large, publicly-traded company, should not be disqualified for that reason alone.[80]

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74 Craig, Park & Paulsson, supra note 10, at 229; IBA Ethics §§ 3.2, 3.3.

75 See generally Carter, supra note 2, at 168.

76 Craig, Park & Paulsson, supra note 10, at 211, 229-30; Hunter & Paulsson, supra note 2, at 155. This analysis should also generally apply to a retired employee who currently receives unfunded retirement benefits from the company.

77 Craig, Park & Paulsson, supra note 10, at 211, 230; Hunter & Paulsson, supra note 2, at 155.

78 Craig, Park & Paulsson, supra note 10, at 231.

79 Carter, supra note 2, at 168.

80 See Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1503 (S.D.N.Y. 1987) (no conflict of interest requiring disqualification when new partners joined arbitrator's law firm during pendency of arbitration, and they had in the past billed, and expected in the future to bill, subsidiary of party less than $10,000 per year for legal services, because the amounts were minor and the services were unrelated to any issue in the arbitration).

A significant, existing business relationship is also a disqualifying factor.[81] For example, a major creditor of a party may be subject to disqualification under this standard. The French Cour de Cassation vacated an arbitral award in a case in which an arbitrator appointed by a party was an official of one of the party's major creditors.[82] It should be noted, however, that the arbitrator in that case failed to disclose the relationship.

Another obvious disqualifying interest in this category would be any form of arbitrator fee contingent on the success of a party. This would include not merely a direct payment, but also a bonus or premium from the arbitrator's employer or from a third-party.

Equally prone to promote partiality would be a promise or understanding of future employment – including subsequent arbitral appointments – in the event of a favorable award. Any of these would provide the arbitrator with a direct monetary incentive to advocate and decide for the party appointing him or her, without an unbiased assessment of the merits of the case.

2. Close Family Relationship

A close family relationship should also be an automatically-disqualifying factor. A close family relation should include the party's spouse, parents, grandparents, children, grandchildren, siblings, first cousins, nieces, nephews, and in-laws.

Close family relationships must be assumed to be too personal to survive the test of impartiality. Any ordinary person will (a) assess credibility differently in a family member than in a stranger, (b) have some financial connection with close family members, and (c) likely face family repercussions from a decision affecting a family member. These tensions are inconsistent with unbiased judging.

Upon objection of the opposing party, the ICC has refused to confirm party-nominated arbitrators whose cousin, brother and spouse, respectively, worked for, or was a partner in, the law firm that represented the nominating party.[83] Similarly, the Swiss Federal Court barred an arbitrator whose wife worked as an assistant for one of the party's counsel.[84] The Second Circuit Court of Appeals in the U.S. vacated an award because of a father-son relationship between an arbitrator and an officer of a party.[85]

3. Non-Financial Involvement in the Subject Matter of the Dispute

A potential arbitrator who is, or in the past has been, in a decision making or controlling role, or has been significantly involved, in the project, the dispute or the subject matter of the dispute should also be disqualified. Examples include the architect or project manager in a construction case, the attorney who drafted or approved the agreement in a contract dispute, the consulting engineer who approved the plans and specifications for a project or piece of equipment in a case involving that project or equipment, a manager of a petroleum exploration and production venture

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81 IBA Ethics § 3.3.

82 Hunter & Paulsson, supra note 2, at 155, citing Forges et Ateliers de Commentry Oissel v. Hydrocarbon Engineering, decided 20 February 1974 (2e chambre civile), 1975 Revue de l'arbitrage 238.

83 Hascher, supra, note 9, at 89

84 Hunter & Paulsson, supra note 2, at 155, citing Centrozap v. Orbis, decided 26 October 1966, ATF 92 I 271; JT 1967 I 518.

85 Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

in a case focusing on that venture, or an attorney who consulted with, or advised, a party about the dispute. A person in such a position will almost certainly have a professional or emotional stake in the status of the project or the origins of the dispute, and therefore, is likely to be influenced in judging the case by that present or prior role.

The ICC has refused to confirm party-nominated arbitrators who, respectively, had conducted a technical study related to the dispute, had translated written submissions for the case and had given legal opinions either to the parties or to entities with common interests such as affiliated companies or lenders.[86] Similarly, the French Cour de Cassation set aside an arbitral award when a party-appointed arbitrator did not disclose that he had previously consulted with the appointing party about the subject matter of the dispute.[87]

4. Public Position Taken on Specific Matter in Dispute

If a prospective arbitrator has already taken a public position on a specific matter involved in the relevant dispute, then that should bar selection.[88] An example would be a professional who wrote an article or made an oral presentation referring to the specific dispute in issue and suggesting the proper outcome. This must be distinguished, however, from intellectual positions taken in articles or lectures on an issue that, fortuitously, arises in the dispute. For example, an article in a legal journal by a law professor generically taking a position on what the law should be in a given field should not be a disqualifying factor absent a reference to the particular dispute between the parties and the taking of a position with respect to that dispute. It is only if the potential arbitrator has publicly advocated a position on an issue as it relates to the specific dispute in arbitration (i.e., on a fact-specific level) that disqualification is warranted.

5. Involvement in Settlement Discussions

Although in some Asian cultures it is proper for an arbitrator also to act as mediator or conciliator in an attempt to settle the dispute,[89] this is generally considered improper, absent party consent, in Western countries.[90] Under the Western view, the belief is that the arbitrator's judgment will likely be affected by acting as mediator because of his or her private discussions with the parties in which they may confide confidential information that is never conveyed to the other party, they may engage in frank discussions of the weaknesses of their case, and they will undoubtedly entrust the arbitrator with their settlement offers and positions. Consistent with this view, the ICC allowed a challenge to an arbitrator who also served on the conciliation committee that attempted to settle the same dispute.[91]

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86 Hasher, supra, note 9, at 7.

87 Hunter & Paulsson, supra note 2, at 155, citing Consorts Ury v. Galeries Lafayette, decided 13 April 1972 (2e chambre civile), 1975 Revue de l'arbitrage 235. See also Craig, Park & Paulsson, supra note 10, at 221.

88 Carter, supra note 2, at 168; IBA Ethics § 3.2.

89 See Donahey, The Asian Concept of Conciliator/Arbitrator: Is It Translatable to the Western World?, at 5-6, included in the materials presented at the Eleventh Annual Joint Colloquium and Seminar on International Commercial Arbitration sponsored by AAA-ICSID-ICC in San Francisco (Oct. 1994).

90 Hunter & Paulsson, supra note 2, at 158.

91 Hascher, supra note 9, at 13.

6. Adversary Relationship with a Party

A significant, unrelated role adverse to a party may create prejudice against the adverse party, thus providing grounds for disqualification. In one case, a U.S. court vacated an award because the presiding arbitrator was involved in a separate arbitration as a representative and witness for a company against one of the parties to the present arbitration.[92] The arbitrator had negotiated and signed the contract for the adverse party in the other arbitration. Because of the adverse role and the arbitrator's conduct, the court decided the arbitrator was prejudiced against the party.

B. Non-Disqualifying Factors

Just as there are factors that should lead to the disqualification of a potential arbitrator, there are factors that – after full disclosure – generally should not. These include a potential arbitrator's:

1) professional writings and lectures;
2) professional associations;
3) position in the same industry or similarly-situated government; and
4) relationship with the arbitral institution.

Again, the second and third factors are technically related to the potential arbitrator's independence, but the degree of relationship is so minor that they are not objective indicators of partiality.

1. Professional Writings and Lectures

It should not be a disqualifying factor that a potential arbitrator has written articles or lectured concerning the legal or commercial issues involved in the case, as long as those writings and lectures do not take a position on the parties' specific dispute.[93] Likewise, it should not matter whether these papers or lectures involved procedural, liability or damage issues. An arbitrator is not bound by his or her previous writings and is always free to change his or her mind.[94] Indeed, it is not unusual for professionals to modify their views over time when they either learn new information or reflect further on the issues. It is also possible, of course, for an arbitrator to determine that general statements made, or positions taken, in his or her own writings are not applicable to the specific facts of a given case.

One of the advantages of international arbitration is the expertise the arbitrators bring to the tribunal. Professionals who are knowledgeable of the industry or the legal or commercial issues involved in a case are more likely to be good arbitrators than the uninitiated. Such people should not be disqualified because of their expertise in the area.

In an arbitration concerning a foreign government's nationalization of an oilfield, for example, counsel for the claimant might search the literature looking for a potential arbitrator who had published articles generally supportive of the principle of prompt, adequate and effective compensation for an expropriation. Similarly, counsel for the government might consider a professional whose general writings indicate sympathy for the "third world" view on compensation. Such nominees should not be objectionable for that reason alone.[95]

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92 Sun Ref. & Mkt. Co. v. Statheros Shipping Corp., 761 F. Supp. 293, 301-03 (S.D.N.Y. 1991).

93 Craig, Park & Paulsson, supra note 10, at 232-33; Carter, supra note 2, at 168.

94 Hascher, supra note 9, at 14-15, citing Reymond, Des connaissance personnelles de l'arbitre à son information privilègiée, Rev. arb. 1991.

95 Craig, Park & Paulsson, supra note 10, at 232.

The foregoing discussion applies, of course, only when the potential arbitrator wrote or lectured for general intellectual reasons. If the articles or lectures were initiated or subsidized by the appointing party or a trade association, that should be a disqualifying factor even if they do not specifically refer to the parties' dispute.

2. Professional Associations

One issue that attracts substantial attention concerns the professional associations of a potential arbitrator. As with professional publications and speeches, contacts between a party or its counsel and its appointed arbitrator through professional or commercial associations of which each is a member, through editorial boards of professional journals, or through conferences or court appearances, should not generally be a disqualifying factor.[96] Some authorities have taken the position that such relationships are too insignificant to disclose.[97] U.S. courts have often said that partiality is more likely to be found in a business, rather than a professional, relationship.[98]

The party-appointment system in international arbitration presupposes some knowledge by the party of the person to be appointed.[99] It is to be expected that a potential arbitrator has been a co-member, officer or director of a professional or commercial association or journal with one of the parties, or a party's employee or counsel.[100] It is also to be expected that parties and their appointed arbitrators attend some of the same professional meetings and occasionally socialize. It bears noting that there are only a few professional associations for international arbitration and, of necessity, the most active international arbitrators and counsel are involved in, and know each other from, these associations. To require disqualification because of such generic professional relationships would deprive the parties of the practical benefits of being able to appoint some of the leaders in the field, and would interfere with the goal of obtaining a professional and knowledgeable arbitral panel.

In one case, a party attacked an arbitral award on the basis of an alleged bias by an arbitrator because his employer and one of the parties were members of the "Ring", a 28-member committee of the London Metals Exchange, which allegedly constituted an "old boy network."[101] In rejecting this claim of bias, the court said:

> "The members of the LME, while known to each other commercially, sometimes deal with each other, and sometimes compete with each other directly. The fact of the matter is that arbitration of metal contracts disputes before the LME makes available to the parties "prominent and experienced members of the specific business community in which the dispute to be arbitrated arose"; no appearance of bias arises from the fact that, in such a community, "the wakes of the members often cross."

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96 Carter, supra note 2, at 168. See Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1502 (S.D.N.Y. 1987) (claim that arbitrator should disclose that he serves on the board of directors of a professional association with executives or counsel of a party "borders on the frivolous").

97 See Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1502 (S.D.N.Y. 1987); Hascher, supra note 9, at 8.

98 Andros Compania Maritima, S.A. v. Marc Rich & Co.,579 F.2d 691, 701 (2d Cir. 1978); Sun Ref. & Mkt. Co. v. Stratheros Shipping Corp., 761 F. Supp. 293, 299 (S.D.N.Y. 1991).

99 Amco Asia Corp. v. Indonesia, supra note 65, at 6.

100 See generally Hascher, supra note 9, at 7-8.

101 Brandeis Intsel, Ltd. v. Calabrian Chem. Corp., 656 F. Supp. 160, 168-69 (S.D.N.Y. 1987).

It goes without saying that there is a marked distinction between a general professional association between a party and a potential arbitrator and a close personal relationship. Occasional socializing at professional association meetings is not the same as frequent family visits in the home of a long-time personal friend who also happens to be a professional colleague. The latter may well be disqualifying because it may entail actual bias. The key to making the distinction lies in the breadth and depth of the relationship, which of course, should be disclosed.

3. Position in the Same Industry or Similarly-Situated Government

Another factor that may be considered is whether the potential arbitrator hails from the same industry as the appointing party. For example, in a dispute between Company A, an international energy company, and Company B, a state-owned oil company, a question might arise as to the appointment by Company A of an arbitrator employed by another private energy company involved in the same line of business. This should not generally be a disqualifying factor.[102] Provided the nominee's company does not have a current or imminent dispute with Company B, then he or she merely brings a general knowledge of the industry and expertise to bear on the problem – which is wholly consistent with the goal of having an expert panel.[102A] If, however, the potential arbitrator's company has a current dispute with Company B involving the same issues or the same project, or if the potential arbitrator hails from a company involved in a consortium, joint venture or a party to an operating agreement with Company B, and the dispute involves a common project or issue, then the potential arbitrator has a direct or indirect financial interest in the dispute and should be disqualified.

A more difficult issue arises if a government or government-controlled entity (e.g., the state-owned oil Company B) appoints an arbitrator who is employed by the same government. This has not been an uncommon practice by certain formerly-Communist states. The ICC has, in the past, taken the position that this is not a disqualifying factor with respect to Eastern European countries.[103] The rationale for this practice lies in the prevalence of the state in commercial affairs; it would be difficult, if not impossible, for the government to find an arbitrator of the same nationality with expertise in the subject matter of the dispute who is not a government employee. With the demise of the Communist governments in Eastern Europe, however, this rationale should be disappearing. Subject to such political realities, which hopefully will be rare, a potential

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102 Carter, supra note 2, at 168. See Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1275 (2d Cir. 1971) (court would not vacate award because Westinghouse's party-appointed arbitrator's law firm had dealings with General Electric, which was litigating similar or identical contract clauses); Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1499-1500, 1505-06 (S.D.N.Y. 1987) (arbitrator's law firm's representation of other companies in the same industry as a party, that have unrelated joint ventures with a party, or that supply services or materials to a party do not create a conflict of interest).

102A Certain industries do exclude "over-involved" arbitrators. For example, the U.S. securities industry characterizes arbitrators as either "industry" or "public" arbitrators, depending on the percentage of work they do for securities firms, and the National Association of Securities Dealers Arbitration Code restricts the arbitrator role of lawyers who devote 20 percent or more of their time to securities industry clients. Although public relations purposes may justify such restrictions in consumer-related arbitration, the logic does not apply to arbitration of international disputes among experienced business persons. It is counter-productive in international arbitration to exclude those most qualified to assess disputes in specialized fields.

103 Tupman, supra note 33, at 43.

arbitrator who is employed by a government party should be subject to the same standards as other party-appointed arbitrators and hence disqualified because of a financial interest.[104]

Even under the ICC's historic view, however, a government employee whose regular duties include representing the interests of the government, its agencies or government–owned companies, should be disqualified.[105] Similarly, if the arbitrator is directly subordinate to the state agency or enterprise that is a party to the arbitration, then the nominee should also be disqualified.[106]

Of course, there should be no problem with a government appointing an arbitrator from private industry within its country or from a different country's government or government-owned company. The fact that the potential arbitrator's own government, or government company, is in a similar position to that of the government involved in the dispute should not be a disqualifying factor, unless the other government, or government company, is involved in the same dispute with the private party. This is analogous to the situation described above of the private company appointing an arbitrator from another similarly-situated company.

4. Relationship with the Arbitral Institution

A relationship with an arbitral institution, such as sitting on its board of directors, should not be a disqualifying factor even when the institution is the appointing party. Such a relationship does not in and of itself create bias or partiality.

One U.S. court has held that the hiring by a party, while the arbitration was in progress, of the secretary of the arbitral institution that appointed the arbitrators did not create bias or partiality in the arbitrators themselves.[107] Another U.S. court decided that the hiring of the general counsel of an arbitral institution by an arbitrator's law firm while an arbitration was in progress did not establish partiality in the arbitrator.[108]

C. Factors Bearing Close Scrutiny

Identified below are certain factors that do not necessarily weigh conclusively against selection of an arbitrator, but merit close scrutiny in light of the particular circumstances. These include a potential arbitrator's:

1) past business relationship with a party or its counsel;
2) attenuated family relationship with a party or its counsel;
3) friendship with a party or its counsel;
4) affiliations between law firms;
5) office sharing among unaffiliated lawyers; and

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104 An exception to this might be warranted if the appointee were a judge of the International Court of Justice or the government's domestic court, with lifetime or other defined tenure, and whose normal duties require impartiality. Tenure makes financial concerns less relevant, and a regular practice of deciding cases impartially provides some reassurance of intellectual discipline.

105 Hascher, supra note 9, at 7.

106 Craig, Park & Paulsson, supra note 10, at 231.

107 Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1200 (7th Cir. 1980). Id. The same court also held that there is no bias in a panel simply because its members are drawn from the industry that is the subject matter of the dispute. Id.

108 Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1499 (S.D.N.Y. 1987).

5) service in other arbitrations.

Full disclosure by the potential arbitrator, and careful assessment by the appointing party, take on particular importance in these gray areas. One method of addressing problems in these areas is for arbitral institutions, or the parties in their arbitration clauses, to require a statement of impartiality by the parties' nominees. This forces the arbitrator to focus on the required standard of conduct and to make a positive commitment to comply with it.

1. Past Business Relationship

Past business relationships can include the potential arbitrator's legal representation of, direct employment by, or a consulting relationship with, the appointing party. The mere fact of a past business relationship should not, of itself, necessarily be a disqualifying factor.[109] It should be disqualifying only when it crosses the line demarking likely partiality. An appropriate place to draw that line is when past business relationships are such that they are likely to affect an arbitrator's impartial judgment either because of the nature of the relationship (e.g., past legal advice on similar issues) or because they are likely to give rise to future business.[110]

A concrete example involving the familiar attorney-client relationship can best illustrate the line. If the potential arbitrator's law firm has provided only periodic legal counsel to the appointing party, then the frequency and timing of the relationship should be examined to determine the likelihood either that future business from the appointing party could be affected by the outcome of the arbitrator's decision or that the nature of the past representation could unduly affect the nominee's judgment. A short, one-time relationship, several years in the past, unrelated to the subject matter of the dispute, should not be a disqualifying factor. The firm's regular provision of legal advice following each tax law revision by the government probably should be disqualifying, even if the last such advice was pegged to a tax law revision several years earlier. The latter instance, but not the former, would likely cause an arbitrator to have to balance his or her loyalties between impartially deciding the arbitration dispute and regular, albeit periodic, business with a client.

In one case, the French Court of First Instance held that a U.S. lawyer who had been corporate counsel of a party's parent company five years earlier was not disqualified because of the past relationship.[111] That relationship was disclosed at the outset of the proceedings, however, and was not challenged until after an award was rendered. Thus, the court's ruling can be analyzed as a waiver of the right to object to the arbitrator.

In another situation, the U.S. Supreme Court vacated an arbitral award when the presiding arbitrator failed to disclose that he had previously been retained as a consultant for one of the parties over a four or five year period, ending only a year before the arbitration began.[112] The ICC refused to confirm a nominee who was previously employed by an entity with an interest in

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109 IBA Ethics § 3.4.

110 Id.

111 Craig, Park & Paulsson, supra note 10, at 231-32, citing Universal Pictures v. Inex Films & Inter-Export, Cour d'appel of Paris, 16 March 1978, 1978 Rev. arb. 501, sustained on other grounds, Cour de Cassation, 28 April 1980, 1982 Rev. arb. 424.

112 Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147-48 (1968) (arbitrator had received a total of $12,000 in fees).

the resolution of the dispute.[113] When no objection was raised, however, the ICC has confirmed party nominees who had once been employees, trainees or partners in the same law firm with the nominating party's counsel.[114] Other types of past relationships between a party or its counsel and a nominated arbitrator such as having been a student, fellow student, professor, co-employee, or co-counsel should not, without more, be disqualifying factors.[115]

One U.S. court has refused to vacate an award based on the representation of a party by an arbitrator's *former* law firm.[116] The arbitrator was unaware of the representation, and the court held that he had no duty to make inquiry of his former law firm about marginally disclosable facts. Another U.S. court refused to vacate an award when the lawyer who originally signed a petition for one party to sue the other party later ceased to represent the party and became a partner in an arbitrator's law firm.[117] The court noted that the lawyer and arbitrator were located in different offices, had never met one another and did not know of one another's involvement in the case. In addition, the lawyer ceased to represent the party before he changed law firms and became a partner in the arbitrator's firm, which occurred six months after the arbitration proceedings began.

Objective factors, such as the timing and extent of the past business relationship, can and must be disclosed and carefully considered. When future business prospects are concerned, however, a subjective element is involved. No party, arbitral institution or court can look into the mind of a potential arbitrator and determine whether he or she is, in fact, evaluating whether a decision favorable to the appointing party will affect future business. One partial solution would be for arbitral institutions, and the parties in ad hoc arbitrations, to prompt the thorough self-examination necessary by requiring any prospective arbitrator, as part of the disclosure statement, to provide a statement declaring that the past business relationships disclosed will not influence the nominee's decision and that the candidate knows of no reason why he or she cannot decide the case impartially.

2. Attenuated Family Relationship

An attenuated family relationship between a potential arbitrator and appointing party, meaning one beyond those close relationships listed above, should certainly be disclosed, along with such objective factors as the frequency and quality of the contacts. This relationship should be carefully scrutinized. As with past business relationships, attenuated family relationships also involve a subjective factor, which can be managed by requiring the potential arbitrator to declare that the relationship will not influence his or her decision and that the candidate knows of no reason why he or she cannot decide the case impartially.

3. Friendship

Should an arbitrator's friendship with the appointing party, or an employee or counsel, be a disqualifying factor? This is related to, but somewhat more problematic than, the issue discussed above of professional associations. Certainly, the fact that an arbitrator is an acquaintance of the

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113 Hascher, supra note 9, at 7.

114 Hascher, supra note 9, at 8.

115 Hascher, supra note 9, at 8.

116 Al Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996).

117 Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993).

nominating party or its counsel should not disqualify.[118] Close personal friendships, on the other hand, probably should be disqualifying.[119]

The arbitrator may be more likely to find in favor of the friend's client because of a desire to help (or at least not to hurt) the friend, to maintain the friendship or because of the friend's proven credibility. The opposing party may also have concerns about possible *ex parte* contacts between friends. Of course, some people are capable of setting aside personal friendships and deciding a case impartially. For this reason, parties should be able to waive friendship as a disqualifying factor if they know the arbitrator to be a person of great integrity.

Nevertheless, as a general rule a close friendship should disqualify an arbitrator. The issue, of course, is how close is close? Disclosure and scrutiny of objective criteria, again, is the first tier of protection. The data disclosed should include the closeness of personal ties between the appointing party and potential arbitrator: the length of time they have known each other, the frequency and quality of contacts, and whether their ties extend to frequent family visits in the home. Here, the subjectivity is pronounced because there are many degrees of friendship, which vary among cultures and among individuals. For example, many Americans, if put on the spot, may feel compelled to claim friendship with casual acquaintances. Again, to manage the subjective factor, the potential arbitrator should be required to make a declaration with his or her disclosure statement that the nominee's relationship will not affect or influence his or her decision, and that the candidate knows of no reason why he or she cannot decide the case impartially.

The flip side of the coin of friendship, rarely addressed, is the situation in which there is antipathy between an arbitrator and a party of counsel. Is it relevant that the arbitrator dislikes one party or a party's counsel? What if the arbitrator and one side's counsel have carried on an acrimonious debate in scholarly journals or otherwise in the public eye? While exceptions can be imagined, in general it would be a mistake to consider such negative bias on the same footing as positive bias. To do so could encourage tactical maneuvers of a purely subjective nature, i.e., a challenge to one arbitrator simply because he or she has been the subject of public professional criticism by the other party or another arbitrator.

4. Affiliations Between Law Firms

Another problematic area is that of affiliations among law firms.[120] When the law firm of an arbitrator is affiliated with the law firm of one of the parties, the nature of the affiliation should be closely scrutinized. If the relationship involves merely a non-binding understanding to refer cases to one another when feasible, or involve English solicitors engaging barristers in unrelated cases,[121] generally this should not be disqualifying. If the relationship involves revenue sharing, partnerships or close economic involvement in one another's affairs, then the relationship probably should be disqualifying. A full-time consultancy arrangement with a party's law firm should also normally be disqualifying.[122]

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118 Hascher, supra note 9 at 8.

119 Hascher, supra note 9, at 8.

120 Hasher, supra note 9, at 9.

121 Hascher, supra note 9, at 9.

122 Hunter & Paulsson, supra note 2, at 157.

There may be many other types of affiliations, of varying degrees of economic cooperation, among law firms. In all cases, these should be disclosed, reviewed for objective indications of partiality and statements of impartiality required. Determining the disqualifying nature of these relationships requires a delicate balancing to show respect for legal cultural traditions, and to avoid discrimination against particular professional structures,[123] while not allowing such traditions to disguise the appointment of partial arbitrators.

5. Office Sharing Among Unaffiliated Lawyers

Office and service sharing among unaffiliated lawyers who act as counsel and arbitrator in a given dispute generally is not objectionable, but requires an examination of the individual facts. The obvious concern is that office sharing arrangements allow purposeful or accidental *ex parte* contacts between counsel for one party and an arbitrator.

In the United States, where office sharing among unaffiliated lawyers is the exception rather than the rule, the problem is easily addressed with full disclosure and close scrutiny of the relevant facts[124] Disclosure will reflect details of the office sharing arrangements that might raise concerns, such as the number of professionals who are tenants (are they the only two tenants, or are they two among many?), the extent of physical separation between counsel and arbitrator (are they in one room or adjacent rooms, so each can hear all telephone conversations of the other?), the extent of overlapping substantive services (does one paralegal or junior attorney do research and drafting for both of them?), and the pre-existing rules for protecting confidentiality (does the secretary/office clerk promptly deliver or seal incoming telefaxes to the recipient attorney?, does each attorney have separate computer passwords?). If disclosure raises legitimate concerns, the parties can agree on procedures to avoid improper communications or else decide that another arbitrator candidate would be preferable.

Such close scrutiny is not required in circumstances in which office sharing by unaffiliated lawyers is standard procedure. The classic example arises when an arbitrator, whether party-appointed or not, and counsel for one party are English barristers belonging to the same chambers. Many lawyers may not understand that members of the English Bar must practice independently, and cannot affiliate with other barristers or other solicitors. Although barristers commonly do share sets of chambers, or "rooms," they must keep their work professionally distinct and confidential from each other, and they may not share fees or receipts. The staff in shared chambers are trained in procedures to keep each barrister's substantive work separate from that of the others.[125]

Just as English barristers from the same chambers may represent opposing interests in the English courts, it is not per se objectionable for them to represent opposing interests or serve as counsel and arbitrators in arbitrations.[126] In challenges after awards and during the appointment stage, courts have upheld the independent status of barristers from the same chambers who serve as

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123 Hascher, supra note 9, at 9, 10.

124 Hascher, supra, note 9, at 9; Jardine Matheson & Co. v. Saita Shipping, Ltd., 712 F. Supp. 423, 426 (S.D.N.Y. 1989) (renting of office space by arbitrator's employer to a party's lawyer does not create partiality).

125 For a detailed description of the barrister system, and issues raised when barristers from the same chambers take different roles in an arbitration, see John Kendall, Barristers, Independence and Disclosure, 8 Arb. Int'l 287 (1992).

126 Hasher, supra note 9 at 9.

advocate and arbitrator in the same arbitration.[127] Non-English parties will continue to be bemused by this situation, which is exaggerated in international commercial arbitration by the fact that a small number of barristers in a very small number of sets of chambers specialize in the field as advocates and arbitrators.[128] To minimize unnecessary suspicion and time-delaying challenges, at least in cases involving non-English parties, it would seem the better part of valor for an advocate and arbitrator from the same chambers to disclose their "connection" as soon as one learns of the other's role in the case.[129]

6. Service in Other Arbitrations

In general, prior appointment as an arbitrator by one of the parties should not, standing alone, be a ground for disqualification.[130] But there are three basic concerns when a party-appointed arbitrator has served as an arbitrator in a prior case involving at least one of the parties or similar issues: (1) did the prior decision prejudge the liability of a party; (2) has the arbitrator been exposed to material evidence that is unknown to the other arbitrators or to one of the parties; or (3) has the arbitrator become dependent upon substantial fees from one of the parties because of repeated appointments?

If a challenge is based only on the fact that an arbitrator is nominated by the same party or counsel who appointed him or her in a prior arbitration, that objection should be rejected because such prior service may only reflect that the arbitrator originally came with strong recommendations and proved his or her qualifications in the first arbitration. A strong position taken in one arbitration should not disqualify an arbitrator from future appointments. Similarly, many industrial, commercial and legal issues will be common from arbitration to arbitration. This is particularly the case with procedural issues. The fact that an arbitrator has taken a position on one or more of such issues in a prior arbitration should not be disqualifying.

If, however, an arbitrator has served on a prior panel involving one of the parties, and that panel's decision effectively prejudged the liability issue brought by or against a party who was not involved in the prior arbitration, then the arbitrator should be disqualified. The Paris Court of First Instance disqualified an arbitrator who had served as an arbitrator in a prior case involving the nominating party because the award in the first case effectively constituted an incidental

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127 Kendall, supra note 126 at 289-93, discussing among other cases, Kuwait Foreign Trading Contracting and Investment Co. (KFTIC) v. ECORI Estero Spa (Paris Court of Appeal, First Chamber, June 27, 1991) (refusal to annul a decision of an ad hoc tribunal, in which the president of the tribunal and counsel for the prevailing party were barristers in the same chambers, the president having been appointed before the prevailing party instructed its barrister-advocate), PPG Industries, Inc. v. Pilkington, PLC (High Court, Commercial Court, unreported, November 1, 1989) (in an English arbitration in which the parties differed over the arbitrator to replace PPG's original arbitrator, J. Saville ruled that Pilkington (the English party) could not object to PPG's candidate on grounds that he was a barrister in the same chambers as PPG's counsel).

128 One of the authors recently participated in an ICC arbitration in which five barristers from the same London chambers served as counsel and expert witnesses for both parties and as presiding arbitrator.

129 Kendall, supra note 126, at 298.

130 Craig, Park & Paulsson, supra note 10, at 233; Carter, supra note 2, at 168; Hascher, supra note 9, at 7, 9. See also Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 701 (2d Cir. 1978) (Society of Maritime Arbitrators' award upheld by the court although the presiding arbitrator had served on 19 arbitration panels with the president of a company that served as one of the party's agents, the agent's president had selected the chairman as presiding arbitrator in 12 of those cases, and the two had voted together in each arbitration).

declaration of the objecting party's liability in the second case.[131] In another case, the ICC refused to confirm a party's nominee in the second arbitration involving the same parties when the first award was being attacked in court.[132] But in other cases, the ICC has rejected challenges to arbitrators who have served in prior arbitrations either between the same parties or involving one of the parties, concluding that a decision in the first case would not constitute a pre-judgment of the second.[133] In these situations, the facts of the specific case must be carefully examined to determine if a decision in one case will prejudge another. This concern may be alleviated in some cases if the separate arbitrations proceed simultaneously, rather than consecutively.[134]

A different situation occurs when one arbitrator has served on a panel in a separate arbitration involving one, but not both, of the parties, and the same or similar issues and arguments were brought. That situation must also be carefully scrutinized. It should not be objectionable that an arbitrator has served, or is serving, in another arbitration if the parties are the same in both arbitrations, nor should it be a basis for disqualification if the entire panel is the same in the two arbitrations. In both situations, either both parties or all arbitrators, including both party-appointed arbitrators, have been exposed to the same evidence and arguments. But if an arbitrator has likely heard or seen material evidence that is different from that to which the other panel members and one of the parties in the subsequent arbitration will see, then the appointing party may obtain an advantage because of the arbitrator's unique knowledge. In that situation, it may be proper to disqualify the arbitrator as a matter of fundamental fairness.

Finally, if a party-appointed arbitrator has been regularly and frequently appointed by the same party, has substantial knowledge of the party and has obtained substantial fees from the appointing party, then the prior appointments may be sufficient ground for a challenge.[135] In that case, the size of the fees, and the potential for dependency by the arbitrator upon the fees, may create partiality.

IV. COMMUNICATIONS WITH PARTY-APPOINTED ARBITRATORS

The practical question of the proper scope of communication between a party and its appointed arbitrator arises both during and after the appointment process. Other than the AAA, the arbitration rules of the major institutions do not purport to regulate communications between a party and the arbitrator it appoints, other than to demand that the arbitrator be independent or impartial or both.[136] Because of this lacunae, this subject is addressed by both the IBA Ethics and the AAA-ABA Code.

A. Pre-Appointment Interview

Pre-appointment interviews with prospective arbitrators are not *per se* forbidden or unethical, although some arbitrators will refuse an interview as unseemly.[137] Although not prohibited, interviews are regulated to a certain degree by common sense, common practice and by the

131 Hascher, supra note 9, at 10 n.32.
132 Hascher, supra note 9, at 10-11.
133 Hascher, supra note 9, at 11, 14.
134 Hascher, supra note 9, at 11.
135 Craig, Park & Paulsson, supra note 10, at 233.
136 See AAA International Rules, Art. 7(2).
137 The authors have found that many English arbitrators, in particular, will refuse requests for interviews.

relevant codes of ethics. In the words of Professor Lowenfeld, who has written an engaging account of changing his originally-staunch opposition to pre-appointment interviews:

> "If … one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel, some basis for that confidence needs to be established. Sometimes that confidence can be based on mutual acquaintances, without direct personal contact; some potential arbitrators become well-known through published writings, lectures, committee work, or public office. Others are not so well-known, and I understand that lawyers or clients or both want to have a firsthand look. I think, however, some restraint should be shown by both sides.[138]

The AAA International Rules prohibit any *ex parte* communications between a party or its counsel and a prospective arbitrator except: (1) to advise the candidate of the general nature of the controversy and the anticipated proceedings, and (2) to discuss the candidate's qualifications, availability or independence.[139] With a different emphasis, the IBA Ethics *requires* prospective arbitrators to make sufficient inquiry of the appointing party to be able to determine (a) if the arbitrator can give the time and attention necessary to arbitrate the dispute, (b) if the arbitrator is competent to decide the parties' dispute, and (c) whether there are grounds for justifiable doubts as to the arbitrator's impartiality or independence.[140] The IBA Ethics goes on to permit the potential arbitrator to respond to questions about his or her availability and suitability for the arbitration, but enjoins any discussion of the merits of the case with the appointing party or its counsel.[141]

The AAA-ABA Code contains no general provisions concerning this subject although, as noted, Canon VII specifies that party-appointed arbitrators are presumed to be "non-neutral."[142] Under this Canon, a "non-neutral" arbitrator may, with notice, communicate with the appointing party concerning any aspect of the case, which presumably includes the merits.[143] The only proviso is that at the first hearing, or earlier, the arbitrator must inform all parties and arbitrators that such communications have occurred, although the content of such communications need not be disclosed.[144] The IBA Ethics provides a better reflection of the general practice in international arbitration than does the AAA-ABA Code.

Under the various rules and the general practice of international arbitration, it would be proper for a party, or its counsel, to raise and discuss the following matters in the initial interview with a potential arbitrator:[145]

(1) the identities of the parties, counsel and witnesses;
(2) the estimated timing and length of hearings;

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138 Lowenfeld, supra note 10, at 62. See also Craig, Park & Paulsson, supra note 10, at 224.
139 AAA International Rules, Art. 7(2).
140 IBA Ethics, § 5.1.
141 Id.
142 AAA-ABA Code, Canon VII, Introductory Note.
143 Id., Canon VII(C).
144 Id.
145 See generally IBA Ethics, § 5.1; Carter, supra note 2, at 168; Lowenfeld, supra note 10, at 61-62; Hunter & Paulsson, supra note 2, at 154.

(3) a brief description of the general nature of the case sufficient to allow the candidate to determine if he or she is competent to decide the dispute, has disclosures to make, and has the time to devote to the matter;
(4) the arbitrator's background, qualifications and resume;
(5) the arbitrator's published articles and speeches;
(6) any expert witness appearances of the arbitrator, including positions taken;
(7) any prior service as an arbitrator, including decisions rendered (subject to any confidentiality requirements);
(8) whether there is anything in the arbitrator's background that would raise justifiable doubts as to his or her independence or impartiality, and any disclosures that the arbitrator would need to make;
(9) whether the arbitrator feels competent to determine the parties' dispute; and
(10) the availability of the arbitrator (*i.e.*, whether he or she can devote sufficient time and attention to the parties' dispute in a timely manner).

It must be emphasized that in international arbitration practice, parties and their counsel should avoid any discussion of the merits of the case beyond a description of the nature of the dispute and the issues involved sufficient for the candidate to evaluate his or her competence, disclosures and time commitments. The description of the nature of the case and the issues should be stated in a neutral fashion, avoiding advocacy or misrepresentation of the opposing party's position. Any questions, including hypothetical ones, about what position the prospective arbitrator might or would take on any of the issues in dispute between the parties should be strictly avoided.[146] Certainly, the potential arbitrator should not express his or her beliefs or opinions on the merits of the dispute.[147] As a matter of common sense, the more extended the interview, the more reasonable the assumption that the bounds of propriety were exceeded. The ICC Court refused to confirm a party-appointed arbitrator who spent approximately 50-60 hours with the nominating party reviewing the case before appointment.[148]

A slightly more difficult question is whether an appointing party can attempt to ascertain a potential arbitrator's general position in generic terms, meaning without reference to the facts of the specific case. For example, can the party ask a potential arbitrator his or her general views on enforcing a contract as written as opposed to application of the doctrine of changed circumstances? The answer should be "no," although such views may sometimes be ascertained by reference to the potential arbitrator's writings, speeches, expert witness opinions, or positions taken in published arbitration awards.[149]

Some experienced international arbitrators who consent to interviews attempt to control the process by limiting the amount of time for the interview, by limiting the topics they will discuss consistent with those described above or by taking notes of the interview and making the notes available to all parties. Of course, it should be made known in advance to the interviewer that the candidate will make notes of the interview, and those notes will be tendered to the other parties.

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146 See Lowenfeld, supra note 10, at 61-62.

147 Hunter & Paulsson, supra note 2, at 154.

148 Hascher, supra note 9, at 7-8. An interview or consultation lasting only two hours was held not to establish partiality in Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1489 (9th Cir. 1991).

149 See IBA Ethics, § 5.1; Lowenfeld, supra note 10, at 61-62; Carter, supra note 2, at 168.

B. Selection of the Presiding Arbitrator

As noted in the introduction, the prevailing practice in institutional and ad hoc international arbitrations is to have the party-appointed arbitrators jointly choose the presiding arbitrator. The question immediately arises as to the proper scope of communications between the parties and their party-appointed arbitrators on this step.

The IBA Ethics specifically allows a party-appointed arbitrator to obtain the views of the appointing party as to the acceptability of candidates for the position of the presiding arbitrator.[150] The AAA International Rules allow a party or its counsel to discuss with its party-appointed arbitrator the suitability of candidates for selection as the presiding arbitrator.[151] The AAA-ABA Code contains no general provisions regarding this matter, but Canon VII says that "non-neutral" arbitrators may consult with the appointing party as to the acceptability of candidates considered for the third arbitrator.[152]

The practice in international arbitration is to allow party-appointed arbitrators to consult with counsel for their appointing parties about the acceptability of potential candidates for the third arbitrator.[153] One rationale for this practice is that the parties and their counsel are often in a better position, by virtue of their greater resources, to collect any available information on the background and suitability of the candidates. It is certainly proper for a party-appointed arbitrator to seek to prevent the appointment of a presiding arbitrator who holds beliefs inimical to the position of the appointing party.[154] Although the arbitrators may solicit views from the parties, they may not allow the parties directly or indirectly to dictate the outcome. Nor should consultations on the selection of third arbitrator candidates become a vehicle for inappropriate *ex parte* communications about the merits of the case between the appointing party and its party-appointed arbitrator.[155]

C. Post-Appointment Communications

The IBA Ethics strongly suggests that arbitrators avoid any unilateral communications regarding the case with any party or its representatives.[156] The AAA-ABA Code provides that all arbitrators may discuss with the parties such administrative matters as the time and place of the hearings and arrangements for the conduct of the proceedings as long as all parties and arbitrators are promptly informed of such communications and no final determinations are made on such matters until all parties are afforded an opportunity to express their views.[157] The AAA-ABA Code allows “non-neutral” arbitrators to have post-appointment communications with their appointing parties provided that they inform the other parties and arbitrators of their intention to do so.[158]

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150 IBA Ethics, § 5.2.
151 AAA International Rules, Art. 7(2).
152 AAA-ABA Code, Canon VII(C).
153 Lowenfeld, supra note 10, at 63-64; Carter, supra note 2, at 168.
154 Hunter & Paulsson, supra note 2, at 154.
155 Lowenfeld, supra note 10, at 64.
156 IBA Ethics, § 5.3.
157 AAA-ABA Code, Canon III(B)(1).
158 Id., Cannon VII(C).

In international arbitration practice, party-appointed arbitrators should avoid any post-appointment communications with the parties appointing them, preferably even on administrative matters and certainly on any matters other than the most administrative.[159] Any *ex parte* discussions arguably touching on the merits of the case could provide grounds for a challenge.[160] Particularly condemned are communications from arbitrators that inform parties about the deliberations of the Panel in advance of the issuance of the award.[161]

D. Post-Arbitration Communications

After the arbitration is concluded and the award has been paid or otherwise is no longer subject to proceedings to collect, confirm, vacate or appeal, parties may seek to de-brief their appointed arbitrators. At this stage, and provided the arbitrator is not involved in other arbitrations for the party, such interviews should not be considered improper as long as the confidentiality of the Panel's deliberations is maintained.[162] It would be proper, for example, for an arbitrator to give his impressions of the performance of a party's counsel or expert witnesses.

V. DISCLOSURE

It is a separate basis for challenge of a party-appointed arbitrator that grounds that might give rise to justifiable doubts as to the arbitrator's independence or impartiality were not disclosed. In many situations, arbitrators have been disqualified because of the failure to disclose relationships that might not have been disqualifying if initially disclosed.[163] Because of the importance of disclosure, arbitrators should err on the side of full disclosure.

VI. CHALLENGES

To be successful, a challenge to an arbitrator should be made as soon as a party knows of facts justifying a challenge. Although no time limits are provided in any arbitral rules for raising a challenge, the failure to challenge an arbitrator on the basis of initially-disclosed relationships until after an award is rendered may lead to the conclusion that the challenging party has waived its challenge.[164]

In an ICC arbitration, the ICC International Court of Arbitration attempts to allow parties to appoint arbitrators of their choice with similar national, economic and cultural backgrounds, and to reject trivial challenges, but also to provide an arbitral panel in which the parties can have confidence. Because confidence in the constitution of the tribunal is so important, and a challenge after the proceedings have begun may prejudice the parties, the ICC is much more likely to sustain an objection to an arbitrator before the arbitrator is confirmed by the ICC than to admit a challenge after confirmation.

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159 Hunter & Paulsson, supra note 2, at 157.

160 IBA Ethics, §§ 5.1 and 5.3.

161 Hunter & Paulsson, supra note 2, at 157.

162 See generally Hunter & Paulsson, supra note 2, at 159 (discussion of dissenting opinions by minority arbitrators).

163 See, e.g., Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147-49 (1968). See also IBA Ethics § 4.1.

164 See Craig, Park & Paulsson, supra note 10, at 231-32, citing Universal Pictures v. Inex Films & Inter-Export, Cour d'appel of Paris, 16 March 1978, 1978 Rev. arb. 501, sustained on other grounds, Cour de Cessation, 28 April 1980, 1982 Rev. arb. 424.

A study of ICC challenges to arbitrators has indicated that, during a multi-year study period, 72% of objections to arbitrators prior to confirmation have been sustained by the ICC International Court of Arbitration, while only 12% of challenges made after confirmation have been upheld.[165] When no objection was raised before confirmation, the ICC has confirmed arbitrators who may have been susceptible to a successful challenge such as an officer or employee of a company that owns shares in a party, a former partner of a party's lawyer, the hierarchical superior to a party's counsel, an advisor to a party or one of its affiliated companies, and a consultant for a public enterprise party.[166] The lesson is clear that if parties wish to challenge the opposing party-appointed arbitrator, they should do so at the earliest stage at which they have sufficient information, preferably before confirmation.

VII. CONCLUSION

Tripartite arbitral panels, with two party-appointed arbitrators, are a fact of life in international commercial arbitration. When two entities from different commercial, legal and cultural backgrounds agree to dispute resolution by private arbitration, it is understandable that each wants to select an arbitrator who shares that party's background and also has an inclination toward that party's side of the case. It is a reality that this selection process is an integral part of the fairness, both actual and perceived, of international commercial arbitration.

It is also a reality that neither actual fairness nor perceived fairness can be achieved if arbitrators go beyond that understandable inclination toward "their" parties' side and act in a biased or prejudicial manner. A favorable inclination towards the selecting party's case is far from an unspoken commitment to ignore the merits in order to favor that party. Even the more cynical among us would agree that the ultimate integrity of international commercial arbitration rests on the impartiality of all arbitrators involved.

The question for international practitioners becomes, then, how to balance the tensions inherent in the party-appointed arbitrator regime. How can one select an arbitrator who is inclined to favor a party's case and, provided that party proves its case well on the facts and law, can be counted on to vote for that party? How can one select an arbitrator who will, at the very least, translate and explain that party's legal system and cultural Zeitgeist to the all-important independent chair? How can one do all this without selecting an arbitrator who is partial or appears partial, and so alienates the chair against the selecting party? How can one do all this without asking the arbitrator candidate the unacceptable questions? In fact, what are the acceptable questions and the unacceptable questions?

The purpose of this article, in addition to highlighting the known tensions in selecting a "predisposed but impartial" arbitrator, is to categorize the acceptable, unacceptable and unavoidably ambiguous criteria in this delicate selection process. The practitioner's checklist of disqualifying factors, non-disqualifying factors, and factors bearing close scrutiny cannot, of course, be used without the practical understanding that each case, each party and each potential arbitrator carries unique circumstances. The checklist will be most valuable if used by practitioners - and, from other perspectives, clients and arbitrators – as a set of red lights, green

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165 Bond, supra note 14, at 306.

166 Hascher, supra note 9, at 6-9.

lights, and, most important, yellow lights guiding the party-appointed arbitration selection process.